HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN: **PETER ROBERT GARLETT**
Appellant
and
THE STATE OF WESTERN AUSTRALIA
First Respondent
THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA
10 Second Respondent

SECOND RESPONDENT'S SUBMISSIONS

PART I: SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the Internet.

PART II: ISSUES

2. The second respondent ("**AGWA**") accepts that the relevant issue is: do the provisions of the *High Risk Serious Offenders Act 2020 (WA)* ("**the Act**") contravene any requirement of Ch III of the *Commonwealth Constitution* in so far as they apply to a person convicted of robbery, as referred to in item 34 of Schedule 1 Division 1 of the Act?

PART III: SECTION 78B OF THE JUDICIARY ACT 1903

3. The AGWA is satisfied that the appellant has given notice in compliance with s 78B of the *Judiciary Act 1903* (Cth).

PART IV: RELEVANT AND CONTESTED FACTS

4. The AGWA accepts the appellant's narrative of facts and chronology. However, the following further facts and chronology are relevant.
5. The appellant has a juvenile criminal history which includes numerous offences of aggravated burglaries, aggravated robberies and stealing motor vehicles.[1]
6. The appellant has been convicted of an offence of escaping lawful custody[2] and of aggravated armed assault with intent to rob.[3]
7. On 5 September 2017 the appellant was released from prison and made subject to a post-sentence supervision order under Part 5A of the *Sentence Administration Act 2003* (WA).[4]
8. Approximately two and a half months after his release from prison, and whilst subject to the post-sentence supervision order,[5] the appellant, who was then 23 yo, committed an offence of aggravated armed robbery on 19 November 2017. The appellant was in company with his sister. They broke into the residence of two female Korean students aged 20 and 21 yo. The appellant entered the house, and in doing so locked out another student staying at the house. He forced his way into the bedroom of the Korean students and threatened them with an object which he

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1 Appeal Book p. 90 [236]; p. 91 [240] ("**AB**").
2 AB p. 90-91 [236].
3 AB p. 91 [240].
4 AB p. 91 [236].
5 AB p. 91 [236].

pretended was a handgun. He made threats of violence in the course of the robbery, and stole a pendant necklace and $20 cash from the victims.[6]

9. It is this conviction which brings the appellant within the scope of the Act. The appellant was sentenced on his plea of guilty to a total effective sentence of 3 years 6 months' imprisonment on 2 July 2019, which was backdated to 20 November 2017.[7] Although a parole eligibility order was made, the appellant was not released on parole.[8]

10. While in prison, the appellant committed an offence of criminal damage, for which he was convicted to a sentence of 5 months' imprisonment to be served cumulatively, which brought his release date from prison to 19 October 2021.[9]

11. Also while in prison, the appellant was charged with an offence of rioters causing damage, which is an indictable offence contrary to s 67 of the *Criminal Code* (WA). The appellant has entered a plea of not guilty. The matter is awaiting trial.

12. The appellant's sentence would have expired on 19 October 2021. He would nevertheless have been remanded in custody until such time as he was granted bail in relation to the rioters charge.

13. On 29 July 2021 the State of WA[10] applied for a restriction order under s 48 of the Act, orders pursuant to s 46(a), (b) and (d) of the Act, and an interim detention order pursuant to s 46(c)(i) of the Act or, in the alternative, an interim supervision order pursuant to ss 30(2) and s 58 of the Act.[11]

14. On 13 October 2021 Corboy J presided over a hearing in the WA Supreme Court consisting of the appellant's constitutional challenge to the Act, and the preliminary hearing under s 46 of the Act.

15. On 18 October 2021 Corboy J held that the constitutional challenge to the Act failed, that there were reasonable grounds for believing that the court might, in accordance with s 7 of the Act, find that the appellant is a high risk serious offender, and made an interim order under s 46(2)(c)(i) detaining the appellant.[12]

16. On 10 November 2021 Corboy J published his reasons for decision.[13]

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6 AB p. 12 [1]; see also AB p. 89-90 [232] and ***State of Western Australia v Garlett*** [2019] WASCSR 74 [12]-[30] (Fiannaca J).
7 AB, p 12 [2]
8 AB, p 12 [2], [4].
9 AB, p 12 [3]-[4].
10 The first respondent to this appeal.
11 AB p. 5; AB p. 6 [6].
12 AB p. 14 [14].
13 ***State of Western Australia v Garlett*** [2021] WASC 387.

17. On 12 November 2021 Corboy J made declarations that none of the provisions of the Act contravene any requirement of Ch III of the *Constitution* or are inconsistent with s 9(1A) of the *Racial Discrimination Act 1975* (Cth) in so far as they apply to a serious offender under custodial sentence who has been convicted of the offences of robbery or assault with intent to rob, as referred to in items 34 and 35 of Schedule 1 Division 1 of the Act.[14]

18. On 23 November 2021 the appellant filed an appeal notice in the WA Court of Appeal seeking leave to appeal[15] against the declarations upholding the constitutional validity of the Act.[16] Section 69(3)(b) of the Act barred the appellant from appealing against the interim detention order made on 18 October 2021 pursuant to s 46(2)(c)(i) of the Act.

19. On 10 December 2021 the appellant made an application to this Court for the removal of the appeal pursuant to s 40 of the *Judiciary Act 1903* (Cth).

