Special Laws for Murderers

Parole, *Kable* and Twitter

Mr Julian Knight
The Hoddle Street Massacre

- In November 1988 Mr Knight pleaded guilty in the Supreme Court of Victoria to 7 counts of murder and 46 counts of attempted murder
- Mr Knight was 19 years of age and a former army officer cadet when on 9 August 1987 he set himself up on a raised platform behind a billboard on the corner of Ramsden and Hoddle Streets in Clifton Hill and started shooting indiscriminately at passersby
- After a lengthy car chase during which he exhausted his ammunition, he was arrested by Police and has spent 32 years or so in custody

Sentence

- Mr Knight was sentenced by Hampel J to imprisonment for life in respect of each of the counts of murder, and imprisonment for 10 years in respect of each count of attempted murder
- A minimum term was fixed under the *Penalties and Sentences Act 1985* (Vic) which since the enactment of the *Sentencing Act 1991* (Vic) became known as a non-parole period
- Mr Knight became eligible to apply for parole under the Hampel J sentence on 8 May 2014

Legislative response

- On 2 April 2014 the *Corrections Amendment (Parole) Act 2014* (Vic) was enacted and introduced a new s 74AA into the *Corrections Act 1986* (Vic)
- Section 74AA:
  - (1) The Board must not make a parole order under section 74 in respect of the prisoner Julian Knight unless an application for the order is made to the Board by or on behalf of the prisoner.
  - (2) The application must be lodged with the secretary of the Board.
  - (3) After considering the application, the Board may make an order under section 74 in respect of the prisoner Julian Knight if, and only if, the Board –
    - (a) is satisfied (on the basis of a report prepared by the Secretary to the Department) that the prisoner –
      - (i) **is in imminent danger of dying, or is seriously incapacitated**, and as a result **no longer has the physical ability to do harm** to any person; and
      - (ii) has **demonstrated** that he **does not pose a risk to the community**; and
    - (b) is further satisfied that, because of those circumstances, the making of the **order is justified**.

Unapologetic intervention to prevent Mr Knight's release

- …
- (6) In this section a reference to the prisoner Julian Knight is a reference to the Julian Knight who was sentenced by the Supreme Court in November 1988 to life imprisonment for each of 7 counts of murder.
- Second Reading Speech: "Victorians can rightly expect that the government will do whatever we can to ensure Julian Knight is never released until he can do no harm, and with this bill, this government is delivering on that commitment."
- "Julian Knight will die in jail, or will be in such a condition on release that he will be a threat to no-one".
- Politics: mistrust by the legislature of the Parole Board

High Court Challenge

- Mr Knight represented by Kristen Walker QC (now the Vic S-G who argued against Minogue) argued that s74AA was inconsistent with Ch III of the *Constitution* on *Kable* grounds and invalid for two reasons
- First, the effect of s 74AA is to interfere with the sentence imposed by Hampel J. That sentence contained a minimum term. What s 74AA does is to render that minimum term illusory or meaningless. In substance or effect, if not in form, the provision makes the sentence more onerous and is akin to a Bill of Attainder* or a legislative usurpation of judicial power
- Secondly, s 74AA enlists Victorian judicial officers (current and former Magistrates and County Court Judges who comprise the Parole Board) in a decision-making process that undermines their judicial independence
- To understand how the Court dealt with those arguments we need to explore some earlier authorities…

*A Bill of Attainder or Bill of Pains and Penalties is an act of a legislature declaring a person or group guilty of a crime and punishing them without trial

Kable v DPP (NSW) (1996) 189 CLR 51

- Gregory Wayne Kable was convicted of the manslaughter (by reason of diminished responsibility)of his wife. He was sentenced to 5 yrs 4 mnths with a NPP of 4 yrs. While in prison he sent a number of threatening letters to those he felt responsible for denying him access to his children – relatives of his deceased wife. Real concerns about what he might do when released…
- In response, NSW enacted the *Community Protection Act 1994* which applied only to Mr Kable and authorised his detention where the Supreme Court was satisfied that he was more likely than not to commit a serious act of violence and that it was appropriate, for the protection of a particular person or the community generally that he be held in custody.
- As McHugh J noted, the evident purpose of the Act was to maintain Mr Kable's detention beyond the date of his sentence
- Mr Kable challenged the constitutional validity of the law under Ch III of the *Constitution*
- HCA decision (4:2) on 12 September 1996 found that law unconstitutional and invalid
- Majority comprised Toohey, Gaudron, McHugh and Gummow JJ (all separate judgments)
- Surprising decision for many, natural development of the law to some

Kable principle: SoP lite

- "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" *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [40]
- What was the vice in the *Community Protection Act 1994*? "extraordinary character of the legislation" Toohey J
  - It authorised preventative detention for its own sake (cf bail or immigration detention) in circumstances where Mr Kable had not been convicted of any offence.
    - Detention in prison like a sentenced prisoner (cf contagious diseases or mental illness)
    - Imposing criminal sanction but without any offence having to have been committed and on satisfaction to the civil standard as to its likelihood
  - Ad hominem nature – only about Mr Kable (decisive for Toohey J)
  - Interim detention order (McHugh J)

