

Case Note

Pollentine v Bleijie: *Kable* in Pieces

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Abstract

This case note reviews *Pollentine v Bleijie*, the first case in which the High Court of Australia upheld the constitutional validity of preventative detention without any regular judicial review or express safeguards. The Court's ruling was based on a narrow interpretation of the empowering statute, in which the majority implied constraints far beyond what was expressly stated. This interpretation was then used to dismiss challenges based on the *Kable* principle. It is argued that, while a narrow interpretation of such statutes is appropriate, it should have been given a more clearly principled basis. Moreover, the treatment of *Kable* should also have been more clearly related to its principled and practical constitutional foundations in the relationship between the branches of government.

I Introduction

In 1984, Edward Pollentine and Errol Radan were sentenced to prison without a release date. The sentence for each was detention 'until the Governor in Council is satisfied on the report of two medical practitioners that it is expedient to release'.¹ Three decades later, both men are still in prison. In *Pollentine v Bleijie*,² the High Court of Australia unanimously affirmed the validity of the scheme that keeps them there.

All jurisdictions except the Australian Capital Territory and New South Wales have some provision for indefinite detention orders at the time of sentence.³ However, only the Queensland and Western Australian legislation leave the release date entirely up to the executive branch of government.⁴ Until the High Court's decision in *Pollentine v Bleijie*,⁵ the constitutional validity of such schemes had

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¹ *Criminal Law Amendment Act 1945* (Qld) s 18(5).

² (2014) 253 CLR 629.

³ For an excellent summary of preventative sentencing laws in Australia, see Bernadette McSherry, Patrick Keyzer and Arie Frieberg, 'Preventive Detention for "Dangerous" Offenders in Australia: A Critical Analysis and Proposals for Policy Development' (Report to the Criminology Research Council, Australian Institute of Criminology, December 2006) 18.

⁴ *Sentencing Act 1995* (WA) s 98; *Criminal Law Amendment Act 1945* (Qld) s 18.

⁵ (2014) 253 CLR 629.

only been assumed.⁶ It has now been expressly established, but only on the basis of a very specific construction of the empowering statute, and a fragmented application of the *Kable* principle.⁷

II Background

The challenged scheme is contained in s 18 of the *Criminal Law Amendment Act 1945* (Qld). It applies to those convicted of any sexual offence involving a child aged under 16 years.⁸ After both plaintiffs pleaded guilty to such offences,⁹ it empowered the sentencing judges to call for sworn reports from two medical practitioners as to whether each offender's 'mental condition is such that the offender is incapable of exercising proper control over the offender's sexual instincts'.¹⁰ Because both practitioners reported in the affirmative, the sentencing judges could, and did, find such incapacity proven. Having done so, they were then empowered to order detention during Her Majesty's pleasure.¹¹

Since such orders can be 'in addition to or in lieu of any other sentence',¹² Mr Radan was also given a numbered sentence of 12 years' imprisonment.¹³ After 10 years of an entirely indeterminate sentence, Mr Pollentine requested judicial review of a refusal to release him. Reconsideration was ordered, due to violation of an implied right to procedural fairness,¹⁴ but the refusal was reaffirmed.¹⁵ Applications to overturn a later refusal to release also failed at first instance,¹⁶ and on appeal.¹⁷

⁶ The closest to a de facto endorsement was probably the refusal of special leave to appeal, on this and other grounds, in *Yarran v R* [2004] HCATrans 417 (27 October 2004). The frequently-cited obiter dicta in *Veen v R (No 2)* (1988) 164 CLR 465, 495 specifically recommended periodic court orders and safeguards of a type similar to *Fardon v A-G (Qld)* (2004) 223 CLR 575 ('*Fardon*'). There have also been two cases since *Kable* where it was unnecessary to decide the validity of Western Australian laws because sentences were overturned on other grounds: *Yates v R* (2013) 247 CLR 328; *McGarry v R* (2001) 207 CLR 121.

⁷ The principle regarding invalidity of state laws that violate the institutional integrity of state courts exercising Commonwealth jurisdiction, derived originally from *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable*').

⁸ *Criminal Law Amendment Act 1945* (Qld) s 18(1).

⁹ For details of each man's offences, see *Pollentine No 1* [1995] 2 Qd R 412, 53–4; *R v Radan* [1984] 2 Qd R 554, 554.

¹⁰ *Criminal Law Amendment Act 1945* (Qld) s 18(1)(a).