20. On 21 December 2021, Gordon J ordered removal of the appeal in relation to the Ch III ground and only in respect of Item 34 of Schedule 1 of the Act.[17]

PART V: ARGUMENT

THE HIGH RISK SERIOUS OFFENDERS ACT 2020 (WA)

21. The Act extends the Supreme Court's ability to make continuing detention orders and supervision orders in relation to serious offenders in the same manner as the provisions contained in the now repealed *Dangerous Sexual Offenders Act 2006* (WA).[18]

22. The *Dangerous Sexual Offenders Act 2006* (WA) was substantially modelled on the Queensland Act challenged in ***Fardon v Attorney-General of Queensland*** ("***Fardon***").[19]

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14 AB p. 101.

15 Noting that this position was clarified at the removal application hearing: ***Garlett v State of Western Australia & Anor*** [2021] HCATrans 221 (21 December 2021) lines 109-121.

16 AB p. 102-103.

17 ***Garlett v The State of Western Australia & Anor*** [2021] HCATrans 221 (21 December 2021), lines 30-75; 159-163 and 165-177.

18 Hansard Assembly, *Second Reading of the High Risk Offenders Bill 2019* (26 June 2019) p 4675b-4677a [1].

19 ***Fardon v Attorney-General of Queensland*** [2004] HCA 46; (2004) 223 CLR 575 ("***Fardon***").

23. In ***Fardon,*** the court upheld the constitutional validity of ss 8 and 12[20] of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld),[21] which are similar in terms to ss 7 and 14[22] of the repealed *Dangerous Sexual Offenders Act 2006* (WA) and ss 7 and 46[23] of the Act subject to this proceeding.

Operative provisions of the Act

24. Section 35(1) of the Act provides that the State may apply to the Supreme Court for a "restriction order"[24] in relation to a serious offender under a custodial sentence.

25. Section 3 defines an "offender" to mean a "serious offender" under a custodial sentence; or a "serious offender" under restriction.[25] There is no specific definition of "serious offender", but the term "serious offence" is defined in s 5 and the term "high risk serious offender" is defined in s 7.

26. Section 5 provides that an offence is a "serious offence" if, *inter alia*, it is specified in Schedule 1 Division 1 of the Act.[26] Schedule 1 comprises a list of serious violent and sexual offences, the majority of which attract a maximum penalty of imprisonment of seven years or more. In effect, Schedule 1 defines the class of persons against whom an application for a restriction order may be made.

27. Section 7(1) then requires the court to determine whether an "offender" is a "high risk serious offender" for the purposes of the Act. This involves a consideration of whether a restriction order would ensure adequate protection to the community against an unacceptable risk that the offender will commit a serious offence. As amplified in the next section, a determination of this type is at the core of the judicial function. It requires an assessment of evidence, reasoned conclusion and an exercise as to whether the restriction order would achieve its statutory purposes.

28. The matters in s 7(1) essentially involve the court assessing two separate matters:

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20 Section 8 entitled "Preliminary hearing"; Section 13 entitled "Division 3 orders" requiring a consideration of whether the offender is a "serious dangerous to the community": *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)*.

21 ***Fardon*** at 592 [19] (Gleeson CJ), 596-597 [34] (McHugh J), 619-620 [106]-[109] (Gummow J), 648 [198] (Hayne J), 658 [234] (Callinan and Heydon JJ).

22 Section 7 entitled "Serious danger to community"; section 14 entitled "Preliminary hearing": *Dangerous Sexual Offenders Act 2006* (WA).

23 Section 7 entitled "Term used: high risk serious offender" requiring a consideration of whether the offender is a "high risk serious offender"; section 46 entitled "Preliminary hearing".

24 A "restriction order" is either a continuing detention order or a supervision order: *High Risk Serious Offenders Act 2020* (WA), s 3 (definition of "restriction order") ("**HRSO Act**").

25 Or a person under a custodial sentence for offences other than a serious offence but that has remained in custody since being discharged from a custodial sentence for a serious offence: HRSO Act, s 3 (definition of "serious offender under a custodial sentence").

26 HRSO Act, ss 3, 5(1).

(a) first, the court must be satisfied that a risk that the offender will commit a serious offence is unacceptable; and

(b) secondly, the court must be satisfied that it is necessary to make a restriction order to ensure adequate community protection against a risk that the offender will commit a serious offence.

29. Corboy J accepted that s 7(1) involved these two evaluative judgments.[27] There is nothing Byzantine about such a construction. Quinlan CJ also adopted this approach in ***WA v D'Rozario (No 3)***.[28]

30. The matters referred to above need to be demonstrated "by acceptable and cogent evidence and to a high degree of probability".[29] The State has the onus of satisfying the court that an offender is a "high risk serious offender".[30]

31. In considering whether it is satisfied of the matters in s 7(1), to the necessary standard of cogency and probability, the court is required to have regard to an extensive list of matters set out in s 7(3). These matters cover medical, psychiatric, psychological or other assessments of the offender; information regarding the propensity of the offender to commit serious offences; any pattern of offending in the offender's behaviour; any efforts made by an offender to address the cause of the offending behaviour, such as participation in a rehabilitation programme; the offender's antecedents and criminal record; the risk that, if the offender were not subject to a restriction order, the offender would commit a serious offence; the need to protect members of the community from that risk; and any other relevant matter.