  …
  - Unusual evidentiary provision. Court could order production of certain records but if it did was required to receive them into evidence. Otherwise ordinary rules of evidence applied.
  - It raised a possibility of indefinite detention through rolling 6 month orders

Understanding *Kable*

- Best reading of the majority judgments (clearest, McHugh J) is that they regarded the combination of the above considerations as effectively to make the outcome inevitable. Thus, although the Supreme Court was involved and ostensibly applied a rational standard to determine the Q, the decision was already made by the legislature.
- Majority therefore concluded that the scheme provided for in the Act was incompatible with and compromised the impartiality and integrity of the Supreme Court before whom an application was to be brought
- *Kable* is sometimes misunderstood as standing in broad terms for the idea that a law may be so unjust that it becomes unconstitutional. In fact it is more accurately the idea that a law which is so unjust cannot be done with the assistance of the courts and must be carried out exclusively by the executive.
- Politics: We are the good guys. Don't make us complicit!

Kable as applied

- Since the principle was stated in *Kable* it has been argued a lot but applied very few times. Commonly said that the HCA has stepped away from and wound back the principle
- In *Fardon v A-G (QLD)* (2004) 223 CLR 575 the validity of a legislative scheme for the making of preventative detention orders (against sexual offenders) was upheld.
  - Like in *Kable* the scheme authorised the Supreme Court to detain a prisoner beyond the term of their sentence for community protection
  - Like in *Kable* the preventative detention could be indefinite
  - Unlike in *Kable* the scheme applied to any prisoner serving a sentence for a serious sexual offence – general law applicable to a class
  - Unlike in *Kable* the ordinary rules of evidence applied
- The main distinction is that the invalid law in *Kable* was *ad hominem* whereas the valid law in *Fardon* targeted a class
- Promising for the challenge in *Knight* which also involved *ad hominem* legislation

Parole for two NSW co-offenders

- On 20 June 1974 Allan Baker and Kevin Crump were convicted at trial of the murder of Ian Lamb and conspiracy to murder Virginia Morse. They were also convicted of some lesser offences. The conspiracy charge arose because the actual killing of Ms Morse occurred in QLD. The circumstances of both killings showed callous disregard for human life but those in which Ms Morse was killed were particularly horrific.
- Sentenced to life imprisonment
- At the time, Governor could release a prisoner on licence but otherwise life imprisonment was imprisonment for the rest of their life
- On sentencing the pair the sentencing judge remarked: "I believe that you should spend the rest of your lives in gaol and there you should die. If ever there was a case where life imprisonment should mean what it says – imprisonment for the whole of your lives – this is it". -- message for the Governor

Definite term sentencing

- In 1989 NSW introduced a prospective non-parole period scheme.
- From 1990, a person already sentenced to life imprisonment could apply to the Supreme Court for a minimum term or NPP, and an additional period (head sentence).
- Effect: Indefinite sentence became a definite sentence
- Section 13A of the *Sentencing Act 1989* (NSW)
- Various amendments over the years
- By 1997, s 13A provided that where a non-release recommendation was made at the time of sentence the court considering an application for a NPP had to be satisfied that special reasons existed
- There was only a small class of prisoners in this category (incl Mr Baker and Mr Crump)

Baker v NSW (2004) 223 CLR 513

- After 1997, Mr Baker applied for and was refused a NPP under s 13A
- Since he was subject to a non-release recommendation he had to overcome the additional obstacle of demonstrating special reasons
- He appealed from that refusal and also challenged the validity of s 13A on *Kable* grounds. By the time he got to the HCA, only the challenge to constitutional validity remained:
- Two main complaints:
  - (1) that the class of prisoners subject to a non-release recommendation was arbitrary;
  - (2) that the language of special reasons was code for never to be released
- Challenge failed. Established the permissibility of the legislature imposing more stringent requirements on some prisoners obtaining parole than others, and of incrementally making parole more or less difficult for a prisoner
- Politics: remains distrust of the Parole Board

Crump v NSW (2012) 247 CLR 1

- Mr Crump also applied under s 13A of the *Sentencing Act 1989* (NSW) for a non-parole period. His first application was refused. He was successful the second time. He was given a NPP of 30 years expiring on 12 November 2003
- The NSW Government at the time was highly critical of the decision of McInerney J
- Cynical response: special reasons was code for never to be released
- At this point all Mr Crump has achieved is getting a NPP. He has no expectation that parole will be granted. Decision has now moved from the Court to the Parole Board.
- In response the NSW government enacted s 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW)

s 154A of the *Crimes (Administration of Sentences) Act 1999*

- s 154A introduced a condition on the grant of parole for a serious offender the subject of a non-release recommendation that they could only be granted parole if dying or permanently incapacitated and that parole could be revoked if they recovered.
- Second reading speech: "These changes mean Baker, Crump and the other never-to-be released prisoners can only ever be released on their death beds or be so incapacitated that they would pose a threat to nobody. It means that the community is protected from these killers forever."
- Politics: mistrust of the Parole Board by the legislature
- Estimate is that 10 people were subject to s 154 – almost *ad hominem*
- Mr Crump challenged the constitutional validity of s 154 on *Kable* grounds