¹¹ *Ibid* s 18(3).

¹² *Ibid*.

¹³ Mr Radan's numbered sentence was reduced to three years' imprisonment, with the Queensland Court of Criminal Appeal unanimously agreeing that the 'reformatory' indefinite sentence should begin as soon as possible: *R v Radan* [1984] 2 Qd R 554, 557.

¹⁴ *Pollentine No 1* [1995] 2 Qd R 412.

¹⁵ *Pollentine v Bleijie* (2014) 253 CLR 629, 641 [14].

¹⁶ *Pollentine v A-G (Qld)* (1996) 88 A Crim R 146, 147.

¹⁷ *Pollentine v A-G (Qld)* [1998] 1 Qd R 82 ('*Pollentine No 2*').

III The Judgment

The question before the High Court was framed as whether s 18 of the *Criminal Law Amendment Act 1945* (Qld) violated ch III of the *Australian Constitution*, whether by virtue of the *Kable* principle, or otherwise.¹⁸ Two judgments were given: one joint judgment,¹⁹ and one by Gageler J.²⁰ Both focused on three specific possible violations of the *Kable* principle. Before dismissing each of these in turn, the Court explored the meaning of the statutory criteria.

A Step 1: The Interpretative Foundation

For the High Court, the key provision to construe was s 18(5)(b) of the *Criminal Law Amendment Act 1945* (Qld),²¹ which provides the only guidance regarding when to release an offender, namely when ‘the Governor in Council is satisfied on the report of 2 medical practitioners that it is expedient’. Despite the apparent range and flexibility of meanings for ‘expedient’,²² both judgments were adamant that the section did not confer ‘unfettered discretion’²³ on the executive, but, rather, imposed criteria closely related to those used by the sentencing judge. In fact, the joint reasons found ‘no relevant differences’ between the criteria for the executive and the judicial processes.²⁴ Their Honours stated that ‘[w]hat is “expedient” turns only on whether the detainee remains incapable of exercising proper control’.²⁵ This, in turn, was defined as a predictive question regarding what offences they might commit and the likelihood that they would do so.²⁶ This interpretation was said to be founded on the legislative purpose and context.²⁷

Justice Gageler’s judgment was markedly different. Citing *South Australia v O’Shea*²⁸ and *Pollentine No 2*,²⁹ he argued that since risk was a matter of degree, being judged by a political body, the executive should ask what degree of risk is ‘acceptable’, taking into account public opinion.³⁰ However, the other judges

¹⁸ *Pollentine v Bleijie* (2014) 253 CLR 629, 658–9.

¹⁹ *Ibid* 638–51.

²⁰ *Ibid* 652–9.

²¹ The plaintiffs raised numerous construction concerns regarding the criteria and standards used by courts in engaging the scheme. These are outlined clearly in Edward Pollentine and George Radan, ‘Plaintiffs’ Submissions’, Submission in *Pollentine v Bleijie*, No B39 of 2013, 17 April 2014, 9, 11–13 and discussed in the Transcript of Proceedings, *Pollentine v Bleijie* [2014] HCATrans 124 (17 June 2014) 465–620. However, these were all dismissed as matters for resolution in other cases and, in particular, as irrelevant to invalidity, or not in dispute. *Pollentine v Bleijie* (2014) (2014) 253 CLR 629, 645 [27], 646 [30], 651 [50].

²² Transcript of Proceedings, *Pollentine v Bleijie* [2014] HCATrans 124 (17 June 2014) 2655 (P J Dunning QC), 3440–48 (S P Donoghue QC).

²³ *Pollentine v Bleijie* (2014) 253 CLR 629, 646–7 [34]; Gageler J used the term ‘unconstrained power’ at 657–8 [74]–[75].

²⁴ *Ibid* 648 [39].

²⁵ *Ibid* 646–7 [34].

²⁶ *Ibid* 647 [36].

²⁷ *Ibid* 647–8 [37].

²⁸ (1987) 163 CLR 378.

²⁹ *Pollentine No 2* [1998] 1 Qd R 82 (“”).

