

1-1-1995

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Neil Rees

Paul Fairall

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Recommended Citation

Neil Rees and Paul Fairall. (1995) "Gregory Wayne Kable v The Director of Public Prosecutions for New South Wales: The power to legislate for one" , , .

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Gregory Wayne Kable v The Director of Public Prosecutions for New South Wales **The Power to Legislate for One**

by

Professor Neil Rees, Dean, Law School, University of Newcastle

**Professor Paul Fairall, Dean, Law School, James Cook University of North
Queensland**

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1. Introduction

{1} On 5 May 1990 Kable stabbed his wife to death following a bitter custody dispute. He was charged with murder. A plea of manslaughter by diminished responsibility (based on acute depression) was accepted by the Crown. Kable was sentenced to penal servitude for 5 years and four months, made up of a minimum sentence of four years and an additional sentence of one year and four months in relation to two counts of threatening murder.[1] He wrote a number of threatening letters during 4 years in prison. The letters were directed to the carers of his two young children. A failure by the carers to comply with a Family Court order for access fuelled his anger. Kable was not physically violent in prison but his letters alarmed various medical officers.[2] One psychiatrist saw the letter-writing as a form of psychological violence only slightly removed from extreme physical violence.[3] Kable's pending release from prison became a political issue. The government responded with the *Community Protection Act 1994* (NSW) ("The Act") which came into force on 6 December 1994.

{2} The Act permits the Supreme Court of New South Wales to order the preventive detention of Mr Gregory Wayne Kable, and only Mr Kable. The Act has been strongly criticised by most judges who have been called upon to exercise jurisdiction under this unusual legislation.[4] Whilst various judges have supported the statement that the Act "infringes a fundamental safeguard of the democratic rights of individuals in our community"[5] not one judge has declared it to be an invalid exercise of the power of the New South Wales parliament.

{3} The purpose of this article is to describe the terms of the Act, to briefly contrast it with the only known Australian precedent for one man preventive detention legislation - the *Victorian Community Protection Act 1990* ("the Victorian Act") - and to present and evaluate those arguments which may be advanced in support of the argument that the Act is not valid.

2. A Description of the *Community Protection Act 1994* (NSW)

{4} The Act could not be presented to our students as a shining example of good legislative drafting. To be fair to parliamentary counsel the Bill introduced into the New South Wales Parliament was amended during passage^[6] and the Act which resulted contains many sections, which whilst appearing to be of general application, apply only to Mr Kable as a result of the operation of section 3(3) which reads:

"This Act authorises the making of a detention order against Gregory Wayne Kable and does not authorise the making of a detention order against any other person."

{5} The key provision in the Act is section 5(1) which authorises the New South Wales Supreme Court to order that "a specified person" be detained in prison for a "specified period" (up to six months) if satisfied, on reasonable grounds, first, that the person is more likely than not to commit a serious act of violence and, secondly, that it is appropriate for the protection of a particular person or persons or the community generally that the person be held in custody. The usual drafting convention would have been to define the term "specified person". Surprisingly that term is not defined but, arguably, section 3 of the Act makes it clear enough that Mr Kable is the one and only "specified person" to whom section 5 applies. All powers to detain and deal with Mr Kable under the legislation are vested in the Supreme Court alone.^[7]

{6} The sole initiating party under the legislation is the Director of Public Prosecutions.^[8] In order to commence the process of preventive detention the DPP may apply to the Supreme Court for an arrest warrant.^[9] A judge of the Supreme Court is empowered to issue a warrant for Mr Kable's arrest if satisfied that there are reasonable grounds upon which a preventive detention order may be made.^[10] Any warrant is valid for 72 hours only after arrest, during which time Mr Kable must be brought before the Court.^[11] On the return of the warrant the Court may make an interim detention order for a period not exceeding three months.^[12]

{7} Interestingly, the power to make an interim detention order is not accompanied by any criteria which must be satisfied, or taken into account, before making an order. As proceedings for an interim detention order would necessarily be *inter partes* it is strange that there are no statutory criteria to be considered, particularly when in the *ex parte* proceedings for a warrant no warrant can issue unless the Court is satisfied that there are reasonable grounds upon which a preventive detention order may be made. Does the absence of criteria mean that an interim detention order could be made even though the Court had not satisfied itself, in contested proceedings, that there were reasonable grounds upon which a preventive detention order could be made?

