Current experiments in Australian constitutional criminal law*

Australia’s constitutional criminal law

Kable,1 Heydon J observed in his final months on the bench, has ‘received a remarkably chilly reception from some academic lawyers – a class usually keen to salute and foster modernity in constitutional law’.2 Count me among the chilly.3 Kable leaves me cold in almost4 every respect: its rationale,5 its development6 and its application.7 So cold, indeed, that I’d really rather not say anything about it at all. Nevertheless, as a criminal law academic, I am driven to study Kable for just one reason: Kable is primarily, and most likely exclusively, a doctrine of criminal law.

Describing Kable as a constitutional criminal law doctrine is jarring for two reasons: first, Kable is routinely expressed in general terms that make no mention to the type of laws that are vulnerable to invalidity;8 and, second, we don’t usually think of Australia as having any doctrines of constitutional criminal

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1 He actually said this about what he called ‘[t]he Kable statements’, a compendious reference to various reasons for judgment of Toohey J, Gaudron J, McHugh J and Gummow J in Kable v DPP (NSW) [1996] HCA 24. Justice Heydon was presumably distinguish those statements from the actual orders in that case – i.e. the Kable ruling, invaliding the Community Protection Act 1994 (the Kable legislation) – which academics are generally quite chilled about. As well, he was not referring to two other Kables that academics are pretty frosty about – Gregory Kable himself, and a more recent High Court tort law decision, State of NSW v Kable [2013] HCA 26 (where Kable unsuccessfully sought compensation for his detention under the Kable legislation invalidated in the Kable judgment.) In this paper, I use ‘Kable’ (as most do) to refer not only to the Kable statements, but also to the reasons of subsequent judges (including Heydon J himself) that purport to apply those reasons. That is, I use ‘Kable’ as shorthand for ‘the Kable doctrine’ as expounded by Australian judges in decisions applying the doctrine. Of course, that is yet another Kable that leaves many academics cold.
2 The Public Service Association and Professional Officers’ Association Amalgamated of NSW v Director of Public Employment [2012] HCA 58, [62], Heydon J’s sixth-last judgment, and his last Kable judgment.
3 And, I guess, amongst the ‘keen’, although I’m more of a fosterer than a saluter.
4 I am partial to the doctrine’s name, which evocatively sums up the crucial flaw in the first statute struck down in the doctrine’s, um, name. (It is also much snappier than ‘Melbourne Corporation’ or ‘Cigamatic/Bogle’)
5 Recent events in Queensland amply demonstrate that legislation is scarcely on the radar when it comes to significant threats to state courts’ ‘institutional integrity’.
6 It’s hard to go past the Pompano majority’s warning against ‘taking what has been said in explanation of the [Kable] decisions in other cases about other legislation to its apparently logical end’, two paragraphs after the same majority identified exempting judges ‘from any duty to give reasons’ as the reason why NSW’s bikie gangs law was incompatible with judicial integrity: Assistant Commissioner Michael James Condon v Pompano Pty Ltd [2013] HCA 7, [135]-[137].
7 When it comes to the bellwether Kable decisions in Fardon, Baker, Forbes, Totani, Wanohu and Emmerson (not to mention the Kable-like Chapter 3 decisions in Thomas v Mowbray and Magaming) I’m with all three of the Court’s Great Dissenters.
8 See Attorney-General (NT) v Emmerson [2014] HCA 13, [40]: ‘The principle for which Kable stands is that because the Constitution establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court’s institutional integrity, and which is therefore incompatible with that court’s role as a repository of federal jurisdiction, is constitutionally invalid.’ See also the more convoluted summary of various Kable judgments (omitting Emmerson for some reason) in Pollentine v Bleijie [2014] HCA 30, [42].
law. In this first part of the paper (before turning to current events in the second and third parts), I put the case that Kable is nevertheless just such a doctrine.

Kable-vulnerable criminal laws

The simple counter-point to the general way Kable is expressed is an empirical observation about the non-general way Kable is applied: all the laws Kable has struck down to date are criminal laws.

To date, the doctrine has struck down:

- two laws for detaining criminals (specifically, one ‘Gregory Wayne Kable... who was convicted... of the manslaughter of his wife’; and former prisoners);
- two laws on proceeds of crime procedures; and
- two laws for controlling ‘criminal organisations’.

However, that is only six laws, which I concede is too small a sample to establish that Kable is a criminal law doctrine. If a guard dog barks just six times in 18 years, then it’s hard to know what (if anything) it is guarding against.

Fortunately, the empirical point can be further explored by examining the further set of laws where at least one judge (either in a lower court decision that was successfully appealed or a dissenting opinion in a multi-member court) would have applied Kable to invalidate them. There are thirteen ‘Kable-vulnerable’ laws, and ten concern criminals:

- three laws on criminal forfeiture;
- two laws on parole;

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9 Putting aside the federal constitution’s s80, which is read too narrowly, and (the other autochthonous expedient) s120, which is too obscure, to qualify as ‘doctrines’.

10 Community Protection Act 1994 (NSW) (see Kable v DPP (NSW) [1996] HCA 24); Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013 (Qld), ss. 3 & 6 (see Attorney-General (Qld) v Lawrence [2013] QCA 364.)


13 I located this set by using Austlii to search all High Court and appeals court cases that mention Kable and then reading them to check whether either a dissent or a single judge in the court below invalidated a law (as well as checking against mentions of relevant decisions in judgments and articles discussing Kable.) I trust readers will let me know of any judgments I missed (for example, judgments that don’t expressly refer to Kable or whose reference is missed by Austlii’s robot.) The sample could conceivably be expanded to include statutes whose constitutionality has been publicly doubted by at least one judge (e.g. Peek J’s comments about the s189A of the Summary Procedure Act 1921 (SA) – on costs in criminal proceedings – in Police v Holloway [2013] SASC 2, [90]). But such an expansion has problems in both definition and in locating the relevant judgments (as it would require both locating and reading every lower court judgment that refers to Kable.)

14 Crimes (Confiscation of Profits) Act 1988 (WA), ss. 3(2) & 5 (see Stuart Anthony Silbert (as Executor of the Estate of Stephen Retteghy (Dec)) v Director of Public Prosecutions for Western Australia [2002] WASCA 12, [53] (Wallwork J); Criminal Law (Clamping, Impounding and Forfeiture of Vehicles) Act 2007 (SA) s12(1)(a)(iii) (see Bell v Police [2012] SASC 188, [85] (Kourakis CJ)); Misuse of Drugs Act 1990 (NT), s36A & Criminal Property Forfeiture Act 2002 (NT), s94 (see Emmerson v The Director of Public Prosecutions & Ors [2013] NTCA 4, [95] (Kelly J) [133] (Barr J)).
two laws on confidential police evidence;\textsuperscript{16}
\item one law on secrecy of reference appeals on criminal contempt;\textsuperscript{17}
\item one law on sex offender detention;\textsuperscript{18}
\item one law on compelled examination of witnesses by criminal prosecutors.\textsuperscript{19}

As well, all five federal laws that at least one judge would have struck down since \textit{Kable} using a \textit{Kable}-like application of Chapter III\textsuperscript{20} are also criminal laws:
\begin{itemize}
  \item a law requiring the admission of evidence in drug prosecutions;\textsuperscript{21}
  \item a law barring some convicted criminals from being ATSIC commissioners unless the Federal Court declares otherwise;\textsuperscript{22}
  \item a terrorism control order regime;\textsuperscript{23}
  \item a proceeds of crime law;\textsuperscript{24}
  \item a mandatory sentencing regime.\textsuperscript{25}
\end{itemize}

So, that’s a total of 21 criminal laws to date that at least one judge would have invalidated them on \textit{Kable} or \textit{Kable}-like grounds.

By contrast every \textit{Kable} challenge to a non-criminal law has failed to date. Moreover, all but three have failed badly, in the sense that the rejection of the challenge was unanimous. And for two of these three (for laws validating otherwise invalid cross-vested federal court decisions and the regulating the appointment of acting judges\textsuperscript{26}), the only judge who would have upheld the challenge was Kirby J; the same can only be said of just two of the 21 \textit{Kable-}

\begin{footnotes}
\item Sentencing Act 1989 (NSW), ss 13A(3)(b) & 13A(3A) (see Baker v R [2004] HCA 45, [144] (Kirby J)); Sentencing (Crime of Murder) and Parole Reform Act 2003 (NT), s19(9) (see Bakewell v The Queen [2008] NTSC 51, [102] (Thomas J)).
\item Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s8 (see A-G (Qld) v Fardon [2003] QCA 416, [93] (McMurdo P); Fardon v Attorney-General (Qld) [2004] HCA 46,[194] (Kirby J)).
\item Justices Act 1902 (WA), s102 (see Re Grinner; Ex Parte Hall [2004] WASCA 79, [47] (Malcolm CJ)).
\item My sampling approach for these laws is non-rigourous, as there is no simple search term for such judgments (and, indeed, the entire category is open to dispute.) I simply drew on my own knowledge, discussions in relevant judgements and articles, and a haphazard trawl through Austlii, an approach that may well have been biased in favour of my thesis. Again, I welcome examples (especially counter-examples.)
\item Crimes Act 1914 (Cth), s15X (see Nicholas v R [1998] HCA 9, [219] (Kirby J)).
\item Aboriginal and Torres Strait Islander Commission Act 1989 (Cth), s31(3)(c) (see Yanner, in the matter of an application under the Torres Strait Islander Commission Act 1989 [2000] FCA 975,[143] (Dowsett J)).
\item Criminal Code Act 1995 (Cth), Schedule 1, Division 104 (see Thomas v Mowbray [2007] HCA 33 [390], (Kirby J), [518] (Hayne J)).
\item Proceedings of Crime Act 2002 (Cth), s26(4) (see DPP (Cth) v Kamal [2010] WADC 67 (Eaton DCJ)).
\item Migration Act 1958 (Cth), s236B(3)(c) & (4)(b) (see Magaming v The Queen [2013] HCA 40, [60] (Gageler J)).
\item Federal Courts (State Jurisdiction) Act 1999 (SA), ss 6, 7, 8, 10, 12 (see Re Macks [2000] HCA 62, [312] (Kirby J); Supreme Court Act 1970 (NSW), s37 (see Forge v Australian Securities and Investments Commission [2006] HCA 44 , [230] (Kirby J)).
\end{footnotes}
vulnerable criminal laws. While this shows that Kirby J's conception of Kable is not limited to criminal laws, it is uncontroversial that Kirby j's conception of Kable is much broader than that of other judges on the High Court. So, putting aside the four Kirby-only invalidations, there are 20 Kable-vulnerable laws, of which 19 are criminal laws.

**Kable-vulnerable non-criminal laws**

On the other hand, the twentieth law is significant counter-example to my portrayal of (non-Kirby) Kable as a criminal law. In 2011’s Momcilovic v R, three out of seven High Court judges would have applied Kable to invalidate a non-criminal law, making it the closest any law (criminal or otherwise) has come to date to joining the six Kable-invalidated laws. Nevertheless, I argue that the High Court’s notoriously complex Momcilovic decision is actually the best evidence to date that Kable is a criminal law doctrine.

Although Momcilovic was a criminal appeal and included a significant constitutional challenge to a criminal law (a Victorian drug offence provision), the Kable ‘challenge’ (actually raised by the High Court itself and not supported by any party) was to a quite different state law, Victoria’s Charter of Human Rights and Responsibilities Act 2006. Vera Momcilovic raised the Charter in support of her argument (which succeeded on other grounds) that her conviction pursuant to a reverse onus provision was an error of law (and, as a fallback, that the law should be subject to a declaration under the Charter.) As is well known, Heydon J (a year before he faux-puzzled over why modernity-salutin’ academics haven’t warmly embraced Kable) would have applied Kable to invalidate the whole Charter, and three judges (Gummow J, Hayne J and Heydon J) would have applied Kable to strike down s 36, which allows the Supreme Court to declare that a Victorian statutory provision could not be interpreted consistently with a Charter right.

While some of the Charter rights (including the right at issue in Momcilovic, the presumption of innocence) are rights of alleged or actual criminals, the Charter's operative provisions (including s36) are (like Kable) expressed to be about various institutions, notably courts. Indeed, s36 is about as general as a law can be, at the opposite end of the spectrum from the law struck down in the original Kable decision. Nevertheless, an important passage in one of the majority judgments in Momcilovic casts this law's Kable vulnerability in a much less general way. In the only joint judgment in the appeal, Crennan and Kiefel JJ characterised 'the argument for invalidity of s 36' as 'about perceptions' and

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27 Crimes Act 1914 (Cth), s15X (see Nicholas v R [1998] HCA 9, [219] (Kirby J)); Sentencing Act 1989 (NSW), ss 13A(3)(b) & 13A(3A) (see Baker v R [2004] HCA 45, [144] (Kirby J)).

28 Momcilovic v The Queen [2011] HCA 34.


In addition to s36, the judges would also have invalidated s37 (on the consequences of declarations of inconsistent interpretation) and, weirdly, s33 (a general mechanism to refer any question of law or interpretation arising under the Charter from lower courts to the Supreme Court or Court of Appeal.) The baffling inclusion of the latter provision, which Gummow J simply asserted without analysis was ‘integral to the operation of s 36’, is a neat demonstration of the dangers of the High Court raising and deciding constitutional challenges on its own without the support of the parties to the litigation.
dismissed the Charter’s declaration process as ‘largely innocuous so far as concerns the Supreme Court’. However:

Of greater concern regarding the making of a declaration is the role of the County Court and the Supreme Court with respect to the appellant’s trial... The making of a declaration placed the Court of Appeal in a position where it acknowledged that the trial process conducted by the County Court involved a denial of the appellant’s Charter rights even though it upheld the validity of the conviction. In such a circumstance not only does a declaration serve no useful purpose to the appellant, it is not appropriate that it be made.

It may be that, in the context of a criminal trial proceeding, a declaration of inconsistency will rarely be appropriate. Undermining a conviction is a serious consideration. This does not, however, mean that the declaration will have no utility in other spheres. More importantly, it does not require a conclusion that the making of a declaration will impair the institutional integrity of the courts. Rather, in the sphere of criminal law, prudence dictates that a declaration be withheld.