32. Sections 46(1) and 46(2)(d) of the Act authorise the court to set a date for hearing of the application for a restriction order if the court is satisfied reasonable grounds exist for believing that the court might find an offender is a high risk serious offender. If the court is satisfied that there are reasonable grounds for believing that the court might find an offender is a high risk serious offender, the court may make an interim detention order,[31] or interim supervision order.[32]

33. If the court is satisfied there are reasonable grounds for believing that the court might find the offender is a high risk serious offender as required by s 46(1) of the Act, the court must order the offender undergo examination by a psychiatrist and

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27 AB pp. 55-56 [135]-[138].
28 [2021] WASC 412 at [18]-[22].
29 HRSO Act, s 7(1). See also s 82(2).
30 HRSO Act, s 7(2).
31 HRSO Act, s 46(2)(c)
32 HRSO Act, s 58.

qualified psychologist for the purpose of preparing reports to be used on the hearing of the restriction order.[33] The court may also order that other persons prepare reports in accordance with s 75 of the Act to be used on the hearing of the restriction order, on application by the offender or the State.[34]

34. Section 48(1) of the Act provides that if the court hearing a restriction order application finds that the offender is a high risk serious offender, the court must make:

(a) a continuing detention order; or

(b) a supervision order (except as provided in s 29);

in relation to the offender.

35. Section 48(2) provides that in deciding whether to make such an order, the paramount consideration is the need to ensure adequate protection of the community.

36. A continuing detention order is an order that the offender be detained in custody for an indefinite term.[35] A person's detention under a continuing detention order must be annually reviewed in accordance with Part 5 of the Act.

37. A supervision order in relation to an offender is an order that the offender, when not in custody, is to be subject to stated conditions that the Court must make or which it considers appropriate, in accordance with s 30.[36] It has effect, in accordance with its terms, from a date stated in the order and for a period stated in the order.[37]

38. Section 29(1) provides that a court cannot make, affirm or amend a supervision order in relation to an offender unless it is satisfied, on the balance of probabilities, that the offender will substantially comply with the standard conditions of the order as made, affirmed or amended. The standard conditions are set out in s 30(2). A supervision order must require that an offender: report to a community corrections officer as specified and as directed by the court; be under the supervision of a community corrections officer and comply with any reasonable direction of the officer; not leave or stay out of Western Australia without the permission of the community corrections officer; not commit a serious offence during the period of the order; and be subject to electronic monitoring under s 31 of the Act.

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33 HRSO Act, s 46(2)(a).
34 HRSO Act, s 46(2)(b).
35 HRSO Act, s 26(1).
36 HRSO Act, s 27(1).
37 HRSO Act, s 27(2).

THE JUDICIAL FUNCTION IN MAKING A RESTRICTION ORDER

39. It is evident that s 7 is a critical element of defining the judicial function which must be performed by a court in deciding whether to make a restriction order. Section 7(1) states the nature of evidence which must be considered by a court, and the degree of probability which must be applied by a court in making a determination that a person is a "high risk serious offender". Section 7(2) states an onus of proof which the State must satisfy. Section 7(3) prescribes matters which a court must take into account in making a determination that a person is a "high risk serious offender". These are all matters which go beyond the function of a provision which simply provides a definition of a term.

40. As explained earlier, s 7(1) involves the making of two separate evaluative judgments.[38] Corboy J recognised the following important consequence of a construction that s 7(1) involved two distinct evaluative judgments:[39]

> "It is to be inferred adequate protection for the community should form part of the court's determination of whether an offender is a high risk serious offender (the first step in making a restriction order) and not merely the paramount consideration in deciding what form of order should be made in respect of an offender who has been found to be a high risk serious offender (the second step)."

41. Corboy J considered that the second evaluative judgment involved a balancing exercise of the kind referred to in ***Vella v Commissioner of Police (NSW)*** ("***Vella***").[40] That is, on the one hand, a court would consider the likelihood that a restriction order would prevent an offender committing a serious offence. On the other hand, the court would consider the extent to which an order would intrude upon an offender's liberty. The balancing exercise may include the possibility that a restriction order would not be necessary at all.[41]

42. While s 48(1) provides that the court must make a continuing detention or supervision order if it is satisfied that an offender is a "high risk serious offender", the terms of s 48(2) and the definition of "high risk serious offender" contained in s 7(1) mean that there is a significant degree of judicial evaluation involved in a court determining that it is appropriate to make a restriction order.

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38 Para [29] above.
39 AB p. 56 [139], referring back to AB p. 57 [141].
40 [2019] HCA 38; (2019) 269 CLR 219 ("***Vella***").
41 AB pp. 58-59 [144].

43. The terms of s 7(1) ought to be read in conjunction with s 48, according to the special interpretative principles which were stated by McHugh J in ***Kelly v The Queen*** ("***Kelly***").[42] His Honour said:

> "… the function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment. There is, of course, always a question whether the definition is expressly or impliedly excluded. But once it is clear that the definition applies, the better - I think the only proper - course is to read the words of the definition into the substantive enactment and then construe the substantive enactment - in its extended or confined sense - in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment".[43]

44. Applying the interpretative principles from ***Kelly***, s 48(1) should be construed (when read with s 7(1)) as providing that if the court hearing a restriction order application is satisfied, by acceptable and cogent evidence and to a high degree of probability, that it is necessary to make a restriction order in relation to the offender to ensure adequate protection of the community against an unacceptable risk that the offender will commit a serious offence, the court must make a continuing detention order in relation to the offender, or, (except as provided in s 29) make a supervision order in relation to the offender.