{8} When making either a final preventive detention order under section 5, or an interim detention order under section 7, the Court is empowered, by section 9, to make the order "subject to such conditions (including a condition specifying the particular prison in which the detainee is to be detained) as the Court may determine". This section, especially when read with section 12, poses the question whether the Court could order Mr Kable to accept medical treatment as a condition of any detention? The answer to this question may be important when an attempt is made to characterize the Act for it may be a beneficent piece of legislation, like a mental health act, or it may be a modern day variation of the old bills of attainder. Under section 12, when making a detention order, or at any time within the duration of such an order, the Court may order the Commissioner of Corrective Services to make specified medical, psychiatric or psychological treatment available to Mr Kable. This section is clearly directed to the Commissioner of Community Services and not to Mr Kable. Whilst it empowers the Court to order that medical treatment be made available to Mr Kable, it does not oblige him to accept that treatment and, in contrast to section 31(2) of the *Mental Health Act 1990* (NSW), it does not authorise any person to carry out treatment without his consent and thereby legally perform what would otherwise constitute an assault.

{9} Despite the limited operation of section 12, does the general power given by section 9 permit the Court to both direct that Mr Kable accept treatment and authorise a nominated person to administer that treatment? The usual rules of statutory construction suggest a negative answer.[13] First, as medical treatment is dealt with in the limited way set out in section 12, it would be a strange construction of the provision of general application, section 9, to find that it permits medical intervention which is not provided for in the section which specifically deals with the provision of medical services to Mr Kable. Secondly, as the right to elect whether to accept medical treatment is so deeply rooted in the common law, it would be proper to expect that the legislature would expressly remove this right, as it has in the *Mental Health Act*. Thus, it is strongly arguable that while the Act clearly permits an order to be made that the Commissioner of Corrective Services must provide Mr Kable with certain medical services whilst he is detained in custody pursuant to a detention order, Mr Kable is not obliged to accept that treatment and no one can be authorised to force it upon him.

{10} Other provisions which deal with medical assessments of Mr Kable are worthy for comment. During any proceedings the Court may order that Mr Kable be medically examined and that reports be prepared.[14] There is nothing in the Act which obliges Mr Kable to submit to any examination. It appears, however, that Mr Kable has a somewhat illusory "right to silence". This "right" is illusory because it appears that Mr Kable's refusal to participate in any medical examination could be admitted into evidence and used to draw inferences which are adverse to him. Similar comments may be made about evidence from the assessors who must be appointed to observe and report on Mr Kable when, or soon after, a preventive detention order is made pursuant to section 5.[15] Mr Kable need not cooperate in any way with his Court appointed assessors but, presumably, he does so at his own risk.

{11} The Act contains a number of procedural and administrative provisions which should be briefly noted in order to complete the picture. Both Mr Kable and the Director of Public Prosecutions may apply to the Court to amend a preventive detention order or to revoke such an order.[16] Proceedings under the Act are declared to be civil proceedings which are to be conducted in accordance with the law relating to civil proceedings unless the Act provides otherwise.[17] The *Bail Act* is deemed not to apply to Mr Kable in respect of proceedings under the Act[18] and the Court is directed to apply the civil standard - proof on the balance of probabilities - when determining whether to make a detention order.[19] Further, the

Court may proceed in the absence of Mr Kable even if he has not been served with a copy of a summons but if the Court is satisfied that all reasonable steps have been taken to serve him.[20]

{12} Thus what may appear in manner and form to be criminal proceedings are legislatively deemed to be civil proceedings and many of the procedural rules and safeguards usually associated with criminal proceedings, such as proof beyond reasonable doubt, access to bail and the compulsory presence of the accused at trial have been abandoned. Despite the legislative declaration about the nature of the proceedings it would seem open to the Court to declare that proceedings under this Act are truly criminal in nature because of the facts that there must be some adjudication of Mr Kable's prior behaviour in order to determine whether he satisfies the criteria set out in section 5(1) of the Act and because the ultimate order available under the Act, a preventive detention order, results in Mr Kable being detained in prison and treated as a prisoner for the purposes of the application of other laws.[21] Any characterisation that proceedings under this Act are truly criminal in nature may have important consequences when considering the constitutional validity of the legislation.