Here, Crennan and Kiefel JJ take a very general statutory regime directed to all law-making bodies and, in applying Kable, sharply distinguish its operation ‘in the sphere of criminal law’ from ‘other spheres’. Admittedly, their discussion is expressed to ‘not require a conclusion’ about ‘institutional integrity’ and is expressed to be only about whether such declarations serve a ‘useful purpose’ and the need for ‘judicial prudence’ (indeed, it only ‘may be that... a declaration’ will rarely be appropriate’ in a criminal matter.) However, the discussion follows immediately after their conclusion that the declaration process is ‘largely innocuous’ when it comes to institutional integrity, is expressed to be on a matter of ‘greater concern’ and describes a situation (placing a state court ‘in a position’ of both upholding a conviction and declaring that someone’s rights were denied) that appears to address the ‘perceptions’ that they identified as crucial to Kable invalidity.

In short, Crennan and Kiefel JJ’s discussion implies that Kable would bar state parliaments from requiring state courts to declare that a law is incompatible with human rights in the course of applying it, but only ‘in the context of a criminal trial proceeding’. By contrast, a court criticising a civil law as incompatible with human rights while applying it to civil litigants is okay, or at least of less concern (for reasons Crennan & Kiefel JJ don’t explain.)

This reading of both Crennan and Kiefel JJ’s judgment and of Kable gains a measure of support from the key minority judgment of Gummow J (with Hayne J agreeing on this point.) After ruling that the declarations provision that Crennan and Kiefel JJ deemed ‘largely innocuous’ was ‘a significant change to the constitutional relationship between the arms of government’, Gummow J added a couple of comments that are clearly directed to Crennan and Kiefel JJ’s analysis:

Nor is it an answer to the invalidity of a provision such as s 36 that it may be read as conferring a function which the court may or may not decide to exercise. That

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30 Momcilovic v The Queen [2011] HCA 34, [604]-[605] (emphasis added).
31 See also Yanner, in the matter of an application under the Aboriginal and Torres Strait Islander Commission Act 1989 [2000] FCA 975, [139] (Dowsett J): “A primary function of the courts is to uphold the criminal law. Although this Court does not have a substantial role in that area, it should not be seen as undermining the process.”
32 Momcilovic v The Queen [2011] HCA 34, [185]-[186] (emphasis added).
proposition would require identification of criteria to be applied in deciding when it was imprudent to make a “declaration of inconsistent interpretation”.

To fix upon the undesirability of undermining the criminal process as a reason for the Supreme Court to decline to act would be unsatisfactory in several respects. First, there is the well-recognised difficulty in classification of proceedings as either civil or criminal in character. Secondly, the adoption of such a criterion for the exercise of the power suggests, albeit perhaps sub silentio, an apprehension of partial invalidity were s 36 read as permitting a “declaration of inconsistent interpretation” which would be liable to undermine the criminal process. Thirdly, this course would be adopted without consideration of what might be other odious exercises of the s 36 function, and without consideration of those operations of s 36 which might be severed and those which may be saved as being valid.

The underlined sentence reads Crennan & Kiefel JJ’s analysis as I do, as effectively holding that Charter s. 36 would be invalid under Kable if it permitted courts to apply it to a criminal law. The surrounding sentences reject this stance, but they do so because the line between criminal and civil matters isn’t clear cut. What Gummow J (with Hayne J agreeing) doesn’t reject is the notion that s36’s threat to institutional integrity varies depending on what law it is applied to, and that its application to ‘the criminal process’ poses a particular threat. Notably, he seems to assume that a declaration about a criminal law ‘would be liable to undermine the criminal process’, whereas there merely ‘might be other odious exercises of the s 36 function’. This contrasts with the express (albeit brief) rejection of the relevance of such distinctions by French CJ (with Bell J agreeing).33 (Justice Heydon’s dissent doesn’t address this issue.)

In short, Momcilovic, the only case where a non-criminal law has come close to being overturned on Kable grounds, is actually the exception that proves the rule: despite the Charter’s extreme generality, a (slim, I’d concede) majority of the High Court treat its application in criminal settings as its dominant, perhaps sole, Kable problem. Given that Crennan & Kiefel JJ’s judgment is arguably the narrowest one upholding s 36,34 the case appears to be authority for the proposition that state parliaments can validly give courts a power to declare a law to be inconsistent with human rights, but only in non-criminal matters.

This result – precluding criminal defendants from having a flaw in their convictions pointed out by an Australian court – of course illustrates a point that many others have made about Kable: that the doctrine is about protecting courts, not individuals. Likewise, when I claim that Kable is a doctrine of criminal law, I am not saying that it is like constitutional criminal laws overseas that are based on bills of rights and therefore generally benefit criminal suspects, defendants and offenders. Rather, I am saying that it is a limitation on state legislative powers to make laws about criminals. While it still often operates in practice to protect criminals’ rights, it does so only incidentally to protecting courts, and it is sometimes entirely contrary to criminals’ interests.

33 There is no distinction in principle to be drawn in this respect between civil and criminal proceedings which would render a declaration of inconsistent interpretation inappropriate in the latter class of case: Momcilovic v R [2011] HCA 34, [96].

34 An alternative argument is that French CJ’s judgment (with Bell J agreeing) is the narrowest, because he sides with the minority judges on the question of whether s36 is limited by the Charter’s reasonable limits provision in s7(2).
For completeness, I should mention another prominent *Kable* judgment, 2010’s unanimous *Kirk v Industrial Relations Commission.*\(^{35}\) *Kirk* is a further counter-argument to my characterisation of *Kable* as a criminal law doctrine. While *Kirk*, like *Momcilovic*, was a criminal appeal, neither the law at issue in the case – a privative clause for the NSW Industrial Court\(^{36}\) – nor the principle that *Kirk* stands for – that state parliaments cannot prevent state courts from reviewing decisions of inferior courts or tribunals for jurisdictional error – is specific to criminals. However, *Kirk* can be distinguished on the (accurate, but unconvincing) ground that it was about interpretation, not invalidity; or on the (contentious but more compelling) ground that it is in some respects a separate doctrine from *Kable*. As well, *Kirk*’s undoubted generality has (and has been taken by some courts to have) a criminal law edge.\(^{37}\)

**Some *Kable* thought experiments**

All of these arguments must be weighed against the High Court’s repeated expression of *Kable* in wholly general terms. However, the Court itself warns against applying the Court’s ‘explanations’ of *Kable* outside of the context in which they were made: \(^{38}\)

> But the constitutional validity of one law cannot be decided simply by taking what has been said in earlier decisions of the Court about the validity of other laws and assuming, without examination, that what is said in the earlier decisions can be applied to the legislation now under consideration. The critical questions are whether and why what has been said can be applied... Care must be exercised lest taking what

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\(^{35}\) *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1.

\(^{36}\) *Industrial Relations Act* 1996 (NSW), s179(1).

\(^{37}\) *The Court’s exegesis of the core notion of ‘jurisdictional error’ focused on some peculiarly criminal law errors by the Industrial Court – the lack of sufficient particulars in the charge; and the calling of the defendant as a prosecution witness; admittedly, both these errors have civil analogues, but they get their bite from the power imbalance between parties that is characteristic of criminal trials. As well, although the majority’s famous comment about ‘islands of power immune from supervision and restraint’ is quite general, Heydon J’s lengthier critique of ‘specialist’ courts focuses especially on how they can become divorced from general practices in the criminal law: *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1, [122]. I admit that these points are hardly overwhelming, but it is notable that the difference between criminal and civil matters was highlighted by the NSW Court of Appeal, both in *Kirk* itself and in subsequent decisions distinguishing that judgment. In *Kirk Group Holdings Pty Ltd & v Workcover Authority of New South Wales & Anor* [2006] NSWCA 172, [90], Basten JA wrote: “On one view, the present case involves part of the core jurisdiction of the Supreme Court, namely aspects of the criminal law. On the other hand, the particular offences of strict or absolute liability, with respect to occupational health and safety, were the creation of a statute only in 1983 and hence may not fall within the heartland of the judicial power as envisaged in the Constitution.” This discussion, distinguishing (wrongly, I’d submit) between criminal and regulatory offences, implicitly accepts that it is the application of the clause in criminal matters that is the main problem. Compare *Mitchforce v Industrial Relations Commission & Ors* [2003] NSWCA 151, [126], where Spigelman CJ wrote: “A State Parliament may make a specialist tribunal like the Industrial Commission the sole judge of its jurisdiction... However, there may be a fundamental distinction between statutory rights and matters at the heart of the exercise of the judicial power, such as the law of torts or of contracts or the criminal law.” In *Brennan v New South Wales Land and Housing Corporation; New South Wales Land and Housing Corporation v Brennan* [2011] NSWCA 298, [106], Basten JA observed: “The circumstances of *Kirk* differed in two respects from the present case. First, the original (invalid) judgment in *Kirk* was that of a court exercising criminal jurisdiction. The original (invalid) decision in the present case is one of a tribunal exercising a specialist civil jurisdiction...” See also *King v Health Care Complaints Commission* [2011] NSWCA 353, [6]–[7].

\(^{38}\) *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7, [137].
As Appleby has argued, the Court’s approach means that Kable’s content is apparently to be derived from the outcomes of Kable litigation, rather than the judicial reasons behind them, and that is what I have done above. The relatively recent discovery (and muted initial application) of Kable means that any attempt to derive the doctrine’s nature from its application is weakened by the size of the sample and the non-random nature of the enactment (and challenges to) statutes. On the other hand, my theory has the virtue of falsifiability. It could be readily disproved if Kable is ever applied to strike down a law’s application in a civil setting, something that hasn’t happened to date.

This proposition can be tested by thought experiments about whether similar laws to those actually struck down by Kable would have survived a challenge if they had been decided not about the criminal law. A new ‘Community Protection Act’ empowering the NSW Supreme Court, on an application by the Minister for Women, to bar Kyle Sandilands (and only Kyle Sandilands) from (non-political) public speaking for up to six months if a judge is satisfied, on reasonable grounds, that it is more likely than not that Sandilands will commit a serious act of bad taste? A ‘Serious and Organised Obesity (Control) Act’, empowering a magistrate to issue orders controlling subscribers to Massively Multi-user Online Role Playing Games that the Minister for Health declares represent a risk to public health or fitness? A ‘Freedom of Information Amendment (Public Interest Declarations) Act’ allowing a Premier to conclusively declare that documents that a court has ordered to be released under a freedom of information law must not be released?

The Court makes clear that a future High Court is free to distinguish any of its earlier pronouncements on basis of particular features of the earlier laws, even if those features were not given attention in the earlier discussion. That means that it is open for the Court, in considering a Kable challenge to a non-criminal law, to distinguish any of its earlier judgments that invalidated a law simply on the basis that all the earlier judgments were concerned with criminal laws. A tantalising almost-experiment is the case where Heydon J gave Kable a parting kick. In that case, the Court unanimously rejected a Kable challenge to a provision requiring the NSW Industrial Relations Commission (whose members include judges) to ‘give effect to any policy’ set out in regulations in when making an award or order. But what if that requirement had applied in a criminal proceeding? As it turns out, the Commission is required to ‘take into account the public interest in the exercise of its functions’ even in Court session, but that provision expressly exempts ‘criminal proceedings’. What if it hadn’t?

40 For example, extreme criminal law statutes may be more readily enacted by legislatures than extreme non-criminal law statutes (due to law and order politics) and may be more readily challenged by those affected (due to the harsh nature of criminal punishment.)
41 The Public Service Association and Professional Officers’ Association Amalgamated of NSW v Director of Public Employment [2012] HCA 58, discussing Industrial Relations Act 1996 (NSW), s146C(1).
42 Industrial Relations Act 1996 (NSW), s146(2).
Is Kable a ‘separation of powers’ doctrine?\textsuperscript{43} A ‘court protection’ doctrine?\textsuperscript{44} A ‘rights protection’ doctrine?\textsuperscript{45} A ‘federalism’ doctrine?\textsuperscript{46} An ‘elaborate game of bluffing’?\textsuperscript{47} Or is it a ‘criminal law’ doctrine? Like other academics attempting to characterise Kable in less Delphic terms than those used by the High Court, my purpose is not to criticise others’ characterisations, but rather to argue that something can be learnt about this elusive doctrine by recognising that it has a further character. It may well be that recognising Kable’s criminal law focus will cast some light on the doctrine’s shifting rationales concerning public perceptions and confidence (noting the public’s enormous interest in criminal matters), the autochthonous expedient (now largely, albeit not wholly, about federal criminal law), historical attributes of courts (noting the deep, contentious and sometimes overblown historical roots of common law criminal process) and federalism (noting the significant, but waning, relationship between Australia’s States and Australia’s criminal law.)

In the remainder of this paper, my concern is not with Kable’s tortured jurisprudential journey, but rather the corresponding journey of Australia’s criminal law, specifically from the past year (below) to the coming one (the final part of this paper.)

Recent experiments in Australian criminal law

The first Friday in October 2004 was a turning point in Australian constitutional law, notable not only for two failed major Kable challenges to criminal laws, but also for an iconic conversation about the future of the doctrine between two High Court judges.

In Baker v R (upholding a law giving courts a role in parole decisions concerning a small set of prisoners), Kirby J famously fretted that the High Court was treating Kable as ‘a constitutional guard-dog that would bark but once’.\textsuperscript{48} The same day, in Fardon v Attorney-General (Qld) (upholding a law for the court-ordered post-sentence detention of sex offenders), McHugh J soothed that Australian constitutional guard-dogs simply have very little to bark about:\textsuperscript{49}

Kable was the result of legislation that was almost unique in the history of Australia... The terms, background and parliamentary history of the legislation gave rise to the perception that the Supreme Court of that State might be acting in conjunction with the New South Wales Parliament and the executive government to keep Mr Kable in prison. The combination of circumstances which gave rise to the perception in Kable is unlikely to be repeated. The Kable principle, if required to be applied in future, is more


\textsuperscript{47} G Appleby, ‘State Law and Order Regimes and the High Court: A study in federalism and rights protection’, paper presented at the Australian Association of Constitutional Law (NSW Branch), Sydney, 23 October 2013, p. 28.