45. Reading s 48(1) with the definition in s 7(1) demonstrates that adequate protection of the community is the key matter informing the court's evaluation of whether a restriction order should be made in the first place. Section 48(2) expressly carries that through in relation to the court's choice as to which type of restriction order should be made. It provides that the paramount consideration for a court in choosing between whether to make a continuing detention order or a supervision order is the need to ensure adequate protection of the community.

46. It is significant that the question about the type of restriction order comes at a third evaluative stage, after the court has assessed that:

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42 [2004] HCA 12; (2004) 218 CLR 216 ("***Kelly***").

43 ***Kelly*** at 253 [103] (McHugh J). This passage has been cited with approval or applied in Western Australia: see ***Browne v Director General, Department of Water and Environmental Regulation*** [2020] WASCA 16 at [63] (the Court), ***Birdsall v The State of Western Australia*** [2019] WASCA 79; (2019) 54 WAR 418 at 441 [107] (Buss P and Mazza JA), 493 [425] (Beech JA), ***Hayman v Cartwright*** [2018] WASCA 116; (2018) 53 WAR 137 at 148 [54] (the Court).

(a) the risk that the offender will commit a serious offence is unacceptable; and

(b) it is necessary to make some form of restriction order to ensure adequate community protection against that risk.

47. The significance of this third evaluative stage is that the court has already decided that there is an unacceptable risk that an offender will commit a serious offence and that a restriction order is necessary to provide adequate community protection. In these circumstances, the community protection necessarily relies upon the court either taking the offender out of the community by a continuing detention order; or it depends upon the court being satisfied that a supervision order will be appropriate and effective.

48. In making that choice, the court must be satisfied, to the prescribed standard of a balance of probabilities, that an offender will substantially comply with the standard conditions of a supervision order, as provided in s 30(2). Importantly, these require provision of an address where the offender can be located for the purposes of supervision and submitting to electronic monitoring. In other words, a court cannot make a supervision order to protect the community, unless it considers that the order is likely to operate in a way which provides actual community protection.

49. A court may also choose to add other terms to a supervision order if it is appropriate to ensure the adequate protection of the community; for the rehabilitation, care or treatment of the offender; or to ensure adequate protection of victims of the offences committed by the offender.[44]

RELEVANT REASONS OF THE COURT BELOW

50. Corboy J considered that the Act was not inconsistent with the institutional integrity of a court which was the repository of federal jurisdiction for the following reasons:[45]

(a) a court's assessment of the risk that an offender will commit a serious offence requires an evaluative and predictive judgment which requires the exercise of judicial power in making the assessment;

(b) s 7 requires a court to undertake a balancing exercise concerning whether it is necessary to make a restriction order to ensure adequate protection to the community against an unacceptable risk. Further, s 48 requires a court

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44 HRSO Act, s 30(5).

45 These reasons were summarised at AB pp. 65-66 [162]-[164].

to perform a further balancing exercise in determining whether to make a continuing detention order or a supervision order, and to determine what conditions ought to apply to any supervision order. Section 7 incorporates balancing criteria;

(c) the Act contains provisions that are designed to ensure procedural fairness to an offender. The procedures by which an application is heard and determined are traditional judicial forms and procedures;

(d) the Act is preventative not punitive legislation;

(e) the Act does not erode public confidence in the court;

(f) the Act does not compromise the court's impartiality or its decisional independence. The court is not an instrument of the executive.

INSTITUTIONAL INTEGRITY AND PREVENTATIVE DETENTION

51. State legislation cannot impair the institutional integrity of a State court in a way which makes it unsuitable to exercise federal judicial power. That is the basis of the four decisions of the High Court striking down legislation in ***Kable v Director of Public Prosecutions (NSW)*** ("***Kable***"),[46] ***International Finance Trust Co Ltd v NSW Crime Commission*** ("***IFT***"),[47] ***South Australia v Totani*** ("***Totani***")[48] and ***Wainohu v New South Wales*** ("***Wainohu***").[49]

52. The principle has recently been described by French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ as follows: "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".[50]

53. It is not possible to state exhaustively what features of legislation may be regarded as impermissibly impairing a court's institutional integrity.[51] It is a matter of

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46 (1996) 189 CLR 51 ("***Kable***").

47 [2009] HCA 49; (2009) 240 CLR 319 ("***IFT***").

48 [2010] HCA 39; (2010) 242 CLR 1 ("***Totani***").

49 [2011] HCA 24; (2011) 243 CLR 181("***Wainohu***")..

50 ***Attorney-General (NT) v Emmerson*** [2014] HCA 13; (2014) 253 CLR 393 at 424 [40]. See also ***Australian Education Union v Fair Work Australia*** [2012] HCA 19; (2012) 246 CLR 117, 140-141 [48] (French CJ, Crennan and Kiefel JJ); ***Minister for Home Affairs v Benbrika*** [2021] HCA 4; (2021) 95 ALJR 166 at 207 [158] (Gordon J) ("***Benbrika***").