3. An Outline of the *Community Protection Act 1990 (Vic)*

{13} Like the Act, the Victorian Act has one purpose - to empower the Supreme Court to make an order for the preventive detention of Garry David.[22] The Victorian Act, which commenced operation on 24 April 1990, originally contained a one year sunset clause.[23] It was amended by the *Community Protection (Amendment) Act 1991* which, amongst other things, extended the sunset clause to a period of four years.[24] As Mr David died on 11 June 1993,[25] whilst in custody pursuant to a preventive detention order made under the Victorian Act, that Act has ceased to be of any practical effect.

{14} The Victorian Act differs in a number of important respects from the Act presently under consideration. First, the Victorian Act permits the relevant Minister to apply to the Supreme Court for an *ex parte* order that Mr David be placed in preventive detention.[26] If at the time the Minister applies to the Supreme Court Mr David is not in custody he is deemed to be a prisoner by reason of the making of the application.[27] Thus, an act by a member of the executive government in applying to the Supreme Court for an order under the Victorian Act has the effect of automatically causing Mr David to be detained in custody until the application is determined. (The Victorian Act was amended in 1991 to provide that proceedings under that Act must be commenced by way of originating motion served on Mr David, but the Court is permitted to proceed in his absence).[28] Secondly, in the original Victorian Act the ultimate order which the Supreme Court could make was a preventive detention order for a period of six months.[29] The 1991 amending Act increased the maximum duration of a preventive detention to twelve months.[30] Thirdly, the criteria in the Victorian Act are broader than those in section 5(1) of the Act. In order to make an order detaining Mr David the Victorian Supreme Court is required to be satisfied, on the balance of probabilities, that Mr David -

" (a) is a serious risk to the safety of any member of the public; and
(b) is likely to commit any act of personal violence to another person." [31]

{15} Fourthly, the Victorian Supreme Court is not limited to ordering preventive detention in a prison. It is also empowered to order detention in a psychiatric hospital or "another institution of detention".[32]

4. Equal Protection of the Law

{16} It may be argued that the Act is invalid because it violates an equal protection limitation upon the powers of the New South Wales legislature. This argument may proceed as follows. Section 5 of the *Constitution Act 1902* (NSW) gives the legislature power to make laws for the peace, welfare, and good government of New South Wales "subject to the provisions of the *Commonwealth of Australia Constitution Act*".

{17} According to the judgement of Deane and Toohey JJ in *Leeth v Commonwealth*[33] the legislative powers of the Commonwealth are limited by "the fundamental common law doctrine of legal equality".[34] Their Honours found that this doctrine of legal equality comprises two separate notions. The first element of the doctrine is "the subjection of all persons to the law" and the second is "the underlying or inherent theoretical equality of all persons under the law and before the Courts".[35] It is this second aspect which is relevant in this case.

{18} It would appear that the Act offends the notion of equality of all persons under the law because it applies to only one person.[36] The Act nominates Mr Kable as the only person who is susceptible to a preventive detention order. Thus, there is no formal equality because no other person who may satisfy the criteria set out in section 5(1) of the Act may be dealt with under the Act and suffer a period of preventive detention.

{19} According to Deane and Toohey JJ it is quite proper to regard the powers of the Commonwealth legislature as being confined by the doctrine of legal equality because the Court is required to take judicial notice, when interpreting the *Constitution*, of fundamental constitutional doctrines which existed and were recognised at the time the *Constitution* was enacted. They advanced three reasons for concluding that the doctrine of legal equality is one of the fundamental constitutional doctrines which should govern the interpretation of the *Constitution*. Of most importance, for present purposes, is the first reason which is that the conceptual basis of the *Constitution* was the free agreement of all of the people in the federating colonies to unite under the *Constitution*. The second and third reasons advanced by Deane and Toohey JJ are not relevant for present purposes as they relate to matters specific to the Commonwealth *Constitution*.