\textsuperscript{48} Baker v R [2004] HCA 45, [54].

\textsuperscript{49} Fardon v Attorney-General (Qld) [2004] HCA 46, [43].
likely to be applied in respect of the terms, conditions and manner of appointment of State judges or in circumstances where State judges are used to carry out non-judicial functions, rather than in the context of Kable-type legislation.

As is well known, the dog did start barking again, but only after both judges left the bench and by-and-large in the dreary way predicted by McHugh J.

After three quick yaps at the turn of the decade, the dog fell silent with respect to Queensland’s bikie laws in 2013. This time last year, Gabrielle Appleby drew on these events and their aftermath to argue:50

As a result of the uncertainty of the Kable principle, State Governments and Legislatures are likely to exercise prudence in involving courts in innovative schemes, and therefore the Kable principle may operate to promote the adoption of known-to-be constitutional law and order measures across jurisdictions to the detriment of experimentation and diversification as well as to the detriment of democratic engagement and participation in a conversation about the sufficiency and appropriateness of community protection measures.

However, subsequent events in Queensland and Victoria show that Australian experimentation in criminal law remains very much alive (if not exactly well).

The 27th September laws
The last Friday in September 2013 was a turning point in Australian criminal law, due to twin events in South-East Queensland. That morning, Peter Lyons J of the Queensland Supreme Court replaced sex offender Robert Fardon’s detention order with a supervision order that allowed him to ‘live in the community’.51

That evening, 80km away, Jacques Teamo (a tattoo parlour owner who was allegedly shot along with a bystander by a member of rival gang the Finks in 2012) led 60 members of the Bandidos to Broadbeach’s Aura restaurant. Amongst the diners were two Finks, including Jason Trouchet (now seeing Teamo’s ex-girlfriend.) The resulting fight outside and a later gathering at a police station recalled a 2009 brawl at Sydney airport between the Hells Angels and Comancheros that left one person dead and prompted that year’s passage of anti-bikie laws in NSW52 (invalidated in 2011’s Wainohu) and Queensland (upheld in 2013’s Pompano.)

These otherwise unrelated events had a subtle constitutional law connection: Fardon was the very same Fardon who lost his Kable challenge to Queensland’s sex offender detention law nine years earlier, while Trouchet’s Gold Coast Chapter of the Finks Motorcycle Club was the loser just six months previously in the Kable challenge to Queensland’s bikie gang legislation.53 While this legal connection meant nothing to South-East Queenslanders, its corollaries were of urgent public interest.

51 Attorney-General for the State of Queensland v Fardon [2013] QSC 264. ‘[L]ive in the community’ is dubious term for permitting him reside at premises designated for supervised sex offenders that he could only leave with an escort and a GPS tracker.
53 Fardon v Attorney-General (Qld) [2004] HCA 46; Assistant Commissioner Michael James Condon v Pompano Pty Ltd [2013] HCA 7.
One corollary is that, like most *Kable* challengers (especially to criminal laws), Fardon and the bikies were hugely unpopular and their respective presence and misbehaviour in the community were of enormous public concern. In turn, the public’s concern was of enormous political concern to the Queensland government (which, in a contemporary trend in Australia, had experienced a sharp fall in popularity in its first term.) Avoiding such public and political concerns was clearly the major purpose of both statutes. The fact that the statutes failed to meet their political objectives is a vindication of the High Court’s rulings in both *Fardon* and *Pompano*; Queensland’s Supreme Court was clearly not a tool of the executive when it came to detaining sex offenders and the judicial processes in the 2009 bikie gang laws clearly constrained, rather than implemented, the executive’s desire to control bikie gangs. However, in turn, this meant that the Queensland government could readily – and, indeed, accurately – blame both problems on the courts, both State and High.\(^{54}\) In short, the events of September 27\(^{th}\) 2013 were a perfect illustration of the political costs of the law and order ‘prudence’ that Appleby argued last year was prompted by *Kable*.\(^{55}\)

The government’s instant reaction was to announce some dramatic new criminal law experiments. By Sunday 29\(^{th}\) September, the media was quoting Bleijie as telling bikie gangs that ‘the government is considering a raft of new laws to shutdown organised crime’, specifically United States ‘racketeering’ laws and NSW’s ‘banning of colours’.\(^{56}\) By Wednesday, he was telling the media that ‘[t]he State Government has taken the view that we want Queensland to be the safest place to raise a child’, but that ‘[w]e can not keep that commitment if Robert John Fardon is out in the public domain’. Observing that ‘I respectfully disagree’ with the Supreme Court’s ‘particular reasoning’ he said that he would ‘do everything he could to keep Fardon locked up’, noting that ‘that might mean a law change’.\(^{57}\)

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\(^{54}\) To be sure, the two laws were also conveniently passed by Labor governments while the present Liberal-National government was in opposition. However, less conveniently, the then opposition opposed the 2009 bikie gang laws on the grounds of Queensladder’s civil liberties: ‘LNP opposes anti-bikie laws’, news.com.au, 22 November 2009, available at <http://www.news.com.au/national/LNP-opposes-anti-bikie-laws/story-e6frflp9-1225801627910>, quoting then opposition leader John-Paul Langbroek: “The police here have said ‘we won’t abuse the laws’, now that’s not exactly a ringing endorsement. If you give anybody too much power there will always be someone in the organisation who will abuse it.”. During the 2009 parliamentary debate, then opposition backbencher Jarod Bleijie described the bikie control law eventually upheld in *Pompano* as ‘[t]his draconian piece of legislation’ that was the result of a ‘crisis management government’. Even more embarrassingly (in hindsight), the future Attorney-General added: ‘We should be leading the way, but we do not need to lead the way when it comes to encroaching on the freedoms and liberties of our people. The Bligh Labor government has a history of copying legislation and other material from its southern counterparts. I have said in this place before that it is a sad state in the history of politics in Queensland when this government looks to the southern states, in particular New South Wales, as a great example of legislative reform’: Parliament of Queensland, *Record of Proceedings*, First Session of the Fifty-Third Parliament, 25 November 2009, p3620.


\(^{56}\) Anonymous, ‘Queensland Police declare crackdown on bikies after massive Gold Coast brawl’, *ABC News Online*, 29 September 2013.

\(^{57}\) The Queensland media quickly reported Bleijie’s ‘hint’ that he would introduce legislation to ensure Fardon remains behind bars for the rest of his life should the appeal be unsuccessful: A Davies, ‘Bleijie takes action to halt release of sex offender Fardon’, *Sunshine Coast Daily*, 2\(^{nd}\) October 2013. On an earlier occasion in 2013 when Fardon had been similarly released from detention, Premier Campbell Newman told the
New bikie laws were introduced on 15\textsuperscript{th} October (18 days after the ‘brawl’), enacted at 2.49am the following morning and comprised three complex and interacting statutes.\textsuperscript{58} As Bleijie foreshadowed, one statute (the \textit{Vicious Lawless Associate Disestablishment Act 2013}) loosely echoes the United States Racketeer Influenced Corrupt Organisations law – a 1970 federal law that (amongst other things) makes it a federal crime to participate in the affairs of an ‘enterprise’ ‘through a pattern of racketeering activity’\textsuperscript{59} – by imposing additional sentences on anyone who is convicted of one of a list of generally serious crimes (but including possessing a dangerous drug) if the crime was done ‘for the purposes of, or in the course of participating in the affairs of’ any association (defined to include any ‘group of 3 or more persons’), unless the police commissioner accepts the offender’s offer to cooperate in a proceeding about one of those crimes.\textsuperscript{60}

A second statute (the \textit{Tattoo Parlours Act 2013}) mimics some NSW anti-bikie laws enacted in 2012\textsuperscript{61} and has two components.\textsuperscript{62} The first is a licensing regime for commercial tattoo businesses and employment – a classic exercise in entirely civil control of alleged crime, but with two hard edges: a ‘controlled person’ under the 2009 bikie laws cannot apply for a licence; and a licence cannot be granted (without approval of Queensland’s administrative tribunal) if the Commissioner of Police has made an ‘adverse security determination’.\textsuperscript{63} A second component of the second statute (but which had nothing to do with tattoo parlours) bars anyone from entering (or being allowed to enter) licensed premises if they are wearing or carrying items bearing the name, logo or anything else that indicates membership of a ‘declared criminal organisation’.\textsuperscript{64}

Finally, a third statute (the \textit{Criminal Law (Criminal Organisations Disruption) Amendment Act 2013}), together with amendments enacted a month later,\textsuperscript{65} inserts a variety of new criminal laws applicable to a ‘participant in a criminal organisation’. The rules include a ‘show cause’ requirement for bail; new investigative powers (and restrictions on excuses for non-cooperation) for the state’s crime commission; new offences of being ‘knowingly present in a public place with 2 or more other participants’, entering a ‘prescribed place’ (a list of 41 specific addresses\textsuperscript{66}), attending a ‘prescribed event’ (not defined to date) or

\textsuperscript{59} 18 U.S. Code §§ 1962(c), 1963(a).
\textsuperscript{60} \textit{Vicious Lawless Association Disestablishment Act 2013} (Qld), ss 5, 7, 9, Schedule 1.
\textsuperscript{61} \textit{Tattoo Parlours Act 2012} (NSW); \textit{Liquor Act 2007} (NSW), s116A(2)(g) & \textit{Liquor Regulation 2008} (NSW), s53K.
\textsuperscript{62} There is also a third component facilitating the use of drug detection dogs in a variety of places, including tattoo parlours and licensed premises.
\textsuperscript{63} \textit{Tattoo Parlours Act 2013} (Qld), ss 6–8, 11(4)(c), 17(2)(b).
\textsuperscript{64} \textit{Liquor Act 1992} (Qld), ss. 173EB & 173EC.
\textsuperscript{65} \textit{Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013} (Qld).
\textsuperscript{66} \textit{Criminal Code (Criminal Organisations) Regulations 2013} (Qld), s3.
recruiting new participants; aggravating sentences for various offences; impoundment (upon charge) and automatic forfeiture and licence suspension (upon conviction) of motor vehicles for various offences; powers for police to stop and search any suspected participant in a criminal organisation (or their vehicle) or demand their name and address at random; segregation orders for prisoners; the installation of tracking devices on parolees; disqualifications for people identified by the police commissioner from electricity, liquor, builders’, racing, second-hand dealing, pawnbrokers’, security, tow truck and weapons licences without approval by Queensland’s administrative tribunal; and authorising the police commissioner to disclose criminal records in the public interest (despite spent convictions and youth justice laws.)

The package of statutes is supported by broad features that cut across many of the provisions. The concept of ‘participation’ is broadly defined to cover not only association with or taking part in the affairs of an organisation but also merely attending ‘more than 1 meeting or gathering of persons who participate in the affairs of the organisation’, a definition that appears broader but perhaps easier to establish than what Heydon J called the ‘extreme and ill-defined’ definition of ‘member’ that he argued in Totani (in dissent) gave the courts a sufficient role to overcome a Kable challenge. As well, the definition of ‘criminal organisation’ not only picks up the judge-focused civil scheme (including criminal intelligence confidentiality provisions) upheld by the High Court in 2009’s Pompano, but provides two alternative ways for establishing an organisation’s criminality: that criminality can also be proved during a prosecution (or, for executive power provisions a police officer’s reasonable suspicion or the police commissioner’s ‘identification’); and (most importantly) by regulations naming organisations as ‘declared’ criminal organisations.

A further three features appear responsive to earlier Kable challenges. First, perhaps to avoid a Totani problem, in many instances (such as the VLAD Act’s mandatory sentences for offences as part of any association, the show cause requirement for bail and the public place, prescribed place and aggravated offences, but not the ban on wearing badges, etc in licensed premises), defendants will avoid these negative consequences if they can ‘prove that the criminal organisation’ – even if it is a controlled or declared organisation ‘is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity’. Second, the regime makes heavy use of any association, the show cause requirement for bail and the public place, prescribed place and aggravated offences, but not the ban on wearing badges, etc in licensed premises), defendants will avoid these negative consequences if they can ‘prove that the criminal organisation’ – even if it is a controlled or declared organisation ‘is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity’. Second, the regime makes heavy use

67 Bail Act 1990 (Qld), s16(3A)(a); Corrections Services Act 2006 (Qld), ss 65A, 267A; Crime and Misconduct Act 2001 (Qld), ss 55A, 55D, 82(6); Criminal Code (Qld), ss 60A-C, 72(2), 92A(4A), 320(2), 340(1A), 408D(1AA); Electricity Safety Act 2002 (Qld), ss 59(5), 65A; Liquor Act 1992 (Qld), s228B; Penalties and Sentences Act 1992 (Qld), s187(2); Police Powers and Responsibilities Act 2000 (Qld), s29(1A), 32, 40(2A), 123G, 123H, 754(2); Police Service Administration Act 1990 (Qld), s10.2AAB; Queensland Building Services Authority Act 1991 (Qld), ss31(2A), 32(1A), 32AA(1A), 32AB(1A); Racing Act 2002 (Qld), s211(2); Secondhand Dealers and Pawnbrokers Act 2003 (Qld), s7(1)(e); Security Providers Act 1993 (Qld), s11(6); Tow Truck Act 1973 (Qld), s4C(1AA); Weapons Act 1990 (Qld), ss 10B(2A), 10C(2A).

68 Crime and Misconduct Act 2001 (Qld), schedule 2; Criminal Code (Qld), s60A(3); Vicious Lawless Association Disestablishment Act 2013 (Qld), s4.