³⁰ *Pollentine v Bleijie* (2014) 253 CLR 629, 657–8 [75]. His argument was nuanced, and he did dismiss any other type of political considerations.

strongly emphasised that the criteria for release were apolitical, and factoring in anything but the narrowest predictive considerations would be a ‘legal error’.³¹ Their Honours ~~felt-determined~~ that because the satisfaction was to be ‘on’ medical reports, considerations should focus exclusively on the question those reports answered, even possibly on the reports alone.³² ~~They did feel that~~ Their Honours ~~viewed~~ the words ‘unacceptable risk’ in the criteria for parole ~~were-as~~ relevant, because parole formed a complementary part of the scheme,³³ but they said precisely how was ‘not necessary to explore’, and returned to their main point about no relevant differences.³⁴ By contrast, the difference identified by Gageler J could hardly be considered irrelevant or insignificant, so for his Honour the executive and judicial decisions were complementary.³⁵

B Step 2: The Kable Arguments

Their Honours used their narrow construction of executive power to dismiss each of the proposed *Kable* violations with increasing brevity. They cited *Fardon v Attorney-General (Qld)*³⁶ in defining the principle as a lack of power to confer upon state courts functions that are repugnant to or incompatible with ‘the institutional integrity ... which bespeaks their constitutionally mandated position in the Australian legal system’.³⁷ It is necessary to refer to the plaintiffs’ submissions to understand their Honours’ reasoning here. Below, I consider each *Kable* argument in turn.

1 The Delegation Issue

The plaintiffs submitted that too much of what should be judicial functions were being delegated to the executive. Their counsel presented several cases from the United Kingdom in which it had been found that while life sentences are determined by the courts, indefinite sentences are set by the executive.³⁸ These included some Privy Council decisions overturning indefinite sentences in countries with a constitutional separation of powers.³⁹ The plaintiffs’ counsel then attempted to draw this together with Australian jurisprudence by arguing that this was preventative detention at the pleasure of the executive and so separated involuntary detention from the judicial function, determination of guilt, and sentencing.⁴⁰ They relied upon a line of cases beginning with *Lim*,⁴¹ which had established a rule that involuntary detention by the state should be a concomitant of

³¹ Ibid 647 [36].

³² Ibid 646–7 [34].

³³ Ibid 647–8 [37].

³⁴ Ibid 648 [38]–[39].

³⁵ Ibid 657–8 [75].

³⁶ (2004) 223 CLR 575.

³⁷ *Pollentine v Bleijie* (2014) 253 CLR 629, 648–9 [42], quoting *Fardon* (2004) 223 CLR 575, 617 [101].

³⁸ *R v Secretary of State for the Home Department; Ex parte Venables* [1998] AC 407.

³⁹ *Hinds v R* [1977] AC 195; *Browne v R* [2000] 1 AC 45; *DPP Jamaica v Mollison* [2003] 2 AC 411.

⁴⁰ Transcript of Proceedings, *Pollentine v Bleijie* [2014] HCATrans 124 (17 June 2014) 1755–64.

⁴¹ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (‘*Lim*’).

the ‘exclusively judicial function’ of ‘adjudgment and punishment of criminal guilt’, with only carefully limited and well justified exceptions.⁴² Participation in such a violation of the principles governing its own functions, it was argued, could not be compatible with a court’s institutional integrity.

Justice Gageler’s judgment is a much clearer response to these principles. His Honour distinguishes two types of indefinite detention: the type in the United Kingdom cases, he reasons, was punitive in character. However, the detention in *Pollentine v Bleijie* is of a different type, with the executive and judiciary playing ‘complementary’ roles in a ‘purely preventative and therapeutic’⁴³ exercise. His Honour claims that this has been a permissible type of detention, and it has been permissible to incorporate it into the judicial conviction and sentencing exercise since the *Criminal Lunatics Act* of 1800.⁴⁴ He therefore concludes that the Queensland scheme falls within one of the classic exceptions recognised in *Lim*.⁴⁵

The joint judgment does not mention *Lim* at all, probably because, for their Honours, the features that marked this off from ordinary judicial processes were minimal. They saw the orders as serving the normal range of sentencing purposes and as depending on the normal methods for judicial decision-making.⁴⁶ That the decision is discretionary, not mandatory, was sufficient to distinguish *Pollentine v Bleijie*, in their eyes, from all the United Kingdom jurisprudence,⁴⁷ freeing them to focus on the question of whether there was a ‘feature’ that points to ‘repugnancy’.⁴⁸ Their Honours found none in the judicial decision-making process, and in the executive process they found quite the opposite. Their interpretation of s 18(5)(b), they reasoned, meant that it is entirely free from any retributive considerations, and therefore the executive cannot be performing any of the functions associated with the determination and punishment of criminal guilt.⁴⁹ Their Honours then noted that this, combined with the reliance on ‘mental condition’ in s 18(5)(1), was reminiscent of court powers over the unfit to plead or criminally insane.⁵⁰ The degree and significance of the similarity is not, however, made explicit. It seems sufficient for their Honours to note that this division of power between the judiciary and the executive is not a ‘feature’ unknown to the Australian system.