51 See, for example, ***Forge v ASIC*** [2006] HCA 44; (2006) 228 CLR 45 at 76 [63]-[64] (Gummow, Hayne and Crennan JJ).

examining the substantive effect of the totality of the legislation in each particular case.[52]

54. There have been four cases where legislation has been held invalid by reason of conferring functions upon a court, or prescribing processes for a court, which have been contrary to the requirements of the institutional integrity of a court. The core significance of these cases is summarised by Hayne, Crennan, Kiefel and Bell JJ in ***Assistant Commissioner Condon v Pompano Pty Ltd***.[53] They give rise to the following principles.

55. By reason of Ch III of the *Constitution*, a State legislature:

(a) cannot effect an impermissible intrusion into the judicial processes or decisions of a court which is a repository of federal jurisdiction. This includes enlisting the court to implement a decision of the Executive;[54] and

(b) cannot confer a non-judicial function or power upon a State court which substantially impairs the institutional integrity of that court because it is inconsistent with the Court being the repository of federal jurisdiction, and cannot confer a non-judicial function upon a judge of a State court which is substantially incompatible with the functions of that judge's court.[55]

56. Three cases exemplify the first category. In ***Kable***, the relevant law empowered a State court to order the detention of a named person where, upon considering the relevant statute as a whole, the NSW Parliament was using the Court to implement a plan to keep that person detained in custody upon the basis of evidence which was not admissible in legal proceedings. In ***IFT***, the relevant law conferred the function of making a freezing order upon a court, where the process involved an ex parte order with ongoing effect, based upon a suspicion of wrongdoing and without scope for release of that order if the duty of full disclosure on an ex parte application had been breached. In ***Wainohu***, the law conferred the function of making declarations about criminal organisations upon judges of a State court. However, the prescribed process was incompatible with the institutional integrity of the State court as it exempted judges from giving reasons for decision.

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52 See, for example, ***Kuczborski v Queensland*** [2014] HCA 46; (2014) 254 CLR 51 at 90 [106] (Hayne J) ("***Kuczborski***"); ***Assistant Commissioner Condon v Pompano Pty Ltd*** [2013] HCA 7; (2013) 252 CLR 38 at 94 [137] (Hayne, Crennan, Kiefel and Bell JJ) ("***Condon***").

53 ***Condon*** at 90-93 [127]-[135].

54 See ***North Australian Aboriginal Justice Agency Ltd v Northern Territory*** [2015] HCA 41; (2015) 256 CLR 569 at 593-595 [39] (French CJ, Kiefel and Bell JJ) ("***North Australian Aboriginal Justice Agency***"), esp points 1 and 7.

55 See ***Benbrika*** at 178 [20] (Kiefel CJ, Bell, Keane and Steward JJ), 191 [82] (Gageler J).

57. In each of these cases, the process provided for carrying out the functions was inconsistent with the institutional integrity of the court because it required resolution of an issue which involved imposing a process upon the court which impermissibly intruded into the court's decision-making role, or effectively enlisted the Court (by reason of a narrowly prescribed process) into making a decision dictated by the Executive.

58. In this category of case, if the State legislation had been a Commonwealth law, and it would not have been contrary to Ch III, then the ***Kable*** principle will certainly not invalidate it.[56]

59. One example of a Commonwealth law which permissibly regulates the exercise of judicial power by the Commonwealth Parliament is the use of evidentiary provisions which reverse the onus of proof. In ***Williamson v Ah On***,[57] Higgins J said that the argument, that it is a usurpation of the judicial power of the Commonwealth for Parliament to prescribe what evidence may or may not be used in legal proceedings as to offences created or provisions made by Parliament under its legitimate powers, was destitute of foundation. In ***The Commonwealth v Melbourne Harbour Trust Commissioners***,[58] Knox CJ, Gavan Duffy and Starke JJ said that a law does not usurp judicial power because it regulates the method or burden of proving facts. These sentiments have been re-iterated in subsequent cases.[59] This line of cases would certainly not be contrary to ***Kable***.

60. An example of the second category of case is ***Totani***. The function conferred upon the Court was, by itself, inherently inconsistent with the functions of a Ch III court. The legislation required the Court to impose and enforce a control order following a declaration by the Executive that an organisation was a criminal organisation. The findings that formed the basis for the declaration made by the Executive could not be tested or challenged judicially. The conferral of that function enlisted the Court to do the will of the Executive. It crossed the line between conferring jurisdiction upon a court, and the legislature directing the exercise of jurisdiction.[60]

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56 ***H A Bachrach Pty v Queensland*** [1998] HCA 54; (1998) 195 CLR 547 at 561-562 [14] (the Court); ***Duncan v ICAC*** [2015] HCA 32; (2015) 256 CLR 83 at 95-96 [17]-[18] (French CJ, Kiefel, Bell and Keane JJ); ***Benbrika*** at 27 [82] (Gageler J), 47 [158] (Gordon J).

57 (1926) 39 CLR 95 at 122.

58 (1922) 31 CLR 1 at 12.

59 See, for example, ***Sorby v The Commonwealth*** (1983) 152 CLR 281, 298-299 (Gibbs CJ); ***Nicholas v The Queen*** (1998) 193 CLR 173 at 189-190 [24] (Brennan CJ); and ***CEO of Customs v Labrador Liquor Wholesale Pty Ltd*** [2003] HCA 49; (2003) 216 CLR 161.