69 South Australia v Totani [2010] HCA 39, [312].

70 Criminal Code (Qld), s1; Criminal Code (Criminal Organisations) Regulations 2013 (Qld), s2.

71 Bail Act 1990 (Qld), s16(3D); Criminal Code (Qld), ss 60A(2), 60B(3), 60C(2), 72(3), 92A(4B), 320(3), 340(1B), 408(1AB); Vicious Lawless Association Disestablishment Act 2013 (Qld), s5(2).
of criminal intelligence confidentiality regimes in licensing matters, similar to those upheld by the High Court in 2009’s K-Generation decision; however, there are no similar arrangements for criminal matters. Third, the regime makes heavy use of mandatory sentences, ranging from fines or imprisonment for failure to stop, to six month minimums for the public place and prescribed place offences and crushing sentences of 15 (or, for officer bearers) 25 years without parole for ‘vicious’ offences in furtherance of an association. Presumably coincidently, the High Court’s judgment in Magaming v R, rejecting a (Kable-like) Chapter 3 challenge to a federal mandatory sentencing scheme, was released four days before the package was introduced (and enacted).

A separate statutory regime that was introduced nineteen days after Fardon’s release (and enacted at 2AM on the 21st day) is comparatively very simple. The Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013 inserted provisions empowering the Governor-in-Council, on the recommendation of the Attorney-General (following submissions from the proposed detainee) to declare that it is satisfied that the detention of a ‘relevant person’ is ‘in the public interest’. The effect of the declaration is that the person ‘is a prisoner’ until the Governor-in-Council, again on the recommendation of the Attorney-General, is satisfied that the detention ‘is no longer in the public interest’. The Attorney-General must review the detention annually and must have regard to an annual examination of the detainee by two psychiatrists. The review and release aspects of the scheme resemble (and, indeed, are inserted alongside) a much older 1945 preventative detention scheme for sex offenders that was then the subject of a Kable challenge but whose validity has since been upheld by the High Court. The difference, though, is that the initial detention under the 1945 scheme is ordered by a judge (following a report by two psychiatrists) at the time a sex offender is sentenced or (at the application of the Attorney-General) while a sex offender is imprisoned. By contrast, detention under the 2013 scheme is entirely up to the executive.

Crucially, though, judges still play a central role in the scheme. The definition of ‘relevant person’ is limited to ‘a person subject to a supervision order if the person was subject to a continuing detention order immediately before the supervision order was made.’ That is, the scheme only applies to people who were once ordered detained by a court under the legislation upheld by the High

73 Crime and Misconduct Act 2001 (Qld), s199(8B); Criminal Code (Qld), ss60A(1), 60B(1), 60B(2), 60C(1), 72(2); Police Powers and Responsibilities Act 2000 (Qld), 754(2); Vicious Lawless Association Disestablishment Act 2013 (Qld), ss 7(1), (2), 8(1).
74 Magaming v The Queen [2013] HCA 40.
76 Criminal Law Amendment Act 1945 (Qld), s21.
77 Criminal Law Amendment Act 1945 (Qld), ss 22B(1), 22F(1).
78 Criminal Law Amendment Act 1945 (Qld), ss 22C, 22E.
79 Criminal Law Amendment Act 1945 (Qld), s18; Pollentine v Bleijie [2014] HCA 30.
80 Criminal Law Amendment Act 1945 (Qld), s19. (The scheme also covers people who are subject to a detention order. Apart from a situation where the Attorney-General anticipates that a court may cancel the order, it is not clear why such a public interest declaration would be made about such a person.)
Court in *Fardon* and who a judge has since decided can now live in the community with supervision (a category that of course now covers Fardon himself.) Presumably, the purpose of this restriction is to avoid making the Queensland government responsible for the liberty of each and every released sex offender; however, it also proved to be the new scheme's downfall. On 6th December 2013, the same day the Queensland Court of Appeal dismissed the Attorney-General's appeal against the release of Robert Fardon into the community, the same Court applied *Kable* to strike down the new legislation on the basis that it rendered all judicial supervision orders ‘provisional’.

Both Fardon's release and the invalidation of the legislation could have been further appealed to the High Court. However, in January this year, Acting Attorney-General David Crisafulli ruled out further court action:

*We have done more than any other government to keep Robert John Fardon behind bars but our legal advice is that we just can't win in the High Court. We kept Fardon in prison after successfully appealing his release last year and we lodged a subsequent appeal when he was ordered to be released again. We did everything we could but some of Queensland's top silks, including the Solicitor-General, all advised we were out of options.*

These comments suggest that either the Solicitor-General (who would resign two months later) advised the government in the first place that the legislation was likely to be invalid under *Kable*, or he was persuaded of that invalidity by the Court of Appeal judgment. Notably, the comments also suggest that the Solicitor-General also ruled out alternative legislative schemes that did not shadow the judicial supervision scheme (such as a one-man legislative or executive detention statute for Robert Fardon alone.)

**The 27th March law**

Where else but Queensland? As always, there is no shortage of new law and order legislation across Australia. However, this year has seen a new law in my home state of Victoria that finally paid to McHugh J’s prediction in *Fardon*.

The law, which passed Victoria’s parliament exactly six months after 27th September 2013, is the *Corrections Amendment (Parole) Act 2014* (Vic). It inserts a provision into Victoria’s corrections legislation barring Victoria’s Adult Parole Board from making an order for release on parole ‘in respect of the prisoner Julian Knight’ unless the Board is satisfied that Knight is ‘in imminent danger of dying, or seriously incapacitated, and as a result he no longer has the physical ability to do harm to any person’ and ‘has demonstrated that he does not pose a risk to the community’ and ‘because of those circumstances, the making of the

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81 Attorney-General (Qld) v Fardon [2013] QCA 365.
82 Attorney-General (Qld) v Lawrence [2013] QCA 364, [41].
84 It is certainly plausible that the government enacted the laws despite advice that they were unconstitutional. On the eve of introducing the bikie gang laws, Premier Campbell Newman told the media: ‘We know that some of these things will be challenged. We know that some may be overturned. It doesn’t matter. We are going to continue to try again. There are many mechanisms that we are going to use.’ S Vogler, ‘Crime and Misconduct Commission gets $7m funding boost and more powers to take on bikies’, *The Courier Mail*, 11 October 2013.
The major difference, though, is that the NSW legislation applies to any ‘serious offender the subject of a non-release recommendation’. By contrast, in Victoria (which, as discussed below) lacks any history of such recommendations, the restriction applies to just one prisoner, ‘the prisoner Julian Knight’, who is further defined as ‘the Julian Knight who was sentenced by the Supreme Court in November 1988 to life imprisonment for each of 7 counts of murder’ (1987’s Hoddle St massacre, a random shooting of drivers, passers-by and police officers on the busy Melbourne commuter street, including seven murders.) There are, of course, two precedents for this sort of definition in a criminal law.

One is the Community Protection Act 1990 (Vic), which contains a provision stating:91

In this Act, Garry Ian David, also known as Garry Ian Webb, who was born on 20 November 1954 in Melbourne, is called “Garry David”.

The second is the Community Protection Act 1994 (NSW), which contains the following provision:92

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.

All three statutes are concerned with the detention of convicted criminals.93 The NSW statute was, of course, the first struck down under Kable.

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85 Corrections Act 1986 (Vic), s74AA.
86 Oddly, the Victorian legislation includes an extra comma between ‘incapacitated’ and ‘and’. Arguably, this means that the Victorian law is more restrictive than the NSW one, because the incapacity to danger test appears to qualify the imminent danger of dying test in Victoria, but not in NSW.
87 Crump v New South Wales [2012] HCA 20, concerning Crimes (Administration of Sentences) Act 1999 (NSW), s145A.
88 Second reading speech to the Corrections Amendment (Parole) Bill 2014, Legislative Assembly, 13 March 2014: ‘By essentially mirroring the preconditions contained in the New South Wales legislation we are seeking to ensure the constitutional validity of the bill. These provisions change the preconditions on which the adult parole board must be satisfied before it can grant parole to Julian Knight. These same preconditions have been upheld by the High Court in the Crump case.’
90 Corrections Act 1986 (Vic), s74AA(6).
91 Community Protection Act 1990 (Vic), s3.
92 Community Protection Act 1994 (NSW), s3(4).
93 And there is a causal link: Garry David, whose string of offending and threats to carry out further crimes (combined with confusion about the application of Victoria’s mental health laws to people with personality disorders) prompted the 1990 Victorian law, was said to be a friend of Julian Knight’s and, indeed, was said to have threatened to re-enact the latter’s crime: Attorney General v David [1992] 2 VR 46: ‘He made references to the mass murderer, Julian Knight, claiming he was a good friend.’ The judgment also discusses David’s ‘Blueprint for Urban Warfare’ (dated 28 November 1987, less than three months after the Hoddle St massacre) setting out ‘49 so-called combat situations which describe in chilling detail what appear to be actions contemplated by him upon release’ including ‘the recreation of the Hoddle Street, Queen Street,
The enactment of both the Victorian and NSW *Community Protection Acts* in the early 1990s was an occasion for lengthy and vociferous parliamentary debate. As one of dozens of speakers in Victoria’s debate, then opposition backbencher Dr Denis Napthine said:94

> The *Community Protection Bill* is obnoxious, unacceptable and clearly anathema to anybody who believes our society is free and democratic. The honourable member for Preston should be disturbed, as should many members of the government, about such legislation, which is in direct opposition to the beliefs of civil libertarians in Victoria.

> It is reminiscent of the legislation of the Dark Ages about which the honourable member for Berwick spoke; legislation under which, at the mere whims and fancies of kings, queens and dictators, citizens were beheaded and the like. It is reminiscent of the sort of legislation for which we, in a free and democratic society, criticise other countries, such as those in Eastern Europe, Russia and the dictatorships of South America and South Africa. We are at the forefront in criticising those regimes for their denial of natural justice.

Another opposition backbencher, Robert Clark, presciently identified the grounds on which the Kable law would be struck down by the High Court:95

> I have no objection in principle to the concept of preventive detention. However, it needs to be surrounded by stringent safeguards. The questions that honourable members must ask themselves are: can one be convinced that this person is a danger to the community and is the person concerned going to get a fair trial? Is he going to have the issue heard fairly before a judicial tribunal that does not have a gun pointed at its head by virtue of the terms that the Bill contains for the hearing of any case?...

> I turn to one aspect of the Bill which is highly objectionable and which should concern any person, particularly one with legal training or anyone in the community who has regard to the rule of law. The aspect to which I refer is, of course, that the proposed legislation refers to only one person. That is its greatest sticking point. The principle about legislation that applies to only one person is quite clear: If legislation is good enough to apply to one person, why should it not apply to all other persons in similar circumstances? Conversely, if Parliament is not prepared to apply the proposed legislation to all persons in a particular circumstance, how on earth can it justify applying it to one person?

Ultimately, the opposition announced: ‘We will not object to the Bill, but the government should not ever bring another Bill like this into Parliament...’96 Four Councillors forced a division and voted against it.

By contrast, apart from the second reading speech, just five Victorian parliamentarians spoke on the Knight bill: one from the government and opposition in each house, plus a speaker from the Greens in the upper house.97

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94 Parliament of Victoria, *Parliamentary Debates*, Autumn Session 1990, vol 397, Legislative Council, 11 April 1990, 701 (second reading speech for the Community Protection Bill 1990). In turn, that law was inspiration for the NSW law to detain Gregory Kable. And, of course, the latter law birthed the *Kable* doctrine.


None opposed the bill and several said they were pleased to speak to it, although most expressed qualms about its unusual nature and the possibility of the litigious Knight challenging its validity.\(^98\) Like all four of Queensland’s 27th September bills, the Knight bill was debated and passed by Victoria’s upper house after midnight, but that was entirely due to an extended debate on another law and order bill (expanding Victoria Police’s move on powers.\(^99\) No-one voted against the Bill and neither Dr Naphthine (now the Premier) nor Robert Clark (now the Attorney-General) contributed to the debate. Again, this contrast supports Appleby’s argument that the onset of Kable has replaced broad democratic debate with narrow constitutional law analysis.

To be sure, the Knight legislation differs in important ways from the David and Kable laws. It does not provide for Knight’s detention, as that is already provided for by his life sentence pronounced by the Victorian Supreme Court in 1988.\(^100\) Rather, it prevents an executive body (the Adult Parole Board, presently chaired by a Supreme Court judge) from ordering Knight’s release, except in very narrow circumstances. Unlike the David and Kable laws, the Knight legislation does not give any new role to the courts. Rather, the sole express appearance of the courts in the scheme is to identify Knight by reference to the sentence handed down by Hampel J.\(^101\)

Nearly ten years earlier, McHugh J observed in *Fardon*:\(^102\)

> Kable was the result of legislation that was almost unique in the history of Australia. More importantly, however, the background to and provisions of the Community Protection Act pointed to a legislative scheme enacted solely for the purpose of ensuring that Mr Kable, alone of all people in New South Wales, would be kept in prison after his term of imprisonment had expired.

The Kable legislation is now less unique. To be sure, the Knight law does not provide for Knight to ‘be kept in prison after his term of imprisonment has

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98 The Parliament’s Scrutiny of Acts and Regulations Committee (which I advise), reporting on the compatibility of the Bill with Victoria’s Charter, queried whether extending Victoria’s serious sex offender detention scheme (modeled on the legislation upheld in *Fardon*) to serious violent offenders would be a less restrictive solution: Scrutiny of Acts and Regulations Committee, Alert Digest No. 3 of 2014, 11 March 2014, 1-7. While the then opposition had proposed such legislation nine years earlier, noting in debate such a law could prevent Knight’s release into the community in the unlikely event that he was paroled (Parliament of Victoria, *Parliamentary Debates*, Legislative Council, 14 September 2005, 825 (Bruce Atkinson, debating the opposition’s Serious Offenders Monitoring Bill 2005), now in government it rejected this approach as inappropriate for prisoners serving a life sentence: Parliament of Victoria, *Parliamentary Debates*, Legislative Council, 11th March 2014, 592.

99 *Summary Offences and Sentencing Amendment Act 2014 (Vic).*

100 *R v Knight* [1989] VR 705.