⁴² *Lim* (1992) 176 CLR 1, 27. This case was used by four judges in the original case of *Kable* (1996) 189 CLR 51, 61–2, 87–8, 97–8, 131–2. It was also applied and developed in key challenges to court preventative and detention powers in *Fardon* (2004) 223 CLR 575, 611–12, 654–5 and *Thomas v Mowbray* (2007) 233 CLR 307. The best summary and discussion of the principle is found in Gummow J’s judgment in *Fardon* (2004) 223 CLR 575, 611–13.

⁴³ *Pollentine v Bleijie* (2014) 253 CLR 629, 656–7 [72] quoting *R v Secretary of State for Home Department; Ex parte Venables* [1998] AC 407, 514.

⁴⁴ 40 George 3, c 94; *Pollentine v Bleijie* (2014) 253 CLR 629, 656–7 [71]–[73].

⁴⁵ *Ibid* 656 [70].

⁴⁶ *Ibid* 649–50 [44].

⁴⁷ *Ibid* 649 [44] n 78.

⁴⁸ *Ibid* 649–70 [44].

⁴⁹ *Ibid* 650 [45].

⁵⁰ *Ibid*.

2 *The Cloaking Argument*

The second argument rejected by their Honours was that the executive had so much authority under s 18(5)(b), ostensibly on the basis of a court order, that the ‘neutral colors [sic] of judicial action’ became a ‘cloak’ for the executive’s political actions.⁵¹ Both judgments found that the executive’s power was sufficiently constrained to render its decision-making of a different type to that contemplated in that metaphor.⁵² Their Honours stated, ‘the decision to release a detainee is not properly described as a “political decision”’.⁵³ Further, they emphasised that the decision ‘is to be made according to a criterion which admits of judicial review’.⁵⁴ The joint judgment also reasoned that there was no cloaking, because the decisions that the executive makes are clearly seen to be made by non-judicial bodies.⁵⁵

3 *The Safeguards Argument*

The final possibility canvassed by the plaintiffs was that a court’s involvement in this kind of detention might be permissible, but only with sufficient safeguards, which are not present in s 18.⁵⁶ Both judgments focused on the plaintiffs’ complaints about the absence of the regular reviews by the courts. Such reviews were central to the indefinite detention regimes approved in *Fardon* and *R v Moffatt*.⁵⁷ However, the joint judgment simply pointed to their Honours’ reasoning, which established that authorising the executive to determine the end of an indefinite sentence is acceptable.⁵⁸ Justice Gageler cited the availability of judicial review as a sufficient answer to the problem.⁵⁹

IV Critical Analysis

A *Interpretation*

The joint judgment’s extremely narrow interpretation seems difficult to sustain on the expressly stated bases alone, especially given the failure to engage with the careful arguments that were accepted by Gageler J.⁶⁰ However, their Honours’

⁵¹ Ibid 650 [46], citing *Fardon* (2004) 223 CLR 575, 615 [91]. This metaphor originates in the case of *Mistretta v United States* 488 US 361, 407, but it was used by two other judges in *Fardon* (2004) 223 CLR 575, 602 [44] (McHugh J), 615 [91] (Gummow J). It also received a strong endorsement in *A-G (NT) v Emmerson* (2014) 253 CLR 393, 425 [41].

⁵² *Pollentine v Bleijie* (2014) 253 CLR 629, 650 [47], 657–8 [75].

⁵³ Ibid 650 [47].

⁵⁴ Ibid.

⁵⁵ Ibid 650–51 [48].

⁵⁶ Ibid 658 [76]; Transcript of Proceedings, *Pollentine v Bleijie* [2014] HCATrans 124 (17 June 2014) 2045–59.

⁵⁷ *Pollentine v Bleijie* (2014) 253 CLR 629, 805 [51], 809 [76]; *R v Moffatt* [1998] 2 VR 229 (*Moffatt*).

⁵⁸ Ibid 651 [51].

⁵⁹ Ibid 658 [76].