{20} Whilst Deane and Toohey JJ were in dissent in *Leeth*, a majority of the Court did not consider and reject their argument that the Commonwealth legislative power is limited by the doctrine of legal equality. Therefore, it is possible, in theory, that a majority of the Court may choose to adopt the findings of Deane and Toohey JJ in a later case. However, even if that theoretical possibility is realised it is necessary, for present purposes, to explain why the doctrine of legal equality similarly limits the powers of the New South Wales legislature.

{21} The reasoning employed in recent cases to extend the implied freedom of political discussion beyond the Commonwealth may be applicable in the present case. In *Theophanous v Herald & Weekly Times Limited*[37] Mason CJ, Toohey and Gaudron JJ concluded that the

implied freedom of political communication "shapes and controls the common law".[38] In *Stephens v West Australian Newspapers Limited*[39] the same three judges found in the West Australian *Constitution Act* an implied freedom of political communication similar to that which is found in the Commonwealth *Constitution*. The source of the limitation upon the legislative powers of the state parliament is those provisions in the *Constitution Act 1889* (WA) which established and support a system of representative democracy.[40]

{22} By shifting these arguments to the present case it could be argued that there are two reasons why the doctrine of legal equality limits the powers of the New South Wales legislature. First, in keeping with the reasoning of Mason CJ, Toohey and Gaudron JJ in *Theophanous*, the doctrine of equality shapes and controls the common law and the legislative powers of states. If, in keeping with the reasoning of Deane and Toohey JJ in *Leeth*, the principle of legal equality was a fundamental constitutional doctrine which existed and was recognised at the time of the making of the Commonwealth *Constitution*, it was a doctrine which also existed at the time the state constitutions were enacted. Section 106 of the Commonwealth *Constitution* and section 5 of the *Constitution Act 1902* (NSW) may be enlisted in aid of this argument. Section 106 of the Commonwealth *Constitution* provides that the constitution of each state shall continue "subject to this constitution"; similarly, the powers of the New South Wales legislature are expressed to be "subject to the provisions of the *Commonwealth of Australia Constitution Act*." Thus, it may be argued, the legislative powers of the federating states must be construed as being subject to the same fundamental constitutional doctrines which provide the backdrop against which Commonwealth legislative power may be exercised.

{23} Secondly, in *Leeth*, Deane and Toohey JJ made the point that the states are artificial entities and that "it is the people who, in a basic sense, now constitute the individual states just as, in the aggregate and with the people of the territories, they constitute the Commonwealth".[41] If it is the people who constitute the states the first argument advanced by Deane and Toohey JJ to support the existence, at the Commonwealth level, of the doctrine of legal equality must also apply at the state level. Their Honours argued that implicit in the free agreement of the people to unite at a Commonwealth level was "the notion of the inherent equality of the people as the parties to the compact".[42] The same implication must apply at a state level if it is accepted that the conceptual basis of the states, as part of the federal compact, was the free agreement of the people who comprise each state.

{24} If the Court accepts this reasoning, or by some other approach finds that the doctrine of legal equality constitutes an implied limitation upon the power of the New South Wales legislature, the final issue to be determined is whether the Act infringes the notion of legal equality. It is strongly arguable that the Act is not consistent with the notion of equality under the law. Inevitably some laws are directed to only certain sectors of the community. For example, road traffic laws govern only the conduct of those people who drive motor vehicles and mental health laws govern only those people who have a mental illness. However, in these instances, the same law applies to every person within a given category. In the present case the Act does not apply to every person who is "more likely than not to commit a serious act of violence". The Act is clearly under-inclusive. The Court could quite properly take judicial notice of the fact that there is in New South Wales, at the present time, more than one person who is "more likely than not to commit a serious act of violence".