101 There is a further, implicit impact on the courts that is worth noting. One sub-section of the Knight legislation is directed to the application of a law that itself narrowly survived a Kable challenge: ‘The Charter of Human Rights and Responsibilities Act 2006 has no application to this section’ (Corrections Act 1986 (Vic), s74AA(4)). This purports to be an ‘override declaration’ under Charter s. 31(1), which provides: ‘Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.’ (The Knight law curiously fails to use the words of s. 31(1).) Regardless, its effect is to disapply the Charter, including its provisions directed to courts: its interpretation provision, its declarations provision (which narrowly avoided being struck down in Momcilovic) and its provision for remedies – a one-person reduction in the powers Victoria’s parliament has given to its Supreme Court to (mildly) protect Victorians’ human rights.

102 *Fardon v Attorney-General (Qld)* [2004] HCA 46, [43].
expried’.

But it is surely doubtful that McHugh J thought in 2004 that a one-person detention law would ever be enacted again in Australia.

**Looming experiments in Australia’s constitutional criminal law**

Are the new laws constitutional? One *Kable* challenge has already succeeded, another is well under way and a third will inevitably be brought by a certain ‘prisoner Julian Knight’. But I’m not up for making predictions when it comes to *Kable*.

To take one pair of seemingly relevant, forward-looking *Kable* comments, consider McHugh J’s remark in *Fardon* that Queensland’s constitution:

> would authorise the Queensland Parliament, if it wished, to abolish criminal juries and require breaches of the criminal law to be determined by non-judicial tribunals... [N]o process of legal or logical reasoning leads to the conclusion that, because the Federal Parliament may invest State courts with federal jurisdiction, the States cannot legislate for the determination of issues of criminal guilt or sentencing by non-judicial tribunals.

and Gummow J’s rejoinder six years later in *Totani*: 

> As a general proposition, State legislatures may confer judicial powers on a body that is not a “court of a State” within the meaning of s 77(iii) of the Constitution. But that does not involve acceptance of the corollary respecting enforcement of the criminal law.

These comments are obviously relevant to Australian criminal law (and, indeed, provide further support for my thesis that *Kable* is a criminal law doctrine.) But, even putting aside their conflicting nature and the fact that neither judge is still on the bench, what do either of them reveal about how *Kable* would be applied in any future case?

Does McHugh J’s remark mean that he would disagree with the Queensland Court of Appeal’s holding late last year that Queensland’s ‘public interest declarations scheme’ was invalid? Or would he distinguish his *Fardon* remark on

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103 No doubt, thought, the disposal of his remains will spark some sort of political controversy (and, perhaps, some more legislation.)

104 Attorney-General (*Qld*) v Lawrence [2013] QCA 364.

105 See <http://www.hcourt.gov.au/cases/case_b14-2014>. The challenge initially also raised arguments based on representative democracy and inconsistency, but all non-*Kable* arguments were dropped on 23rd July 2014.

106 *Fardon* v Attorney-General (*Qld*) [2004] HCA 46, [40]. See also Gleeson CJ at [18], although he simply attributed this view to a concession by Fardon’s counsel, Stephen Southwood QC. Later in the hearing, Gleeson CJ acknowledged that Southwood may have backtracked: “GLEESON CJ: Does that mean you want to alter an answer you gave me this morning when I asked you whether this law would have been valid if it provided for these powers to be exercised by a panel of psychiatrists? MR SOUTHWOOD: That may be something which flows from it, but I do not think it is necessary for me to go into that in order to maintain our argument. I am simply not able to take that further, regretfully, at this stage, if your Honour pleases.”; *Fardon v Attorney-General for Queensland* [2004] HCATrans 39.

107 South Australia v *Totani* [2010] HCA 39, [147]. Justice Gummow had raised this issue during argument in *Fardon*, also engaging Gleeson CJ: “GUMMOW J: Suppose there was no judicial involvement at all, purely Executive activity, to operate this Act. MR SOUTHWOOD: The State Parliament would be able to pass such legislation. GLEESON CJ: So you could repose the power in a panel of psychiatrists. MR SOUTHWOOD: Yes. GLEESON CJ: But not a judge. MR SOUTHWOOD: Not a court, no. GUMMOW J: Of course, the legislature will have to wear that.”; *Fardon v Attorney-General for Queensland* [2004] HCATrans 39.

108 However, French CJ expressly agreed with Gummow J’s remark: see South Australia v *Totani* [2010] HCA 39, [76].
the basis that it was limited to non-courts replacing, rather than shadowing, State courts’ criminal jurisdiction? Or would he concede that his assertion that there was ‘no process of legal or logical reasoning’ to qualify the States’ outsourcing powers was simply a failure of his own imagination? Does Gummow J’s remark mean that he would have struck down public interest declarations even if they did not shadow the judicial detention scheme? Or would he distinguish such a scheme because locking up sex offenders in the ‘public interest’ is not ‘enforcement of the criminal law’? Or was his 2010 remark no more than a reservation of a question that he would eventually have answered the same way as McHugh J?

Predicting a future High Court’s answer to these questions or, indeed, the outcome of any Kable challenge is a game for mugs and Solicitors-General. Instead, in this final part of the paper, I endeavour to (mostly) avoid the High Court’s slippery words by focusing on how sets of past Kable outcomes frame Australian politicians’ legislative options when it comes to experimenting in Australian criminal law and the High Court’s judicial options when it comes to experimenting in Australian constitutional law. I will discuss, in turn, two potential fault lines in Australian constitutional criminal law.

Kable and prosecutors

While two parts of Queensland’s legislative response to the Aura restaurant incident mimicked US and NSW laws, the third and largest part – the pair of ‘Criminal Organisations Disruption’ laws amending a dozen or so other statutes – is the least original. Its grab-bag of new criminal laws – presumptions against bail, souped-up powers for crime commissioners, police powers to search people and vehicles at random, bans on public gatherings (and attending particular premises or events), higher sentences, mandatory sentences, automatic vehicle forfeitures, automatic drivers’ licence cancellations, and police vetoes on employment – is the familiar ‘wish list’ of many Australian law enforcement agencies.

Kable (as opposed to, perhaps, implied constitutional freedoms) poses no apparent barrier to the enactment of such laws, which are simply nasty versions of existing rules. Rather, Australian governments generally don’t enact them, rightly recognising (and voters’ capacity to recognise) them as the making of a police state. In particular, the Queensland government did not respond to 27th September 2013 by turning all of Queensland into a police state. Rather, in an apparent political calculation about the need to drive bikies away from Queensland without driving Queensland voters away from the government, it attempted to turn Queensland into a police state for bikie gangs. This attempt at nuance gives rise to laws’ most obvious Kable vulnerability.

As noted earlier, the new laws’ central definition of ‘criminal organisation’ has three alternative parts. Two of those parts – the 2009 court declaration scheme approved in Pompano and the new option of prosecutors simply proving the criminality of a defendant’s organisation beyond reasonable doubt during a prosecution – are clearly valid under Kable; however, they are also burdened by the pace and demands of traditional court processes. So, in practice, the crucial part of the new scheme is the definition’s third wing, which allows particular
organisations to be identified (by name) as ‘criminal’ by regulation. Queensland took this idea (and, indeed, 23 of its initial list of 26 bikie gangs) from NSW’s targeted regulation of licensed premises in Kings Cross. The Newman government’s most dramatic innovation was to also use that list as a means of defining the scope of broader criminal laws, including enhanced bail laws, new public order offences, mandatory sentencing and licensed premises throughout the state.

The problem for Queensland is that a scheme for the non-court identification of organisations that may be subjected to court orders was tried by South Australia in 2009 and was struck down by a majority of both the Supreme Court and the High Court in 2010’s Totani v South Australia. Although Queensland’s non-court identification scheme (by regulation, albeit initially set down in legislation) differs from South Australia’s (which involved declarations by the Attorney-General on the application of the Commissioner of Police), it is doubtful that this difference is one of consequence. An issue on which there is greater doubt is whether the judicial role in the Queensland scheme (variously to make special bail decisions, try special offences and hand down special sentences to people found to be participants in declared organisations) is less (or more) vulnerable to a Kable challenge than the Totani scheme (which required South Australia’s Magistrates’ Court to make control orders over people found to be participants in declared organisations, and which six members of the High Court held ‘represents a substantial recruitment of the judicial function of the Magistrates Court to an essentially executive process’ and was therefore invalid under Kable.

Totani, the longest Kable judgment to date, is also the most mysterious, at least to criminal lawyers. That’s because, as the dissents pointed out in both the Supreme and High Courts, schemes where courts make orders after finding that people were connected to groups or things declared criminal by the executive (or listed by name as criminal in legislation) are common in Australian criminal law. The most obvious example is drug offences, where the executive or legislature declares a particular named drug to be contraband and then a court,

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109 Criminal Code (Qld), s1; Criminal Code (Criminal Organisations) Regulations 2013 (Qld), s2.
110 Liquor Act 2007 (NSW), s16A(2)(g) & Liquor Regulation 2008 (NSW), s53K. Queensland’s list adds the ‘Iron Horsemen’, ‘Red Devils’ and ‘Renegades’, but omits the ‘Brothers for Life’.
112 I will not analyse another point of distinction: the provision in some of Queensland’s new laws for a defendant to prove on the balance of probabilities that their organization (even if it was named in the regulations) “is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity”: Bail Act 1990 (Qld), s16(3D); Criminal Code (Qld), ss 60A(2), 60B(3), 60C(2), 72(3), 92A(4B), 320(3), 340(1B), 408(1AB); Vicious Lawless Association Disestablishment Act 2013 (Qld), s5(2). Queensland’s submissions in the challenge to these laws unsurprisingly rely on this provision to avoid Totani: see State of Queensland, ‘Submissions on Behalf of the Defendant’ available at <http://www.hcourt.gov.au/assets/cases/b14-2014/Kuczbowsk1_Def.pdf>, [27], [87], [97]-[98], [114], [131], [150]. The reverse onus (and the difficulties of proving such a proposition) will doubtless be a matter of controversy before the High Court. Regardless, this point cannot be a complete answer to the entire challenge, given that there is no such defence for constraints on entry to licensed premises for visible gang members in Division 5 of Part 6 of the Liquor Act 1992 (Qld)).
after finding that a person was connected with that drug (by manufacture, possession, use, supply or trafficking), makes (sentencing) orders about them. As the dissent observed in the Supreme Court:\footnote{115} 

The expression “controlled drug” could have been defined by reference to specified characteristics, leaving it to the courts to decide in each case whether any substance in which the defendant trafficked had those characteristics. Instead, the expression “controlled drug” is defined in s 4 of the CSA to mean a “drug of dependence” or any other “substance declared by regulation to be a controlled drug for the purposes of [the CSA]”. The expression “drug of dependence” is in turn defined to be “a poison declared by regulation to be a drug of dependence”. The effect of these definitions is that it is the executive, and not the courts, which decides the drugs to which the prohibition in s 32 of the CSA applies.

Just as Queensland didn’t want to subject all Queenslanders to a police state and South Australia didn’t want to give its courts the power to control every South Australian’s associations, Australian governments don’t want to criminalise the possession and sale of every drug that a court may find to be a health or social menace (a category that would include a good many mainstream products.) Rather, they wanted to use the criminal law to target particular drugs. Hence, Australian courts have no more role in determining what is and isn’t a banned drug than they did in South Australia (or do for the 26 named bikie gangs in Queensland) in determining what is or isn’t a declared organisation.\footnote{116}

\textit{Totani} is especially puzzling because, while some of the majority judges addressed this issue, they did so quite unconvincingly, by focusing on supposed (and supposedly relevant) contrasts between the respective prior executive determinations (e.g. distinguishing naming a ‘thing’ from naming a ‘person’\footnote{117}) and the respective subsequent judicial functions (e.g. distinguishing controlling a person from convicting and punishing a person.\footnote{118}) However, a more plausible explanation has since emerged in a very recent High Court \textit{Kable} judgment, decided in April this year, which focuses instead on another decision-maker that is interposed between the legislature and the judiciary: the prosecutor.\footnote{119}

Six months before 27\textsuperscript{th} September 2013, a majority of the Northern Territory Court of Appeal held that Territory laws requiring a court to restrain any property (regardless of its connection to crime) of any person who has been charged with a third drug offence in ten years (termed a ‘drug trafficker’, even if

\begin{footnotes}
\footnote{115} Totani \textit{v South Australia} [2009] SASC 301, [269] (White J).
\footnote{116} Indeed, the High Court itself ruled in 2008 that judges sentencing drug offenders must not make any assessment of the harmfulness of any drug, but instead take their lead exclusively from the legislature’s list and detailed specification of what quantities are traffickable, commercial and so on: Adams \textit{v The Queen} [2008] HCA 15. So, if a state government decides to name ‘icing sugar’ as a banned drug (something that perhaps may assist in heroin law enforcement, or reducing childhood obesity), then a court who found that someone (say Woolworths Pty Ltd or your grandmother) was trafficking in icing sugar would have no choice but to convict and sentence them exactly like any other ‘drug’ trafficker (i.e. harshly.) The potential for injustice (and the perception that courts have been co-opted by a political agenda) in such a scheme is by no means hypothetical (as the inflated specified quantities for crack cocaine sentencing in the United States notoriously demonstrated: see Anti-Drug Abuse Act of 1986 (US), 100 Stat 3207 and compare Kimbrough \textit{v United States}, 552 US 85 (2007) and Fair Sentencing Act of 2010 (Public Law 111-220.)
\footnote{117} Totani \textit{v South Australia} [2009] SASC 301, [158] (Bleby J, Kelly J agreeing).
\footnote{118} See \textit{Totani v South Australia} [2010] HCA 39, [219] (Hayne J), [434] (Crennan & Bell J), [467] (Kiefel J).
\end{footnotes}
all three offences were mere possession), resulting in automatic forfeiture upon conviction, was invalid ‘because its substantive effect can be accurately described in the same terms used by the High Court in Totani’.\(^{120}\)

\begin{quote}
It represents a substantial recruitment of the judicial function of this Court to an essentially executive process: that process being one in which the DPP decides which people, chosen from a very wide class of people many of whom are not drug traffickers, should be declared to be drug traffickers. It gives the neutral colour of a judicial decision to that executive decision by the DPP. In doing so, it authorises the executive to enlist this Court to implement decisions of the executive (the DPP) in a manner incompatible with the Court’s institutional integrity.
\end{quote}

As can be seen, the Territory, in partly reviving the old common law that deemed all of every felon’s property to be forfeit to the state, tempered this harsh rule by conditioning it on a discretion. For the Court of Appeal (and, on different constitutional grounds, for Gageler J in the High Court\(^{121}\)), the ability of a non-court body to choose which ‘drug traffickers’ will be stripped of all their assets (and, indeed, to specify which of his or her assets will actually be forfeited) was the law’s central flaw.