Argument failed

- Mr Crump's argument was that s 154A impermissibly interfered with or altered the sentence imposed on him by McInerney J when he successfully applied for the imposition of a NPP
- The Court rejected that argument and held that the imposition of a minimum term says nothing about the criteria which might be applied to the grant of parole. A change to criteria does not alter the sentence
- The legislature can permissibly impose more or less strict conditions on the grant of parole as it deems appropriate
- Reference made to the fact that Mr Crump at the time of his initial sentence had no expectation of parole. Received a windfall from legislative change and then that windfall was removed by a later legislative change. Unfairness?
- Different result without that legislative history?

Returning to *Knight*

- On the one hand, s 74AA like the legislation challenged in *Kable*, was an enactment having the sole purpose of keeping a named prisoner in prison after the date on which they might otherwise be released. The legislature was very open that is what they were doing. The test was calculated to make parole an impossibility.
- However, the two arguments put for constitutional validity were derivatives on arguments which had been rejected in *Crump* and *Baker*. And the HCA found that the reasons in those decisions were indistinguishable.
- The first argument that s 74AA interfered with the sentence granting parole was rejected on the authority established in the earlier cases. The criteria for the grant of parole is not part of the sentence.
- The second argument that judges on the Parole Board applying such a strict almost impossible test for parole were thereby compromised was similarly rejected on the authority established that the imposition of requirements on the grant of parole were properly matters for the legislature who can do what they like in that domain.
- Section 74AA is valid and Mr Knight will never get parole save perhaps on his deathbed
- *Knight* demonstrates the limits of the *Kable* principle. Provided the courts are not made complicit, the legislature can do what it likes to prevent a prisoner's release.

Minogue v Victoria (2018) 356 ALR 363

- In March 1986 Craig Minogue was responsible for a car bomb which exploded in Russell Street Melbourne killing a police officer and injuring 22 other people. He was convicted by a jury of murder and sentenced to life imprisonment with a NPP of 28 years expiring late September 2016.
- In October 2016 Mr Minogue applied for parole.
- In December 2016 the *Corrections Act 1986* (Vic) was amended twice. First, to insert s 74AAA. Secondly, to clarify that it applied to pending applications for parole.
- During the period of legislative amendments, Mr Minogue's application for parole was pending.

Section 74AAA: no parole for cop killers

- Applies to a parole application by a prisoner convicted and sentenced for murder of a person who the prisoner knew or was reckless as to whether or they were a police officer
- Where it applies it operates in the same manner as s 74AA:
  - imminent danger of dying or seriously incapacitates and so no longer has the physical ability to do harm; and
  - demonstrated they do not pose a risk to the community; and
  - order is justified
- Given the decision in *Knight*, a direct *Kable* challenge to s 74AAA was hopeless
- Instead the argument was that the application of s 74AAA to a parole application already made before its enactment was the problem
- Argument was unsuccessful

Arbitrariness working in favour of the prisoner this time

- The only right or entitlement held by Mr Minogue was to the determination of his application for parole in accordance with the law then in force at the time of its determination
- However, the Court found that s 74AAA did not apply to Mr Minogue.
- The plurality held that s 74AAA operated on the basis on which the offender was sentenced – Q whether they were sentenced for knowingly or recklessly killing a police officer. Not necessary that the state of mind is an element of the offence but is necessary that the sentencing remarks show that circumstance as the basis of the sentence.
- Here the sentencing judge found that the bomb was placed outside of the police headquarters and Magistrates Court for maximum effect and that there was evidence of Mr Minogue's animosity towards Police, however there was no specific finding made that he knew or was reckless that the person killed was a police officer
- Arbitrary in the same way as the former s 13A of the *Sentencing Act 1989* since it turned on whether a remark or finding could be found in the sentencing remarks where that remark or finding wasn't necessarily of any particular force or effect at the time

Postscript: pyrrhic victory all the same

- Mr Minogue was not granted parole and remains in prison where he is likely to stay for a long time. Earlier this year he was charged with sexual and abduction offences alleged to have been committed the day before the Russell Street bombing
- Politics of mistrust of the Parole Board justified?
- Much like David Eastman in the ACT, Mr Minogue is a prolific litigant. He has nothing but time. If Wikipedia is to be believed, he was illiterate in 1986 when he went to prison. He now has a PhD in applied ethics.
- While in prison he maintains a Twitter account which is updated through an external intermediatory Mr Minogue contacts on the prisoner telephone system
- He publishes podcasts on his Twitter account
- Around 900 followers
- His profile has come to the attention of corrections who have taken steps to prohibit use of the prisoner telephone system in this way
- Mr Minogue challenges that action on constitutional grounds on the basis that it contravenes the implied constitutional freedom of political communication and the freedom of interstate trade, commerce and intercourse under s 92… [TO BE CONTINUED]