{25} It is submitted that the Act infringes the principle of equality. Specifically, it violates the principle that like cases be treated alike. No other prisoner in Australia is tested for future violence before being released after the expiration of the head sentence. Kable is treated differently from all other prisoners, even those with relevantly similar characteristics: that is, those who have killed and are likely to kill again. The effect of the Act is to incarcerate Kable for conduct which in others would not be a ground for incarceration except pursuant to a criminal trial.

{26} Whilst this reasoning concerning the application of the doctrine of legal equality is rather crude it does appear that the Act would also offend the more complex notions of 'equal protection of the laws' which have been developed in the United States and the detailed 'equality rights' found in the *Canadian Charter of Rights and Freedoms*.

{27} In the United States both levels of government are bound to provide 'equal protection of the laws'; the states as a result of the fourteenth amendment and the federal government by virtue of the 'due process' clause in the fifth amendment. The voluminous literature on the topic is a testament to the complexities of equal protection jurisprudence.[43] The United States Supreme Court has recognised that formal equality is impossible for numerous laws distinguish between groups in the community. That court has determined that decisions concerning constitutional validity should turn upon the reasonableness of classifications made by the legislature. A two-tier standard of review has been devised. The first tier comprises suspect classifications, such as race, and fundamental rights, such as the right to vote. The second tier comprises all other legislature classifications.

{28} The Supreme Court applies a 'strict scrutiny' review to laws in the first tier. There is a presumption that such laws do not involve reasonable classifications and the government must prove that its classification is justified by a 'compelling state interest'. Laws in the second tier are subject to 'minimal scrutiny'; they will be held to be constitutionally valid if there is some rational basis for the legislative classification.[44]

{29} A law which interferes with liberty in an unequal way, such as the Act under consideration in this case, would appear to fall within the first tier as liberty would be considered a fundamental right.[45] Thus the law would be subject to 'strict scrutiny analysis and the government would be required to demonstrate a 'compelling state interest' to justify its classification. It is likely that this legislative classification would be declared unconstitutional for it would seem impossible to argue that there is any compelling state interest in making a preventive detention law applicable to one person only.

{30} The Canadian 'equality rights' jurisprudence is somewhat different.[46] A law will offend section 15 of the *Charter*, which declares that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law . . .", if it discriminates against people on one of the grounds listed in that section which are race, national or ethnic origin, colour, religion, sex, age and mental and physical disability or upon 'analogous grounds'. Whether a law which does so discriminate is found to be unconstitutional depends upon an application of section 1 of the *Charter*, which is a balancing provision. None of the rights in the *Charter* are absolute, but they are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

{31} In order to find that the Act in question would offend section 15 of the *Charter* it would be necessary to conclude that it discriminated against Mr Kable on what has been styled 'analogous grounds', for the basis of the discrimination is not one of the grounds enumerated in section 15. It would appear that a law which discriminates on the basis of personal characteristics is one which falls within the 'analogous grounds' category. The Act in this case clearly singles out Mr Kable because of his personal characteristics.

{32} Professor Hogg, in his analysis of the relevant case law,[47] has identified four criteria which must be met if a law which offends one of the rights set out in the *Charter* is to qualify as a 'reasonable limit' under section 1 and thereby be declared constitutionally valid. Those criteria are described as sufficiently important objective, rational connection, less drastic means and proportionate effect. In this case the Act may satisfy the first two criteria, but it would not appear to meet the third. There are clearly less drastic means for protecting the community from violence than legislating to imprison one man because of what he may do in the future. For instance, if his threats are of concern it is obviously less drastic to strengthen the criminal law in that area and to increase the penalties. Consequently, it is strongly arguable that the Act would be declared unconstitutional under the Canadian *Charter* for it appears to violate section 15 and it is unlikely to be saved by the general limitation clause, section 1.