However, in the High Court, South Australia’s Solicitor-General (who has probably read Totani more than anyone else) argued that the prosecutor’s role was the crucial difference between the law struck down in Totani and the Territory’s scheme: \(^{122}\)

\begin{quote}
The vice identified in Totani was the anterior enquiry taken by the executive branch which formed an essential element and effectively pre-ordained the curial decision of the court in making a control order. It was the coupling of the court’s duty with the anterior classification by the Attorney-General which infected the judicial function, which brought the decisional independence of the court into question.
\end{quote}

\begin{quote}
In the present case, there is no analogous executive determination permeating and infecting the judicial function. The fact that the DPP has a discretion whether or not to make an application for a restraining order or a s36A drug trafficker declaration does not offend the institutional integrity of the Supreme Court. It is axiomatic that judicial power is not exercised other than at the initiative of the party.
\end{quote}

A majority of the High Court agreed: \(^{123}\)

\begin{quote}
That the controversy is initiated by an officer of the Executive, the DPP, does not deprive the Supreme Court of its independence. The DPP’s decision to make an application to the Supreme Court in respect of an individual... is a discretionary decision, similar to the well-recognised prosecutorial discretion to decide who is to be prosecuted and for what offences... The role of the DPP in the statutory scheme reflects no more than procedural necessity in the adversarial system....
\end{quote}

This ruling upholds the usual way that parliaments temper harsh criminal laws: with discretionary criminal justice. \(^{124}\)

\(^{120}\) Emmerson v DPP [2013] NTCA 4, [92].

\(^{121}\) Attorney-General (NT) v Emmerson [2014] HCA 13, [134]-[135], holding that the law was invalid as a deprivation of property without just terms. (Gageler J did not discuss Kable.)


\(^{123}\) Attorney-General (NT) v Emmerson [2014] HCA 13, [61].

\(^{124}\) Incidentally, by relying heavily on a type of executive discretion that is unique to criminal justice, it further supports this paper’s starting thesis that Kable is essentially a criminal law.
South Australia’s Solicitor-General submitted at the hearing:\(^{125}\)

A Director does not prosecute everyone who commits an offence. A Director does not prosecute everyone who commits a similar act to another person for the same offence. A Director does not prosecute all offending, fraud is the primary example. You could have 3,000 transgressions, but they will not prosecute all. A Director does not call every witness. There are many reasons why you do not call some witnesses. A Director does not seek compensation in every case. A Director does not seek confiscation in every case wherever possible. A Director does not seek bonds to be estreated in every case, or suspended sentences to be revoked. Those decisions are made upon complex competing factors that we entrust to the Executive, fairness, a benefits analysis of the costs involved against the benefit of proceeding, the public interest, the interests of victims, complainants, the prospects of success and policy reasons.

However, this prosecutorial role isn’t always so benign. The Territory’s forfeiture law and mandatory sentencing laws that leave courts with no discretion after the prosecutor has chosen to proceed, effectively give prosecutors exclusive control over which ‘drug trafficker’ will be denuded and what sentence an ‘aggravated’ offender will be given. But only Gageler J (who dissented in both Emmerson and the Magaming ruling upholding the federal mandatory sentence for aggravated people smuggling) appears to see this difference as even relevant.\(^{126}\) Nor is it a problem for the rest of the High Court if the laws to be applied by prosecutors set out flawed labels and definitions (such as ‘trafficker’ and ‘aggravated’) as triggers of those mandatory consequences or that the mandatory consequences they imposed are wildly disproportionate to those triggers (e.g. seizing a lawfully acquired home from a minor trafficker or five year sentences imposed on deckhands.)

The discretionary role of the mover of proceedings, while made express in the Territory’s forfeiture laws, is typically only implicit in criminal laws. For example, the federal sentencing scheme for people smugglers simply set out two overlapping laws (only one of which carried a mandatory sentence), implicitly empowering the prosecutor to decide who will be subject to the harsher scheme. More subtly, the Vicious Lawless Association Disestablishment Act’s crushing sentences will only actually be imposed if the prosecution chooses to allege in an indictment that the offence charged was done ‘for the purposes of, or in the course of, participation in the affairs of an association.’\(^{127}\) The result of Emmerson implies that neither the prosecutor’s ability to select who is subject to the scheme, the law’s bizarre label for such offenders nor the insane sentences that it imposes will invalidate the VLAD Act under Kable.\(^{128}\)

Together, Totani and Emmerson frame the ability of Australian legislatures to enact targeted criminal laws. Totani holds that targeted schemes are invalid if the targeting is achieved by a non-court decision that partly determines the outcome of any court proceedings to apply the scheme (at least where the court’s

\(^{125}\) Attorney-General for the Northern Territory and Anor v Emmerson and Anor [2014] HCATrans 6 (4 February 2014).

\(^{126}\) Magaming v The Queen [2013] HCA 40, [70].


\(^{128}\) This paper does not analyse a further discretion built into the Vicious Lawless Association Disestablishment Act 2013 (Qld) – the Commissioner of Police’s discretion to accept an offender’s offer to cooperate with law enforcement authorities in a proceeding (see s9(2)(b) and see also (3)-6).
subsequent role is insufficiently determinative.) *Emmerson* holds that targeted schemes are valid if the targeting is achieved by a non-court discretion to move (and define the subject-matter of) the proceedings that allow a court to apply the scheme (even if the court proceedings themselves involve little or no further determinations).\(^{129}\)

But what these judgments do not resolve is the validity of schemes that combine both an anterior non-court determination that partly determines the outcome and a non-court discretion to initiate and define the proceedings. Queensland’s new laws targeting participants in criminal organisations (to the extent that they involve court proceedings) fit this description, because the targeting occurs through both an executive determination naming the 26 gangs that are ‘criminal organisations’ and a prosecutorial discretion to commence proceedings for public order offences (or to seek to apply harsh bail laws) that only apply to such participants.\(^{130}\)

The High Court has invalidated two schemes to date that fall within this description. In *Kable* itself, the invalidated scheme combined a legislative determination that the *Community Protection Act* will only apply to Greg Kable, and a discretion given (exclusively) to the DPP on whether or not to apply for a detention order.\(^{131}\) In *Totani* itself, the invalidated scheme contained a second executive discretion (given to the Commissioner of Police) to initiate proceedings for control orders against particular alleged participants in declared organisations.\(^{132}\) However, the *Emmerson* court did not address this aspect of *Totani* and neither *Kable* nor *Totani* addressed the executive discretion to initiate the court’s role in their respect schemes.\(^{133}\) Nevertheless, there is at least one compelling reason to think that the addition of a traditional prosecutorial discretion to a scheme with an anterior ‘executive’ determination suffices to render some schemes valid under *Kable*.

The reason is that such a result would explain why the many parts of the criminal law whose application is partly determined by non-court

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129 The subsequent proposed adoption of each exact procedural detail of the Northern Territory scheme (albeit tied with a narrower, saner application to a ‘serious drug offender’) in Victoria is yet another instance of Appleby’s thesis that *Kable* rulings discourage experiment and innovation by state legislatures: see Criminal Organisations and Other Acts Amendment Bill 2014, clauses 29 & 49.

130 The analysis to follow assumes that these laws do not give the courts a sufficient determinative role to overcome any *Kable* problems arising from the executive’s anterior decision. Whether that is actually the case will vary from particular law to particular law (and details such as the reverse onus defence), matters that will doubtless be closely considered by the litigants and the court in the *Kable* challenge.

131 *Community Protection Act 1994* (NSW), s. 8. In addition, the judicial role was clearly extensive.

132 *Serious and Organised Crimes (Control) Act 2008* (SA), s. 14 (1), (2).

133 In *Emmerson*, the High Court distinguished *Kable* as follows: ‘Unlike the position in *Kable*, the statutory scheme is not directed ad hominem’: Attorney-General (NT) v *Emmerson* [2014] HCA 13, [62]. It may be that Totani is distinguishable from Emmerson because the moving discretion is exercised by the Commissioner of Police, who is the same person who requests the executive to make the anterior determination; by contrast, a hallmark of modern independent public prosecutors is their separation from other executive functions of government. (See *Totani v South Australia* [2010] HCA 39, [139] (Gummow J): ‘[i]t is the executive branch which not only initiates the process of the Magistrates Court, by the Commissioner making the application, but also has by its own processes under Pt 2 already achieved the result that there exists a vital circumstance, the existence of a declaration by the Attorney-General, upon which the Court now must act.’ See also [226], [229], [236] (Hayne J), [436] (Crennan & Bell JJ)). By contrast, Queensland’s bikie laws are not (or, perhaps more accurately, are much less: see *Totani v South Australia* [2010] HCA 39, [349] (Heydon J)) ad hominem and, in any event, utilise a wholly traditional version of prosecutorial discretion.
determinations (including drug laws) are valid despite Totani. If indeed it is the interposition of a traditional prosecutorial discretion that validates these laws, it is must be because prosecutorial discretion isn’t merely neutral as to a court’s institutional integrity (as held in Emmerison) but can actually negate threats to that institutional integrity that would otherwise flow from prior executive determinations.\(^{134}\) Granted, not all prior executive determinations can be so shielded (given the outcome of Kable) and not all executive initiating discretions suffice to so shield (given the outcome of Totani.) But unless you accept either the Totani judges’ unconvincing distinguishing of such laws or that significant parts of Australia’s criminal law are actually invalid, they must suffice some, indeed most, of the time.

While the notion that there is something constitutionally special about prosecutors seems like something Dennis Denuto might say, the link between prosecutors and the institutional integrity of courts has been a recurrent theme of High Court judgments throughout the Kable era. In Maxwell v R, heard three weeks before Kable and similarly involving a man who killed his wife and from whom prosecutors (initially) were willing to accept a plea to manslaughter on the grounds of diminished responsibility, Gaudron and Gummow JJ (two members of the Kable majority) remarked:\(^{135}\)

\textit{The integrity of the judicial process - particularly, its independence and impartiality and the public perception thereof - would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.}

In a 2008 case, Gummow and Kirby JJ stated in passing that the above sentence 'may well raise concerns about the institutional integrity of the courts in the manner discussed in Kable.’\(^{136}\) Like Kable, the Maxwell dicta was little applied by the Gleeson Court, but has had a resurgence in the French Court, which has taken to citing it repeatedly in both constitutional cases (including Emmerison, as well as the Kable-like Chapter 3 discussion on mandatory sentencing\(^{137}\)) and a variety of non-constitutional ones\(^{138}\) (including a mid-2013 judgment that stated that ‘recognition of the separation of prosecutorial and judicial functions... in this country has a constitutional dimension’.\(^{139}\))

Given that the current Queensland bikie law challenge provides a straightforward way of testing this point,\(^{140}\) there is little worth in speculating

\(^{134}\) See Totani v South Australia [2010] HCA 39, [72] (French CJ), referring to ‘[f]orms of external control of courts “appropriate to the exercise of authority by public officials and administrators”’ as ‘in consistent with’ Kable.


\(^{136}\) Ayles v The Queen [2008] HCA 6, [37].

\(^{137}\) Attorney-General (NT) v Emmerson [2014] HCA 13, [63]; Magaming v The Queen [2013] HCA 40, [20].

\(^{138}\) Likiardopoulos v The Queen [2012] HCA 37, [37]; X7 v Australian Crime Commission [2013] HCA 29, [99]; Elias v The Queen; Issa v The Queen [2013] HCA 31, [35]; Barbaro v The Queen; Zirilli v The Queen [2014] HCA 2, [47]; James v The Queen [2014] HCA 6, [37].

\(^{139}\) Elias v The Queen; Issa v The Queen [2013] HCA 31, [33]. Contrast McHugh J’s remark that ‘nothing in Ch III prevents a State, if it wishes, from implementing an inquisitorial, rather than an adversarial, system of justice for State courts’: Fardon v Attorney-General (Qld) [2004] HCA 46, [40].

\(^{140}\) Queensland’s written submissions do not rely on this argument, although Emmerison and Magaming court’s remarks on the dangers of courts being drawn into political disputes are referenced: State of
further on whether and when the ‘constitutional dimension’ of prosecutorial discretion may save a criminal law that rests on anterior executive determinations from invalidity. However, it is worth observing that, if prosecutorial discretion has this effect, then it may be a mixed blessing for state and territory governments. That is because the constitutional validity of many criminal laws may then depend for their validity on the nature of the institution that exercises prosecutorial discretion. Indeed, that corollary would already seem to follow in the Northern Territory, thanks to Emmerson, where the High Court’s reasons included this observation:

   The DPP is a statutory officer. In representing the state in the prosecution of an accused person, the DPP is subject to what are sometimes called “traditional considerations” (or obligations) of fairness. Those obligations, and the standards of fairness which they entail, spring not so much from statute as from rules of practice; established by judges over the years, they are calculated to enhance the administration of justice by ensuring that an accused has a fair trial.

The Northern Territory government, and perhaps all other Australian ones, may need to think twice before interfering with these ‘traditional’ (albeit hardly ancient or entrenched) attributes of modern prosecutors in the future.