60 ***Totani*** at 63 [133] (Gummow J).

61. It has been accepted that the institutional integrity of a court is not substantially impaired, and there is nothing inconsistent or repugnant to the institutional integrity of a court, by reason of conferring a function or power upon a court to make preventative orders restricting the actions or liberty of a person in order to protect the public. Preventative detention is justified upon this basis, as was accepted in ***Fardon***,[61] ***Thomas v Mowbray,***[62] and ***Minister for Home Affairs v Benbrika*** ("***Benbrika***").[63]

62. ***Benbrika*** makes clear that the power to order preventative detention to protect the community from serious harm is a judicial power within Ch III of the *Constitution*.[64]

APPELLANT'S ARGUMENTS

63. The appellant does not specifically challenge the construction of s 7 adopted by the trial judge, as explained at [39]-[47] above. As well, the appellant does not seek to overrule ***Fardon*** or ***Benbrika***.

64. Instead, the appellant primarily submits that ***Fardon*** and ***Benbrika*** should be confined and that the power conferred on the State Supreme Court to order preventative detention in the present case is not a judicial power, because it requires the court to do something that courts have not historically done.[65]

65. The appellant then effectively submits that conferring a non-judicial power to order preventative detention will have the effect of substantially impairing the court's institutional integrity, for various further reasons (which are dealt with below).[66]

66. In relation to the appellant's primary submission, the appellant submits that ***Benbrika*** only stands for the proposition that "a Commonwealth law that empowers a State Court to exercise a power to order detention of a person, who is serving a sentence for contravention of a provision the subject of Division 105A of the *Criminal Code* (Cth), where detention is for the purpose of protecting the community from the risk of future contraventions of Division 105A (and therefore not based on a *factum* of criminal guilt for past Acts) is a judicial power".[67] The appellant also says that it is critical that the offences for which Mr Benbrika was in

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61 [2004] HCA 46; (2004) 223 CLR 575.
62 [2007] HCA 33; (2007) 233 CLR 307.
63 [2021] HCA 4; (2021) 95 ALJR 166 ("***Benbrika***").
64 ***Benbrika*** at 181 [36], 185 [48] (Kiefel CJ, Bell, Keane and Steward JJ), 187 [64] 192-193 [88]-[89] (Gageler J), 227 [239] (Edelman J).
65 Appellant's Submissions [65] ("**AB**").
66 AS [73]-[78].
67 AS [57].

prison were terrorism offences, which were necessarily extraordinary because of the singular threat which terrorism poses to Australian society.[68] Likewise, the appellant seeks to confine the authority of ***Fardon*** only to permitting the exercise of judicial power to order preventative detention of serious sex offenders.[69]

67. The appellant also says that, contrary to the analysis of this Court in ***Fardon***, ***Vella***,[70] and ***Benbrika,*** courts have not historically made orders for preventative detention.[71] The appellant distinguishes preventative orders which restrict actions and which order detention;[72] and legislative regimes where preventative detention is attached to the curial sentencing process upon conviction.[73]

10 **SUBMISSIONS ON APPELLANT'S ARGUMENTS**

68. As explained, ***Benbrika*** establishes that the power to order preventative detention to protect the community from serious harm is a judicial power within Ch III of the *Constitution*.[74] The principle is not confined to preventative detention of sexual offenders or terrorists. Kiefel CJ, Bell, Keane and Steward JJ said that it was "the protective purpose that qualifies a power"[75] to order preventative detention as judicial.

69. Quite evidently, the power to order preventative detention under the Act is concerned with protection of the community from harm. This was explained by the primary judge in identifying the second evaluative judgment required by s 7(1).

20 Section 7(1) provides that a person only comes within the definition of "high risk serious offender" if it is necessary to make a restriction order "to ensure adequate protection of the community". As well, s 48(2) makes plain that "the paramount consideration [about whether to make a restriction order] is to be the need to ensure adequate protection of the community".

70. The object of the preventative detention is not simply to prevent the commission of crimes, as distinct from the protection of the community from harm.[76] While the definition of "high risk serious offender" refers to an "unacceptable risk that the

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68 AS [57].
69 AS [56]. See also AS [72].
70 [2019] HCA 38; (2019) 269 CLR 219.
71 AS [65], building upon submissions at AS [37]-[44].
72 AS [38].
73 AS [40].
74 ***Benbrika*** at 181 [36], 185 [48] (Kiefel CJ, Bell, Keane and Steward JJ), 187 [64] 192-193 [88]-[89] (Gageler J), 227 [239] (Edelman J).
75 ***Benbrika*** at 181 [36].
76 See ***Benbrika*** at 183 [42] (Kiefel CJ, Bell, Keane and Steward JJ), 191, [79] (Gageler J). See also at 210, [174] (Gordon J).

offender will commit a serious offence", the question of whether a risk is unacceptable depends upon the need to protect members of the community from the relevant risk. See, for example, s 7(3)(i). This is similar to the wording of the same provision which was considered in ***Fardon***.[77]

71. For these reasons, the appellant's primary submission should be rejected. It is not correct that the Act confers a non-judicial power upon the Supreme Court which is inconsistent with the institutional integrity of the Court. The Act confers judicial power. That is consistent with the primary judge's approach.[78]