⁶⁰ Ibid 654–55 [67].

reasoning is immediately preceded by an acknowledgement of valid concerns about ‘administrative arbitrariness’ and a statement that the risk thereof depends ‘first and foremost upon [the Act’s] proper construction’.⁶¹ Liberty is considered ‘the most basic’ of common law rights.⁶² Avoiding arbitrariness in its removal is a key element of that right.⁶³ The European Court of Human Rights found that detention could become arbitrary if it was not assessed and limited according to specific objectives for which detention was acceptable, and if this was not the case at every point when decisions about it were made.⁶⁴ The United Nations has also expressed concerns about differences between the reasons and procedures for the initial deprivation of liberty and its continuation in Australian preventative detention regimes.⁶⁵ The deliberate implication of strictly limiting criteria paralleling the enabling judicial decisions is, therefore, a welcome and appropriate approach to construction of executive powers over indefinite detention.

Unfortunately, their Honours did not place this important human rights issue in any principled framework. Using the extremely strong legality presumption surrounding detention,⁶⁶ or the assumption that legislation is harmonious and coherent,⁶⁷ would have been more defensible and set up a practical basis for human rights protection in the future. The significance of arbitrariness for validity was also never clarified, because the chosen construction was never the sole reason for defeating any argument. Similar observations can be made about the protection offered by judicial review.⁶⁸ The joint judgment treats both things as one positive among other positives, a ‘feature’ that ‘points’ away from ‘repugnancy’, but not conclusively.

B *The High Court’s Approach to Kable*

This focus on ‘features’ appears to be the hallmark of the approach in the joint judgment. While Gageler J’s focus is on the ‘complementarity’ between the executive and legislative powers in performing an ultimate function,⁶⁹ the joint judgment deals with each exercise of power as a feature in isolation. It seems very strange, for example, that a court order, made following normal judicial processes and authorising detention for normal sentencing purposes,⁷⁰ can be transformed

⁶¹ Ibid 643–4 [22].

⁶² *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19].

⁶³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9(1); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), art 5(1), as interpreted in *James v United Kingdom* [2012] ECHR 1706.

⁶⁴ *James v United Kingdom* [2012] ECHR 1706, [194].

⁶⁵ Human Rights Committee, *Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (26 March 2007, adopted 18 March 2010) (*Fardon v Australia*) 7.4(3).

⁶⁶ See Chief Justice Spigelman, ‘The Principles of Legality and Clear Statement of Principle’ (Speech delivered at New South Wales Bar Association Conference, Sydney, 18 March 2005) 25–6.

⁶⁷ *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 312 ALR 537, 546 [42].

⁶⁸ *Pollentine v Bleijie* (2014) 253 CLR 629, 650–51 [46]–[49].

⁶⁹ Ibid 657–8 [75]–[76].

⁷⁰ Ibid 649–50 [43]–[44].

into a purely preventative matter when the executive continues it.⁷¹ However, this position can be maintained if specific, process-based, features of each stage are considered in isolation. Such an approach means there is no cloaking if there is no single event where the judicial process and executive decision-making unite.⁷² For the majority, judicial review is relevant to whether executive decisions are political, because everything is assessed as a feature of how one type of power is exercised. For Gageler J, it is relevant to comparisons of safeguards in different regimes, because those safeguards are interpreted as aspects of a functional relationship. In direct contrast, for the majority, they are seen as retentions of power by one branch.⁷³

There are numerous problems with the joint approach. International jurisprudence suggests that transforming a person's sentence from one type or basis to another can itself constitute the very arbitrariness that the joint judgment seeks to avoid,⁷⁴ or it can create it through a disconnect between the justification for detention and the decision-making surrounding it.⁷⁵ Moreover, the Privy Council cases were actually concerned about the practical results of the relationship between mandatoriness and indefiniteness — namely, that the 'severity of the punishment',⁷⁶ was 'effectively passed by the executive'.⁷⁷ Such a thing, they felt, violated basic common law principles, merely reinforced by the relevant constitutional provisions regarding separation of powers.⁷⁸ Australian constitutional law too, has long focused on a law's practical effects in the circumstances as a whole. Moreover, since *Wainohu v New South Wales*, it has been recognised that the principle in *Kable* is not a rule that stands apart, but one that forms part of the interlocking web of constitutional principles that protects the fundamental nature of the relationship between the arms of government.⁷⁹

There is, thus, no longer any room to view the judicial process in isolation, nor to work on the basis of features rather than principles. Justice Gageler's functional relational approach, incorporating the *Lim* principles, should be praised, but its ultimate conclusion is still open to criticism. Looking at the scheme as a whole, one sees that a person remains imprisoned because of a crime for which they are deemed responsible, not for any 'therapeutic' cause.⁸⁰ In fact, in *Moffatt*, this was considered important to the validity of the legislation.⁸¹ Moreover, no

⁷¹ Ibid 650 [45].