5. Arguments from the body politic

{33} The thrust of some recent decisions of the High Court is that the federal system that came into being with federation has a particular political character that governs relations between individuals and the State. The effect is that certain discrete rights, such as freedom of communication in relation to political matters, are implied into the Constitution.[48] In *Australian Capital Television Pty Ltd v Commonwealth of Australia*[49] the High Court held that an attempt to restrict political advertising on television for a specified period prior to an election constituted an unwarranted interference with the implied freedom of political expression contained within the Australian Constitution. In *Theophanous v Herald & Weekly Times*[50] the Court extended the reasoning to extract from the Constitution a freedom of communication in political matters, and a constitutional defence to an action in defamation. In *Stephens v West Australian Newspapers Ltd*[51] the freedom of communication implied by the Commonwealth Constitution was extended to communications about certain political matters appertaining to a State legislature.

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

6. Bill of Attainder

{35} The Commonwealth Parliament is constitutionally prohibited from passing a bill of attainder. This constitutional limitation derives from the exclusive vesting of judicial power under the Constitution in Chapter III Courts. A bill of attainder constitutes a "legislative judgment" by declaring a specified individual to be subject to forfeiture. In the War Crimes Case[52] Mason CJ (as he then was) clearly related the constitutional limitation in relation to such legislation to the separation of powers. His Honour noted that the distinctive characteristic of such legislation is that:

"it is a legislative enactment adjudging a specific person or specific persons guilty of an offence constituted by past conduct and imposing punishment in respect of that offence." [53]

{36} It is arguable that the *Community Protection Act* is a bill of attainder for under its terms Kable (and only Kable) is liable to detention as a *prisoner* by reason of past conduct from which inferences might be drawn as to future behaviour. Moreover, there is, under the legislation, no limitations period after which no such inference can be drawn. However, in the face of authority (the BLF case) that the New South Wales Constitution does not enshrine a separation of powers, this basis for challenge is a constitutional *cul de sac*. In short, the separation of powers effected by the federal Constitution would invalidate a bill of attainder, of which, arguably, the *Community Protection Act* is an example. However, the doctrine of separation of powers does not flow in New South Wales under the State Constitution.[54]

{37} It should be said that the argument for categorising the *Community Protection Act* as a bill of attainder is not irresistible. The Act does not exclude a trial of the issue of future dangerousness, indeed, the Supreme Court is obliged to make a judgement on that matter. The fact that Kable was released pursuant to an order of the Supreme Court is proof positive that the Act is not a bill of attainder in the traditional sense.[55]

7. Implied rights

{38} It has been said that some common law rights lie so deep that even Parliament cannot override them.[56] In the BLF case[57] Street CJ rejected this notion, preferring the theory that State legislation might be invalidated on the ground that it was not for "peace, welfare and good government".[58] His Honour considered that laws which do not serve the peace welfare and good government of New South Wales should be struck down as unconstitutional. Judicial supervision of the legislative process was not limited to matters of form.[59] This view was apparently repudiated by the High Court,[60] where the "deep rights" issue was noticed but not decided. The present appeal provides an opportunity to re-examine both theories of judicial review.

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

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

{41} The Act is extraordinary not only in its particularity but because the Act may be invoked at any time, whether or not Kable has been charged with or is even suspected of a crime. In other words, the factual basis for a preventive detention order does not include commission of any particular offence.

{42} Parliament has a long standing power to pass so-called private Acts, dealing with one named individual.[61] Moreover, by and large, private Acts serve beneficent purposes: in the past private Acts have been used to facilitate divorce, and remove anomalies or stigmata which might otherwise be personally crippling. However, it does not follow that a preventive detention measure that applies to one individual only is beyond legal challenge. If a flaw is to be found in the Act, it may well lie in the combination of two elements: preventive detention and its *ad hominem* nature.

8. Conclusion

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

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

{44} How one should take exquisite care against such false allegations is not clear. Moreover, there is no "innocence" under this legislation, just as there is no "guilt". We have stepped through the looking glass into the world of probability statements, actuarial tables, predictions of future dangerousness, and so on. We have left the world of criminal law behind and entered a world of pseudo science, where evidence is heard from psychiatrists, psychologists and social workers, some with little first knowledge.[62] In this brave new world the rule of law gives way to a rule of speculation, generalisation and fear.