72. As well, the appellant's argument that the historical antecedents of preventative detention are not established should also be rejected. It is contrary to the analysis of this Court in ***Fardon***, ***Vella***, and ***Benbrika***. This submission essentially depends upon the view that there is a difference in principle between ordering preventative detention at the time when a sentence is imposed and subsequently.[79] That suggestion has been previously considered and rejected.[80] The appellant does not offer any principled justification for saying that a distinction exists. All that is submitted is that "the historical absence of such stand-alone regimes … is significant".[81] As well, while the appellant acknowledges that it would be curious if preventative detention could be ordered when sentencing, but not subsequently, he simply submits that "Curiosity in this area of the law abounds".[82] In truth, the purpose of preventative detention, namely community protection, remains the same at whatever point the preventative detention is ordered. There is no “lump concept thinking” here which should be abjured, contrary to the appellant’s contentions.[83]

73. If the power to order preventative detention is characterised as judicial, the only question about the institutional integrity of the State Supreme Court is whether any provision of the Act requires the Supreme Court to act in a manner which is contrary to proper judicial process in reaching a decision whether to make an order for preventative detention.[84]

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77 Section 13(2) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) as at the date when ***Fardon*** was heard on 2 March 2004.
78 Eg AB pp. 65-66 [164](a).
79 AS [39]-[47].
80 ***Benbrika*** at 181 [34] (Kiefel CJ, Bell, Keane and Steward JJ), referring to Gleeson CJ in ***Fardon*** at 586 [2].
81 AS [40].
82 AS [47].
83 AS [38] and fn 27.
84 Compare ***Benbrika*** at 212 [185], 226 [234] (Edelman J).

74. Even if the power to order preventative detention is non-judicial, as the appellant submits, it does not matter.[85] As the primary judge correctly held,[86] cases decided since ***Kable*** establish that preventative legislation (ie, legislation that has as its object the protection of the community from the risk of future harm) is not, by its very subject matter, repugnant to or incompatible with the institutional integrity of State courts invested with federal jurisdiction.[87]

75. The appellant then relies upon various particular matters (albeit in the context of his submission that the power to order preventative detention is non-judicial) to demonstrate that the Act is inconsistent with the institutional integrity of the Supreme Court.[88] As next explained, none of these demonstrate any impermissible intrusion into judicial processes or decision.

76. *First*, the appellant submits that there is no correlation required by the Act between the nature of prior offending and crimes, and the risk against which a detention order is to protect. The appellant supports this submission by pointing out that the Act applies equally to sexual offending as it does to property offending.[89]

77. However, it is for the Court to determine whether there is an unacceptable risk of a person committing a "serious offence". No doubt that will be informed, as a matter of fact, by the nature of offences which have been previously committed. The circumstances concerning the commission of any serious offence previously may well be relevant to the risk of reoffending by committing another serious offence. For example, a person who breaks into a property with the intention of committing a sexual offence may not have actually carried that intention into effect. Nevertheless, the circumstances of the property offence may demonstrate a relevant risk that the offender will commit a different type of serious offence.

78. *Secondly*, the appellant submits that the Act requires the court to consider protection of communities outside Western Australia and Australia, such as the community in Tunisia.[90]

79. Properly construed, Parliament did not intend that the Supreme Court should take into account the risk of serious offence being committed outside Australia, for

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85 See, for example, ***Kable*** at 106 (Gaudron J): "[T]here is nothing to prevent the Parliaments of the States from conferring powers on their courts which are wholly non-judicial, so long as they are not repugnant to or inconsistent with the exercise by those courts of the judicial power of the Commonwealth."

86 AB p. 42 [94].

87 ***Fardon***; ***Kuczborski***; ***Condon***; ***Vella***; ***Thomas v Mowbray***.

88 AS [73]-[78].

89 AS [73].

90 AS [75].

example in Tunisia. The extended definition of "community" contained in s 4 of the Act is obviously intended to ensure that local communities in particular locations within Western Australia may be specifically considered.

80. *Thirdly*, the appellant submits that an assessment of an offender's risk to the community may depend upon expert evidence which would not be admissible at a trial.[91]

81. As explained in paragraph [59] above, it is quite permissible for an evidentiary matter within federal jurisdiction to be the subject of legislative prescription, such as alterations of the relevant burden of proof. Equally, there is no doubt that the Commonwealth may enact legislation such as the *Evidence Act 1995*. Consequently, there is no merit in the submission that it is inconsistent with the institutional integrity of a court to prescribe that questions about preventative detention should be adjudicated upon a particular evidentiary basis which may be different to the common law. There is no prescription that mandates a particular outcome upon the evidentiary basis, and it applies equally to each party.