⁷² Cf, eg, *South Australia v Totani* (2010) 242 CLR 1, another important case applying *Kable*, where invalidity was founded partially on the basis of the scheme requiring a court to act to implement an executive decision.

⁷³ *Pollentine v Bleijie* (2014) 253 CLR 629, 653–4 [62]–[65].

⁷⁴ Human Rights Committee, *Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007, (26 March 2007, adopted 18 March 2010) (*Fardon v Australia*) 7.4(1).

⁷⁵ *James v United Kingdom* [2012] ECHR 1706, [194].

⁷⁶ *Hinds v DPP (Jamaica)* [1977] AC 195, 226 (emphasis added).

⁷⁷ *DPP (Jamaica) v Mollison* [2003] 2 AC 411, 422 (emphasis added).

⁷⁸ *Hinds v DPP (Jamaica)* [1977] AC 195, 212–13; cited in *DPP (Jamaica) v Mollison* [2003] 2 AC 411, 423–4.

⁷⁹ (2011) 243 CLR 181, 228 [105].

⁸⁰ *Pollentine v Bleijie* (2014) 253 CLR 629, 656–7 [71]–[73].

⁸¹ *Moffatt* [1998] 2 VR 229, 238–9, 260. This case was a direct challenge to the possibility of indefinite detention at the time of sentence based on *Kable*, which failed at intermediate court level.

legal or practical arrangements exist to ensure rehabilitation, which is a hallmark of preventative therapeutic detention.⁸²

V An Alternative

The High Court could have found this to be a classic case of judicial criminal sentencing, with legislative empowerment of prevention beyond proportionality.⁸³ This would have had the advantage of avoiding the uneasy middle ground between unfitness, insanity and punishment that is appealed to in this, and other, preventative detention schemes.⁸⁴ It would also open the window to the solution used by the Privy Council, namely, replacing the executive's pleasure with 'the court's pleasure'.⁸⁵ The latter description could probably apply to all but two of the current systems for indefinite sentencing in Australia, including the system considered in the main post-*Kable* case of *Moffatt*.⁸⁶ *Moffatt* and *Fardon* both noted the irony that a *Kable* challenge to indefinite detention needed to be rooted in the involvement of the courts, the branch of government most able to protect someone's rights.⁸⁷ However, whether this is truly the case depends upon one's approach. The effect of a court on its integrity occurs in its immediate institutional context when a features-based approach is taken. However, the principles traceable to *Lim* are fundamentally based in the ultimate effects of the separation of powers on common law rights. Evaluating the real effects of a court's actions in light of the relationship between those powers would engage with the principled roots of *Kable*, removing the need for obfuscatory fictions, and providing a more logical and humane system.

VI Conclusion

The decision in *Pollentine v Bleijie* represents a missed opportunity. An important human right and a complex constitutional principle were brought together by the circumstances of the case. By taking a more holistic and principled approach, the High Court could have given real power to its repeated warnings about the need for care in infringing that right.⁸⁸ Instead, a fragmented approach avoided engaging with the issues. This failure leaves it uncertain whether other indefinite detention statutes will be interpreted as providing for broad executive power, but probable that legislatures will be tempted to reduce reliance upon the courts.

The scheme in question is found in the *Sentencing Act 1991* (Vic) ss 18A–18P and includes mandatory regular court reviews.

⁸² *James v United Kingdom* [2012] ECHR 1706, [194].

⁸³ For a summary of the law on the relationship between proportionality, common law, legislation and sentencing in this context, see *Moffatt* [1998] 2 VR 229, 234–6, 251–2.

⁸⁴ *Pollentine v Bleijie* (2014) 253 CLR 629, 646 [30]; cf *Sentencing Act 1995* (WA) s 98(2)(c)(i).

⁸⁵ *DPP (Jamaica) v Mollison* [2003] 2 AC 411.

⁸⁶ *Moffatt* [1998] 2 VR 229.

⁸⁷ *Fardon* (2004) 223 CLR 575, 586; *Moffatt* [1998] 2 VR 229, 260.

⁸⁸ Cases in which such warnings have been given were listed in the joint judgment in *Pollentine v Bleijie* (2014) 253 CLR 629, 643–4 [22].