Kable and parole
One mystery of 2014’s Julian Knight law is why the Victorian government chose to enact a parole limitation law for Knight alone. In contrast to Queensland’s bikie laws, parole limitation laws can only affect a narrow and very unpopular part of society: prisoners. And, at least since the murder of Jill Meagher by parolee Adrian Bayley, political pressure is one-way in Victoria when it comes to parole. Moreover, prisoners all come with a pre-existing adjudicated history that can be readily used as a ‘factum’ to target particular sorts of prisoners for parole restriction. And yet the Victorian government eschewed these methods and instead chose to target its law by name. One explanation is that, despite the politics, parole (or, more precisely, the hope of parole) remains an indispensable tool for managing prisoners. Accordingly, a government may well be loathe to strip that all hope of parole from any group of offenders, unless there is a particular need. In the case of Julian Knight, a uniquely loathed criminal whose non-parole period inconveniently expired in an election year, that need apparently rose. But not (yet) for anyone else. Hence, the need for a one-person law.

However, since 1996, political imperatives to target particular criminals with nasty laws need to be balanced against the risk of invalidity. Conveniently for the Victorian government, the High Court sent a clear signal two years earlier that Kable does not apply at all to parole-limitation laws. In 2012’s Crump v NSW, the Court unanimously rejected a Kable challenge to s. 154A of the Crimes (Sentencing Procedure) Act 1999 (NSW), which dramatically limited parole for a small group of life-sentence prisoners, effectively ensuring that they will


141 Attorney-General (NT) v Emmerson [2014] HCA 13, [63].

142 The second-reading speech listed them by name: “Allan Baker, Kevin Crump, Michael Murphy, Leslie Murphy, Gary Murphy, John Travers, Michael Murdoch, Stephen Jamieson, Matthew Elliot, Bronson Blessington - these animals represent pure evil.” New South Wales, Legislative Assembly, Parliamentary
spend almost their whole life in prison. In a terse analysis, the majority held that this new law: 143

qualified the jurisdictional facts which had to apply in order to enliven the power of the Parole Authority to make an order directing the release of the plaintiff on parole. Section 154A did not impeach, set aside, alter or vary the sentence under which the plaintiff suffers his deprivation of liberty.

Remarkably, the Crump plurality made no mention of Kable at all144 and instead relied on a single Kable judgment, 2004’s Baker v R, which concerned a different parole-limitation law that applied to the same groups of prisoners. In his concurring judgment, French CJ explained that a crucial but notoriously difficult fault-line between the judiciary and the legislature was straightforward in the context of prison sentences:145

The distinction between the legal effect of a judicial decision and consequences attached by statute to that decision is opposite in the context of sentencing decisions and statutory regimes providing for conditional release by executive authorities.

The Victorian government expressly relied on French CJ’s analysis in arguing that the Knight law was compatible with Victoria’s human rights Charter.146

In Baker, the majority’s upholding of a parole-limitation law was subject to a caveat that at first blush seems highly significant to the validity of the Knight law147:

In the circumstances of the present case, it could not be said that the appellant was the sole and direct “target” of the 1997 Act, so it is unnecessary to determine what would have been the consequences of such a conclusion.

However, this limitation needs to be understood in light of the particular type of parole-limitation in Baker, which required the Supreme Court to rule on whether or not a targeted parolee will be released.148 Arguably, a one-person judicially-determined parole-limitation scheme may have the same flaw as the one-person judicially-determined preventative detention scheme invalidated in Kable.149 The Crump court made no mention of the Baker qualification, presumably because the judiciary played no role in release decisions under the parole-limitation scheme addressed by that court.

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143 Crump v New South Wales [2012] HCA 20, [60].
144 Nor did Heydon J’s concurrence, French CJ mentioned it exactly once: Crump v New South Wales [2012] HCA 20, [31].
147 Baker v R [2004] HCA 45, [50].
148 Sentencing Act 1989 (NSW), s. 13A.
149 Or perhaps not. Because the Baker law targeted a group of prisoners (using a curial factum), the Baker Court did not need to resolve whether one-person parole limitation laws (which are imposed on people still serving a sentence and therefore lack the Kable law’s post-sentence detention nature) are in a different position.
In an exemplar of Appelby’s thesis last year, the Victorian government slavishly copied the Crump law exclusion of courts from any parole eligibility role,150 as well as the particular terms of the parole limitation,151 in its Knight law.152 However, Victoria could not copy NSW’s High Court-approved experiment in toto, because of past differences in the two jurisdictions’ sentencing laws. Until the introduction of so-called ‘truth in sentencing’ laws in 1989,153 all NSW prison sentences were subject to a ‘ticket-of-leave’ system dating from convict days.154 That meant that every NSW prisoner prior to the 1990s, including a murderer serving a life sentence, could be released from prison at any time by the executive. According to the High Court in Baker, it also meant that:155

the judicial power to impose sentence upon a person convicted of murder was confined: the only sentence that could be passed was that the offender suffer penal servitude for life. Upon passing that sentence the judicial power was exhausted. Whether the offender served the sentence in prison or at large was a matter which then was to be decided by the Executive, not a court... But in no sense (whether as a matter of substance or as a matter of form) can later legislation, altering the circumstances in which such mercy could or would be extended to a prisoner sentenced to life imprisonment, make that sentence of life imprisonment more punitive or burdensome to liberty. Whether the power to reduce the effect of a life sentence is given to a court (as the legislation now in question did) or is retained by the Executive, the original sentence passed on the offender could not be and was not extended or made heavier.

By contrast, Victoria abandoned indeterminate sentencing decades earlier. The Penal Reform Act 1956 (Vic) included the following provision:156

Where any person is convicted by the Supreme Court... and sentenced to be imprisoned, or where any person having been convicted... then, if the term imposed is not less than twelve months the court shall... as part of the sentence fix a lesser term (hereinafter called "the minimum term") during which the offender shall not be eligible to be released on parole: Provided that the court shall not be required to fix a minimum

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150 Except, as noted earlier, the exclusion of courts’ role in applying Victoria’s human rights Charter to the new role, something I won’t discuss further here.
151 Give or take a potentially important comma, as noted earlier.
152 Both parliaments’ decisions to leave courts out of their schemes supports a familiar criticism of Kable – that it discourages parliaments from giving courts a protective role in extreme law-and-order schemes and thereby puts courts’ interests ahead of all others’, including the vulnerable – although each decision can also be explained by the political imperative of ‘guaranteeing’ that a particular prisoner won’t be freed (e.g. by a ‘soft’ judge.)
153 Sentencing Act 1989 (NSW).
154 Crimes Act 1900 (NSW), s. 463.
155 Baker v R [2004] HCA 45, [29]. A further consequence was that some NSW judges took to making comments at the time of sentence about when or whether offenders should be released by the executive: see R v Jamieson (1992) 60 A Crim R 68. This permitted more recent NSW governments to identify a suitably narrow group of prisoners for restrictive retreatment: those whose sentencing judges had solemnly (but, at the time, powerless) declared are ‘never-to-be-released’. When Baker attacked any reliance on these informal (and unappealable) remarks as a ‘factum’ for a curial parole restriction scheme, a majority of the High Court responded: There is a long history, both in England and Australia, of recommendations by trial judges to the Executive respecting the carrying out of mandatory sentences. In an age of draconian penal systems and before the establishment of courts of criminal appeal, these procedures to engage the attention of the Executive were “an indispensable element in the administration of criminal justice”: Baker v R [2004] HCA 45, [47]. After that, the NSW government – again, in a Kable-inspired non-experiment – targeted the same prisoners for a much stricter non-judicial parole restriction regime. In probably the most depressing example of the sometimes extreme costs of the effects of Kable-induced non-experimentation discussed by Appelby, one of those prisoners was aged just 14 at the time of his offence!: see Baker v R [2004] HCA 45, [136]-[137].
156 Penal Reform Act 1956 (Vic), s. 26.
term if the court considers that the nature of the offence and the antecedents of the offender render the fixing of a minimum term inappropriate.

Since then, Victorian courts have been able to prevent a prisoner from being paroled for either a particular part of their sentence or (as the last sentence makes clear) at all.

So, for every person presently in a Victorian prison, if the sentencing judge thought he or she should ‘never be released’, then the judge could simply have issued a binding sentence to that effect. In August 1988, Vincent J was the first Victorian judge to choose to make such a determination for a life sentence (for Stanley Taylor, one of the perpetrators of 1986’s ‘Russell Street bombing’). Likewise, a sentencing judge who thought otherwise could set a minimum term for any sentence, including (for anyone sentenced since 1986, a year before Knight’s crimes) a life sentence. In November 1988, Hampel J issued such a sentence for Knight, with respect to the previous year’s Hoddle Street massacre:

Mr Dickson [counsel for the DPP] did not contend that a minimum term should not be fixed. In my view, the fixing of a minimum term in this case is appropriate because of your age and your prospects of rehabilitation, as well as the other mitigatory factors I have already mentioned which justify some amelioration of your sentence, not only in your interest, but in the interest of the community.

Knight’s 27-year minimum term expired in May this year.

In short, the mismatch between a judge’s sentence and the same judge’s views about when the prisoner could be released that arose in NSW, addressed in the Baker and Crump laws, was impossible for Victorians sentenced since 1957 (and, indeed, has always been impossible for murderers.) Instead, the Knight law addresses a mismatch between a judicial sentence (Hampel J’s view that Knight’s eventual release should not be ruled out in advance) and the Victorian government’s current view that Knight should never be released at all.

Again, conveniently for the Victorian government, the High Court also addressed such a situation in 2012’s Crump. That is because, by then, there was also a mismatch between a judicial sentence (McInerney J’s 1997 redetermination of Crump’s sentence to include a 30-year non-parole period) and the NSW government’s current view (which was consistent with the judicial remarks of Crump’s original sentencing judge in 1974.) The Court observed:

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157 Prior to 1986, all Victorian murderers received a life sentence without parole (except before 1975, when they could alternatively have received the death penalty.)
159 In 1986, the successor to the Penal Reform Act’s minimum sentence regime (Penalties and Sentencing Act 1985 (Vic). s. 17) was extended to life sentence prisoners, who were previously ineligible for parole: Crimes (Amendment) Act 1986 (Vic). s. 12.
161 And, more or less, the current view of Victoria’s Adult Parole Board: See Knight v Adult Parole Board [2013] VSC 97, [5]: ‘The Board considers that there is no prospect of an order for release on parole in the foreseeable future. In the Board’s view the prisoner continues to represent a danger to the community’.
162 Application of Crump, unreported, Supreme Court of New South Wales, 24 April 1997.
163 Crump v NSW [2012] HCA 20, [60].
However, the practical reality which, as Gleeson CJ emphasised in Baker, faces sentencing judges (including those in the position of McInerney J) is the prospect of legislative and administrative changes in parole systems. As a matter neither of form nor substance did the sentencing determination by McInerney J create any right or entitlement in the plaintiff to his release on parole. In that regard, the determination itself had no operative effect. Rather it constituted a factum by reference to which the parole system (later including s 154A) operated.

The upshot is that the mere fact that Hampel J’s sentence for Knight specifically included a non-parole period does not invalidate a law effectively making Knight ineligible for parole.

So, is that it for Knight? As it happens, the Queensland government’s own experimentation in criminal law last year may have given him one last hope. As discussed in the middle part of this paper, the Queensland government on 27th September 2013 also faced a mismatch between a judicial order (Peter Lyons J’s refusal to continue the preventative detention of Robert Fardon) and the Queensland government’s own views about the best way to manage the risks Fardon’s release posed. Unlike the Victorian government, the Queensland government did not risk enacting a one-person non-court detention law, presumably fearing Gummow J’s caveat in Totani (and, perhaps, anticipating further disagreements on other detained sex offenders.) Instead, as discussed earlier, it enacted a new scheme for executive detention of any offender who was at any time detained under the judicial preventative detention scheme upheld in Fardon. The Queensland Court of Appeal in turn struck down that scheme in December 2013’s Attorney-General (Qld) v Lawrence.164

The Lawrence law shares a number of characteristics with the Crump law. Both laws allowed the government to reject a court’s view that a particular offender could safely be released in favour of an earlier court’s view that the same offender needed to be detained to prevent a risk to the community. More subtly, both of the rejected orders permitted a court to require the executive to limit an offender’s freedom, but did not otherwise prevent the executive from limiting an offender’s freedom further. A minimum term bars parole for a period of time, but does not stop the executive from barring parole thereafter. Likewise a decision about the supervision of a sex offender may require the executive to detain or control an offender, but does not prevent the executive from detaining or controlling on other legal bases (such as bail, apprehended violence or mental health laws) if they are available.

However, the Court of Appeal held that the Lawrence law differed from the Crump law in one important way:165

The amendments do not merely treat the court order as the criterion by reference to which new rights or obligations are created by legislation; public interest declarations are to be made by the executive, they are to be made on a case by case basis on the merits as perceived by the executive, and the substantial effect of such a declaration is equivalent to a reversal of the Court’s order.

By contrast, the Crump laws do not restrict parole on a case-by-case basis, but simply adopt in toto the sum of earlier judicial declarations that any prisoner is

164 Attorney-General (Qld) v Lawrence [2013] QCA 364, [44].
165 Attorney-General (Qld) v Lawrence [2013] QCA 364, [41].
‘never-to-be-released’. In this way, *Crump* and *Lawrence* together frame Australian legislatures’ power to override a court’s decision not to restrict an offender’s freedom: they can enact a general law that has the effect of reversing such orders but (at least in some circumstances) they cannot reverse such orders on a ‘case by case basis’. I argue that the Knight law falls squarely between these two decisions.

An obvious objection to this view is there was another difference between the two decisions: *Lawrence* concerned post-sentence detention, while Knight (like *Crump*) is concerned with mid-sentence detention. Whatever might be said about post-sentence detention, ‘case by case’ executive decisions by a parole board about prisoners under sentence are a regular and unproblematic part of Australian law.\(^\text{166}\) Moreover, there is nothing to stop a government tightening the general criteria for parole decisions (as Victoria did this year in response to the murder of Jill Meagher\(^\text{167}\)), partly transferring parole decisions to a new body or simply abolishing parole altogether. The difference, though, is that none of these current or possible approaches involve a *case-by-case reversal of court orders*. Rather, they all involve general schemes governing the release of any parole-eligible prisoner.