82. *Fourthly*, the appellant submits that an assessment of an offender's risk to the community may depend upon propensity evidence;[92] and that the Act requires preparation of psychological and psychiatric reports, even though there may be no reason to think that psychological or psychiatric factors played any part in an offender's past offending.[93]

83. However, the evidentiary submissions made in paragraph [81] apply equally here. As well, the legislation considered and approved in ***Fardon*** particularly referred to the court having regard to "information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future";[94] and specific reports which psychiatrists were required to prepare.[95]

PROPOSED AMICUS CURIAE'S ARGUMENTS

84. The proposed amicus curiae ("**proposed amicus**") submits that the Act does not observe the foundational requirement of decisional independence necessary for the exercise of judicial power, and instead enlists the Court in the implementation of

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91 AS [76].
92 AS [77].
93 AS [78].
94 Section 13(4)(c) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) as at the date when ***Fardon*** was heard on 2 March 2004.
95 Section 11 and 13(4)(a) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) as at the date when ***Fardon*** was heard on 2 March 2004.

the legislative or executive policies of the State. The proposed amicus regards the present case as analogous to ***Totani***.[96]

85. The proposed amicus submits that the operation of ss 7, 29 and 48, regarded together, may lead to a Court considering that a "restriction order" (in the form of a supervision order, not a continuing detention order) is necessary to ensure adequate protection of the community; but the Court may be required to impose a continuing detention order, rather than a supervision order, because the offender cannot show that he or she is likely to comply with standard conditions which attach to a supervision order. In this way, the proposed amicus submits that there may be a mismatch between the basis for a court determining that a person is a "high risk serious offender" under s 7 of the Act, and the type of restriction order which is actually made.[97]

SUBMISSIONS ON PROPOSED AMICUS' ARGUMENTS

86. The proposed amicus seeks to raise new legal arguments which were not raised before the primary judge and are not now raised by the appellant. They involve a construction of s 7 of the Act which was not adopted by the trial judge, and in circumstances where the trial judge's construction of s 7 has not been specifically challenged by the appellant. The proposed amicus should not be permitted to make submissions.

87. In any event, the proposed amicus' argument should be rejected. The alleged mismatch between the basis for making a restriction order and the type of restriction order will never arise.

88. The proper construction of s 7(1), which was adopted by the trial judge, is set out above at [39]-[47]. In determining that an offender is a "high risk serious offender" for the purposes of s 7(1), the Court will already have decided that an offender should not be allowed to re-enter the community without restriction, in order to protect the community from an unacceptable risk of harm. The Court will then need to decide whether the protection of the community requires the offender to be taken out of the community altogether or supervised within the community.

89. If the Court decides that an offender could be supervised within the community to prevent an unacceptable risk of harm to the community, the Court must be satisfied that the offender will comply with the terms of the supervision order and will in

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96 Proposed Amicus' Submissions [8]-[10] ("**PAS**").
97 PAS [22]-[28].

fact be capable of supervision. The Court should not make a supervision order which is designed to protect the community from harm, unless satisfied that the order will be effective to do so.

90. The standard conditions of a supervision order required by ss 29 and 30 are for the purpose of ensuring that an offender can be effectively supervised. This requires the location of the offender's residence to be known, and it also requires the location of the offender to be known through electronic monitoring. If the offender cannot demonstrate that he or she will be capable of satisfying the standard conditions which require these locations to be known and which are necessary to allow supervision, the only way to prevent the unacceptable risk of harm to the community will be through a continuing detention order.

91. The proposed amicus claims that there is an impermissible intrusion into judicial processes because a court is unable to decide that an offender can be effectively supervised without the location of the offender's residence or offender being known.[98] However, judicial power is not impermissibly restricted because possible remedial options are limited. Otherwise mandatory sentencing would be contrary to Ch III, when it is well established that it is not.[99]

PART VI: ESTIMATE OF LENGTH OF ORAL ARGUMENT

92. It is estimated that the oral argument for the second respondent will take 2.5 hours.

Dated: 9 February 2022

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98 PAS [29]-[30].
99 See, for example, ***Palling v Corfield*** (1970) 123 CLR 52.

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN: **PETER ROBERT GARLETT**
Appellant
and
THE STATE OF WESTERN AUSTRALIA
First Respondent
THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA
Second Respondent

ANNEXURE TO SUBMISSIONS OF THE SECOND RESPONDENT

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the Attorney General for Western Australia sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

	Description	**Version**	**Provision(s)**
Constitutional Provisions			
1.	*Commonwealth Constitution*	Current (Compilation No. 6, 29 July 1977 – present)	Ch III
Statutory Provisions			
<u>Commonwealth</u>			
2.	*Criminal Code* (Cth)	Current (Compilation No. 142, 9 December 2021 – present)	Div 105A
3.	*Evidence Act 1995* (Cth)	Current (Compilation No. 34, 1 September 2021 – present)	-
4.	*Judiciary Act 1903* (Cth)	Current (Compilation No. 48, 1 September 2021 – present)	s 78B

5.	*Racial Discrimination Act 1975* (Cth)	Current (Compilation No. 17, 10 December 2015 – present)	s 9(1A)
Queensland			
6.	*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)	As made (6 June 2003)	ss 8, 11, 12, 13
Western Australian			
7.	*Criminal Code* (WA)	As at 1 October 2020	s 67
8.	*Dangerous Sexual Offenders Act 2006* (WA)	Ceased (version as at 26 August 2020)	ss 7, 14
9.	*High Risk Serious Offenders Act 2020* (WA)	Current (version as at 26 August 2020 – present)	ss 3, 4, 5, 7, 26, 27, 29, 30, 35, 46, 48, 58, 75, Sch 1
10.	*Sentence Administration Act 2003* (WA)	As at 1 July 2017	Part 5A