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

"The greater the hostility directed against a person ... the greater the temptation to distort the fundamental precepts of our democracy by setting at naught the great principles of British justice".[63]

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

Endnotes:

1. *Crimes Act 1900* (NSW), s 31(1).
2. For example, Dr Baguley, a general practitioner, and Dr Thompson, a psychiatrist; Appeal Book, 182.
3. Dr Westmore; Appeal Book 53.
4. See the judgments of Levine J at 187 (unreported 23 February 1995), Sully J at 26-27 (unreported, 19 July 1995) and Grove J at 4-5 (unreported, 21 August 1995) all sitting at first instance and the judgments of Mahoney JA, (at 8), Clarke JA (at 1) sitting as members of the NSW Court of Appeal (unreported, 9 May 1995)
5. per Sheller JA in *Kable v Director of Public Prosecutions* (unreported, 9 May 1995) at 1.
6. See *Hansard* (Legislative Council) 15 November 1994 at pp.4951-2.
7. *Community Protection Act 1994* (NSW), ss 3(1) and 24.
8. s 8.
9. s 6(1).
10. *Ibid.*
11. s 6(3).
12. s 7(1).
13. Grove J in *DPP v Kable* (unreported, 21 August 1995) at p.15 reaches the opposite conclusion.
14. *Community Protection Act 1994* (NSW), s 17(1)(c) and (d).
15. s 11.
16. s 13.
17. s 14.
18. s 29.
19. s 15.

20. s 16(2).
21. s 22.
22. *Community Protection Act 1990* (Vic) s 1.
23. s 16.
24. *Community Protection (Amendment) Act 1991* (Vic) s 12.
25. *The Age* 12 June 1993.
26. *Community Protection Act 1990* (Vic) s 4.
27. s 5(1)(c).
28. *Community Protection (Amendment) Act 1991* (Vic) s 4.
29. *Community Protection Act 1990* (Vic) s 8(2)(b).
30. *Community Protection (Amendment) Act 1991* (Vic) s 8.
31. *Community Protection Act 1990* (Vic) s 8(1).
32. s 8(2).
33. (1992) 174 CLR 455.
34. *Ibid* at 488.
35. *Ibid* at 485.
36. This point is discussed in more detail below.
37. (1994) 124 ALR 1.
38. *Ibid* at 15.
39. (1994) 124 ALR 80.
40. *Ibid* at 89 (per Mason CJ, Toohey and Gaudron JJ).
41. (1992) 174 CLR 455 at 484.
42. *Ibid* at 486.
43. Leading texts are G Gunther, *Constitutional Law* (12th ed, The Foundation Press, New York, 1991) and L Tribe, *American Constitutional Law* (2nd ed, The Foundation Press, New York, 1988). In preparing this brief description of the equal protection clause we have drawn

heavily upon the useful summary in P Hogg, *Constitutional Law of Canada* (3rd ed, Carswell, Toronto, 1992) at 1152-54.

44. See Gunther, op cit n 40, at 601-608 and Tribe, op cit n 40, at 1436-1457.

45. Tribe, op cit n 40, 1454.

46. The following summary of the Canadian law is drawn from Hogg, op cit n 40, at 1154-1179.

47. Ibid at 852-885.

48. Clearly such implied rights cannot stand in the face of incompatible provisions of the Constitution. For examples, legislation providing for the disenfranchisement of all persons of a particular ethnic group would no doubt violate the Racial Discrimination Act 1975 (Cth). But it would not violate the Constitution, which permits discriminatory voting rules: Constitution, s 25.

49. (1992) 177 CLR 106.

50. (1994) 182 CLR 104.

51. (1994) 182 CLR 211.

52. *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.

53. Ibid, at 535.

54. See also comments by Deane J, at 611.

55. See comments by Toohey J, op cit, at 721.

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

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

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

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

60. *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10; (1988) 82 ALR 43 at 48. *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, (per Deane J) at 605, (Dawson J) at 636.

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

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

63. *Building Construction Employees and Builders' Labourers' Federation of New South Wales v Minister for Industrial Relations & Anor* (1986) 7 NSWLR 372 at 379.