By contrast, consider the *Kable* validity of a new scheme that allows the executive to make ‘public interest declarations’ extending or removing any minimum terms given by courts for particular, named prisoner? Assuming *Lawrence* is correctly decided, such a scheme would also appear to be invalid. The same would apply to any such scheme that had the same substantive effect, for example provision for the executive to add ‘additional’ executive non-parole periods to the minimum terms of named prisoners. As the *Lawrence* court wrote:\(^\text{169}\)

> Even in the absence of any public interest declaration, the Declarations Act itself undermines the authority of the Supreme Court by impugning every order made by the Supreme Court under Division 3 of the DPSOA. All such orders now must be regarded as provisional, their effect after the expiry of the appeal period or the resolution of any appeal being contingent upon the executive subsequently deciding on a case by case basis not to exercise its power to nullify the effect of the orders.

Likewise, under a similar parole declarations scheme, all judicial sentencing decisions with respect to parole eligibility would likewise become provisional and contingent on executive discretion.

A second objection is the *Crump* court’s broad holding that statutory changes to parole eligibility can be distinguished from the judge’s sentence (including the

\(^{166}\) I won’t discuss a potential wildcard: s120 of the Constitution, a version of the autochthonous expedient for prisons, which presumably requires the states to constitute their prisons in a way that makes them suitable as a repository for offenders serving federal sentences handed down by judges exercising federal jurisdiction. Suffice to say that it is unlikely that parole limitations on state prisoners could infringe s120 (especially as federal prisoners are subject to their own separate parole regime: *Crimes Act 1914* (Cth), Part 1B, Divisions 4 and 5.)

\(^{167}\) *Corrections Amendment (Parole Reform) Act 2013* (Vic), s. 11, e.g. inserting a new s. 73A into the *Corrections Act 1986* (Vic): ‘The Board must give paramount consideration to the safety and protection of the community in determining whether to make or vary a parole order, cancel a prisoner’s parole or revoke the cancellation of parole.’

\(^{168}\) E.g. *Corrections Amendment (Further Parole Reform) Act 2014* (Vic), s. 7.

\(^{169}\) *Attorney-General (Qld) v Lawrence* [2013] QCA 364, [41].
non-parole term that McInerney J added to Crump’s sentence.) While this is indeed a significant argument, it is subject to a caveat that the High Court’s holding was made in the context of ten prisoners serving head sentences awarded by judges who had no legal say at all on when a prisoner could be released while under sentence. In Crump, all members of the Court relied on Gleeson CJ’s analysis in Baker in distinguishing between a sentence of imprisonment and legislation on the conditions of imprisonment.\(^{170}\) But Gleeson CJ’s judgment was actually a specific analysis of NSW law, which had gone through multiple variations between the period the ten prisoners were sentenced and the enactment of the Baker and later Crump laws.\(^{171}\) By contrast, the role of Victorian judges in determining parole eligibility has been essentially unchanged since 1957. Justice Hampel’s decision to set a minimum term for Knight applied the same test\(^ {172}\) that Victorian judges apply today.\(^ {173}\) Accordingly, a law that permitted a mid-sentence ‘case by case’ reversal of parole eligibility of any current Victorian prisoner may render provisional the continuing Victorian judicial function of determining parole eligibility at sentence.

A third objection is that the Lawrence scheme allowed for ‘case by case’ detention of an entire category of offenders, whereas the Knight law is a single legislative parole limitation for just one offender. How could a single substantive reversal of a decades old order impugn the current judicial role in determining parole eligibility at sentence? This is also a significant argument. However, it should be recognised that it arises because of a temporal difference between sex offender supervision orders and judicial parole eligibility orders. Supervision orders take immediate effect (i.e. the offender will speedily enter the community), whereas parole eligibility orders are a slow-motion affair. As one politician observed in debate over the Knight bill:\(^ {174}\)

> Julian Knight was sentenced by Justice Hampel in the Supreme Court in 1988 to life imprisonment for each of seven counts of murder. He was given a minimum of 27 years before he could become eligible for parole, which is due to occur in May this year. It has occurred to me — and I know all members would remember these events very clearly and would have been very distressed for the people who were directly affected and


\(^{171}\) Baker v R [2004] HCA 45, [7].

\(^{172}\) Compare Penalties and Sentences Act 1985 (Vic), s. 17(2) (‘A court shall not be required to fix a minimum term if the court considers that the nature of the offence and the antecedents of the offender render the fixing of a minimum term inappropriate.’) and Sentencing Act 1991 (Vic), s. 11(1) (‘If a court sentences an offender to be imprisoned in respect of an offence for— (a) the term of his or her natural life.... the court must, as part of the sentence, fix a period during which the offender is not eligible to be released on parole unless it considers that the nature of the offence or the past history of the offender make the fixing of such a period inappropriate.’) It is possible that the replacement of ‘and’ with ‘or’ has broadened the situations when an offender (including one with no priors, like Knight) can be sentenced to life without parole.

\(^{173}\) Julian Knight’s Wikipedia page (for now, and at the time of the passage of the Knight bill) falsely states: ‘At the time of sentencing Victoria had no provision for life imprisonment without parole...’ Seemingly relying on this, one of the politicians debating the bill stated: ‘It may have been — I am not sure — that at the time Victoria had no provision for life imprisonment without parole.’: Parliament of Victoria, Parliamentary Debates (Hansard), Legislative Council, Fifty-Seventh Parliament, 1st session, 11 March 2014, p. 591 (Ms Pennicuik).

While a judicial parole-eligibility decision may be publicly controversial when it is made, it may only become a significant political liability (and therefore potentially be subject to political reversal) at the end of the prisoner’s non-parole period.

Nevertheless, a single reversal of a parole-eligibility decision alone is unlikely to render every parole-eligibility decision provisional. However, as the shadow Attorney-General observed in the final debate before the Knight bill became law:

\[W\]e should not delude ourselves and imagine that this is the last time there will be a clamour from somewhere for a person who becomes eligible for parole to have that eligibility legislated away. There are lots of really bad people in prison at the moment, some of whom have lengthy non-parole periods — sometimes 30 years or 35 years. I do not intend to put their names on the record in this debate, but it would take only a brief Google search for members to discover to whom I might be referring. There are some people in jail in the state of Victoria who have committed heinous crimes and are not serving sentences of life with no parole — they are serving sentences of life with a minimum of 30 or 35 years — and no doubt when those individuals become eligible for parole there will be an expectation of the government of the day, whoever that might be, that it legislate to remove the possibility of that person being granted parole.

The category described does not include Knight, who was subject only to a 27-year non-parole period. However, as the Hoddle St massacre was committed just a year after minimum terms became available for Victorian murderers, he is simply the first of a number of such prisoners to become eligible for parole, including many whose eligibility will trouble Victorian governments decades in the future. It will be a very many years before we know whether the decisions of each of those judges to fix a lengthy, but finite, non-parole period will be nullified by the legislature.

Paradoxically, there is one near-future event that may instantly make case-by-case legislative review of parole eligibility a normal part of Australian sentencing law: that event is the High Court rejecting a Kable challenge to the Knight law. It is at that moment that Appleby’s compelling thesis will again come into play, and one-person parole limitation laws will become the ‘prudent’ way for Australian governments to handle mismatches between judicial parole eligibility decisions and governments’ own views on community safety. And it is that moment that every Australian non-parole decision will become provisional in the Lawrence sense and (if Lawrence is correct) every Australian court’s institutional integrity will be denied in the Kable sense.

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Coda: Non-current experiments in Australian constitutional criminal law

On 1st March 1945, Queensland’s parliament commenced a debate on how the criminal justice system should manage the risk that a child sex offender will offend after the end of his or her term. The law it considered, s. 18 of the proposed Criminal Law Amendment Act 1945 (Qld), would allow a Supreme Court judge to order a child sex offender (either facing or serving a sentence) into detention at Her Majesty’s pleasure. The law was proposed by an expert committee and was debated in parliament for the balance of three sitting days, with members discussing at length the causes and proper treatment of child sex offenders, and the appropriate role of the judiciary and psychiatrists in their treatment. One member helpfully expounded that the test proposed by the law, whether an offender ‘is incapable of exercising proper control over his sexual instincts’, would only capture ‘sexual morons’, rather than men ‘like you and me, Mr Speaker’ who can observe ‘the near-nudity of our woman today’ and ‘the harlots of Hollywood near nude on the screen’ with ‘no sexual effect on him whatsoever’.

On 19th March 1987, the High Court of Australia heard an administrative law challenge to the application of a similar South Australian law, the model for the Queensland one. Although he (and a majority of the court) dismissed the challenge (to a decision by South Australia’s cabinet to reject a release recommendation by doctors and the parole board), Mason CJ concluded his judgment by observing that that the pairing of judicial sentencing and politicians’ discretion raised ‘obvious difficulties’.

The initial declaration by the judge may exercise a controlling influence in the minds of those who subsequently consider whether the offender should be released. The system would offer greater protection to the offender if provision were made for a subsequent judicial review of the offender’s capacity to control his sexual instincts. However, the Parliament has chosen the present procedures no doubt because it considers that political assessment of the public interest is to be preferred to judicial assessment.

The following year, the South Australian parliament repealed its law and replaced it with one that gave the judiciary, on the application of the director of public prosecutions, the exclusive role of determining when an indefinitely detained sex offender will be released.

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177 The Committee of Inquiry Regarding Sexual Offences, referred to in the second-reading speech to the Criminal Law Amendment Bill 1945: Parliament of Queensland, Parliamentary Debates (Hansard), Legislative Assembly, Friday 2 March, p. 1988 (D Gledson, Attorney-General.)
178 The 2nd, 8th and 13th March 1945.
179 Parliament of Queensland, Parliamentary Debates (Hansard), Legislative Assembly, Thursday 8 March, p. 2080 (Mr Aikens.)
181 South Australia v O’Shea [1987] HCA 39; (1987) 163 CLR 378, 390. Dissenting in the case, Deane J remarked: “To echo the rhetoric of Lord Atkin in Liversidge v. Anderson (at p 245), I know of only one authority which supports such an approach to the right to be heard in relation to matters founding an effective decision that indefinite incarceration should be imposed or continued otherwise than as punishment for a specific proven offence. ‘No, no’ said the Queen. ‘Sentence first - verdict afterwards’ (Alice in Wonderland, chxxii). I reject that approach.” (at 419).
182 Statutes Amendment and Repeal (Sentencing) Act 1988 (SA), s29; Criminal Law (Sentencing) Act 1988 (SA), s23A. The Queensland law was unchanged, despite a similar call for reform by Thomas J a year before the birth of the Kable doctrine: Pollentine v Attorney-General [1995] 2 Qd R 412, 420-421.
On 19th July 2014, Labor’s Dr Anthony Lynham handily won a state by-election in the Brisbane seat of Stafford (occasioned by the resignation of the government’s Assistant Health Minister as a protest against his government’s policies.) Three days later, Premier Campbell Newman apologised to the people of Queensland and promised changes to a number of policies, including the segregation of imprisoned bikies in pink uniforms.183 During a directions hearing on the High Court challenge to the government’s laws, Queensland’s Solicitor-General indicated that the changes would not (to his knowledge) include provisions that were subject to a Kable challenge.184 Nevertheless, the government’s changed tone will likely sound (for the time being) in altered police and prosecutorial decision-making in applying those laws.

On 14th August 2014, the High Court considered the constitutionality of the 1945 Queensland law, by far the oldest Australian criminal law ever challenged in the High Court under Kable.185 The challenge was brought by Edward Pollentine and Errol Radan, both detained under the law three decades ago aged respectively 25 and 45, seemingly the only people currently subject to the scheme.186 The Court unanimously dismissed the challenge, declaring the judicial role under the Queensland law to be similar to ‘powers courts have long had not only to decide whether an offender is fit to stand trial or was criminally responsible for an alleged crime but also, on proof of unfitness or insanity, to direct the indeterminate detention of that offender’187 and the executive’s role as ‘made according to a criterion which admits of judicial review’.188 The majority observed that, while the 1945 law was less protective of detainees than the judicial sex offender detention scheme the Court endorsed in Fardon, ‘[i]t by no means follows, however, that the provisions of s 18 are incompatible with or repugnant to the institutional integrity of the State courts.’189 And so a seventy-year old law, modeled on a century-old South Australian law abandoned almost thirty years earlier, has now been endorsed as a constitutionally safe criminal law option for prudent Australian governments into the future.


185 Pollentine v Bleijie [2014] HCA 30. The next oldest appears to be a 1975 amendment to Queensland’s Criminal Code (s669A(1), on Crown sentencing appeals), which was the subject of a Kable challenge in Lacey v Attorney-General of Queensland [2011] HCA 10. The majority didn’t consider the challenge (having found in Lacey’s favour on statutory interpretation grounds); Heydon J, in dissent, wrote (at [95]): ‘The appellant submitted in writing – the Court did not require oral argument in view of the impending success of the appellant on the construction issue – that if the construction given to s 669A by the majority of the Court of Appeal were correct, the provision was constitutionally invalid by reason of the principles stated in the line of cases commencing with Kable v Director of Public Prosecutions (NSW). The submission is unsound, but there is no point in lengthening this dissenting judgment by giving reasons for that opinion.’ In terms of challenges substantively considered by the Court, the next oldest law would seem to be Kable legislation, enacted almost 50 years after Criminal Law Amendment Act 1945 (Qld).

186 An elderly offender, Keith Lansbury, was detained under the scheme in 1988: Lansbury v Attorney-General [1996] QCA 495.

187 Pollentine v Bleijie [2014] HCA 30, [45].

188 Pollentine v Bleijie [2014] HCA 30, [47].

189 Pollentine v Bleijie [2014] HCA 30, [51].
Papers on current Australian criminal law tend to date very quickly. At the same time, they are also reminders that similar issues arise over and over again. The same may be said of many criminal laws themselves. Whatever might be said of the criminal laws and law-making of 1945 or 1987 or 2013 or even July 2014, they are all of their time, embodying the best and worst of their eras and the costs and benefits of legal experimentation. The exception is *Kable*. Australia’s constitutional criminal law remains resolutely timeless, with all the good – and bad – that that implies.