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
10 First Respondent

THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA
Second Respondent

SECOND RESPONDENT'S ORAL OUTLINE OF SUBMISSIONS

PART I: SUITABILITY FOR PUBLICATION

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

PART II: ORAL OUTLINE

Legislative Scheme

2. **First**, the *High Risk Serious Offenders Act 2020* (WA) ("**HRSO Act**") has an express object of ensuring adequate protection of the community: s 8(a). This is further expressed in ss 7(1) and 48(2). It is also inherent in s 6.

3. **Secondly,** the HRSO Act applies to the "serious offences" in Sch 1. These include offences relating to fires; aggravated or child sexual abuse; unlawful death or GBH; deprivation of liberty or kidnapping; stalking; and armed or violent robbery.

4. **Thirdly**, there is a significant process which occurs before a final hearing, which ensures that the final hearing is based upon available evidence which has been disclosed or obtained. A final hearing only occurs where a Court forms the preliminary view that this is justified. See ss 35, 36, 37, 39, 44, 46, 74, 84.

5. **Fourthly**, the court at a final hearing considers independent psychiatric and psychological reports, applies ordinary rules of evidence, and decides whether there is an unacceptable risk of harm to the community from future offending, and whether a restriction order (either a continuing detention or supervision order) will reduce that unacceptable risk. See ss 7, 29 and 30.

6. **Fifthly**, if a continuing detention order is made, it is subject to an initial annual review and then bi-annual reviews thereafter: s 64. There is also a right of appeal against a final restriction order or a review decision: s 69.

7. In summary, the legislative scheme provides for a hearing by an independent Supreme Court judge, who makes evaluative judgments relating to future matters based upon proper disclosure, independent reports from a psychiatrist and psychologist, and generally the ordinary rules of evidence are applied. The legislation implements a parliamentary purpose of protecting the community against future harm. It does not implement executive decisions about individual offenders.

Institutional Integrity v Separation of Powers

8. The test of whether this legislative regime is constitutionally valid is whether it is inconsistent with the institutional integrity of the Supreme Court as a repository of federal judicial power. If the regime could have been enacted by the Commonwealth Parliament, it will pass the test of institutional integrity. However,

the converse is not true, ie it is not correct to say (as does the appellant) that because it could not have been validly enacted by the Commonwealth Parliament, it is likely to impair the Supreme Court's institutional integrity. See ***Fardon v Attorney General (Qld)*** (**JBA 4/20/838)** at [18]-[20] (Gleeson CJ), [37]-[42] (McHugh J), [85]-[86] (Gummow J), [219] (Callinan and Heydon JJ); ***Vella v Commissioner of Police (NSW)*** (**JBA 7/37/2322**) at [56]-[57] (plurality). ***Minister for Home Affairs v Benbrika*** (**JBA 8/43/2567**) at [35]-[36] (plurality).

9. Further, ***Benbrika*** demonstrates that federal legislation which confers upon a Court the power to order preventative detention for the purposes of protecting the community from harm conforms with the requirements of Ch III of the *Constitution.* State legislation which does the same will in no way inherently render a Court unsuitable to also be a repository of federal judicial power.

The Nature of the Function does not inherently impair Institutional Integrity

10. ***Vella*** held that preventative orders are made in the exercise of judicial power. That is confirmed by ***Benbrika***.

11. The Court has considered whether, historically, preventative detention is an exercise of judicial power, and concluded that it is: ***Vella*** at [29]-[31], [83]. The appellant's submissions do not show that this conclusion is factually inaccurate.

12. As well, in principle, there is no reason why a preventative detention order at the point of sentencing should be regarded as part of the judicial process, whereas preventative detention prior to the point of release should be regarded as involving the exercise of a non-judicial power: ***Fardon*** at [20] (Gleeson CJ).

13. The ***Lim*** principle has nothing to do with whether a preventative detention regime affects the institutional integrity of a State Court. The only majority judge who considered the ***Lim*** principle in ***Fardon*** was Gummow J.

14. The extension of preventative detention by the HRSO Act to violent robbery does not affect the institutional integrity of the Supreme Court. The HRSO Act is still concerned with preventing community harm arising from the commission of serious offences. This Court should not be asked by the appellant to second-guess the seriousness of the offence of armed robbery to the community, particularly where violent robbery may carry a life term of imprisonment.

15. ***Fardon*** at [23] (Gleeson CJ) and ***Vella*** at [80] are against the appellant's propositions about "public confidence", at AS [67]. They are contrary to the propositions that: (a) the assessment of public confidence in the institutional integrity of the Supreme Court is akin to a court determining apprehended bias; or

(b) it is necessary to assess public confidence by considering whether the non-judicial power imposed on the Court is the kind of thing that can be done by the executive government or within a genus of matters for which executive government has customarily been associated.

Manner of Carrying out Functions does not impair Institutional Integrity

16. *Lack of correspondence between previous and predicted offence* – The offence for which an offender is imprisoned may be relevant to the future risk that the offender will commit an offence, whether of the same or different type. Eg, in the case of a professional assassin, a previous offence of an attempt to unlawfully kill (item 12, Sch 1) may well assist in predicting the likelihood of a future murder (item 9, Sch 1). In any event, preventative orders have been held constitutionally valid even where there has been no connection with any prior offence: ***Vella***; ***Thomas v Mowbray*** (**JBA 7/36/2101**). It does not impair public confidence in, or the institutional integrity of, the Supreme Court to consider the risk of harm from future offences based upon what may be different, past offences.

17. *Communities* – The proper construction of "communities" includes local communities, not Tunisian ones. It does not impair public confidence in, or the institutional integrity of, the Supreme Court to consider the risk of harm to a local community from a future offence.

18. *Expert Evidence* – An assessment of an offender's future risk to the community may depend upon expert evidence which would not be admissible at a criminal trial with respect to an offender's alleged past acts. As well, an assessment of an offender's future risk to the community may depend upon propensity evidence; and the HRSO Act requires preparation of psychological and psychiatric reports. However, none of these matters affects the institutional integrity of the Supreme Court. The requirement of independent psychiatric and psychological evidence is akin to the requirements in ***Fardon*** and ***Benbrika***. The legislation there was valid.

19. *Onus of Proving Compliance with Standard Conditions* – There is no effect upon the institutional integrity of a Court where legislation alters or imposes a burden of proof upon a particular party.

Dated: 10 March 2022

J A Thomson SC

S R Pack