HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA P50/2021
PERTH REGISTRY

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

APPELLANT'S SUBMISSIONS

Part I: Suitability for publication

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

Part II: Issues

2. Do provisions of the *High Risk Serious Offenders Act 2020* (WA) (**the Act**) contravene any requirement of Chapter III of the *Commonwealth Constitution* insofar 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* (Cth)

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

Part IV: Primary judgment

4. The judgment of the Primary Court is unreported: *The State of Western Australia v Peter Robert Garlett* [2021] WASC 387.

Part V: Relevant facts

5. On 24 June 2019, on his plea of guilty the appellant was convicted of, *inter alia*, one count of aggravated robbery contrary to s.392 of the *Criminal Code* (WA).[1]

6. The offence was committed on 19 November 2017 and involved the theft of a pendant necklace and $20 in cash, in the company of others with threats of violence while

[1] AB, p.12 [1].

pretending to be armed.[2] The appellant was arrested on 20 November 2017 and has been incarcerated since that date. The appellant was sentenced to a total effective sentence of 3 years 6 months' imprisonment, backdated to commence on 20 November 2017. The appellant was ordered to be eligible for parole.[3] The appellant was not released to the community on parole, and during his incarceration, was sentenced to a further five months' imprisonment for criminal damage. He was to be released on 19 October 2021.[4]

7. On 29 July 2021, the State applied for, *inter alia*, a restriction order under s.48 of the Act, and orders for the preparation of reports following a preliminary hearing under ss.46(2)(a), (b) and (d).[5]

8. On 13 October 2021, at the preliminary hearing of the application, the appellant contended that parts of the Act were invalid.[6] On 18 October 2021, the Court held that the challenged parts of the Act were not invalid[7] and on 12 November 2021 made the negative declaration sought by the State.[8]

9. On 23 November 2021, the appellant appealed against the primary decision,[9] part of which was on 21 December 2021 removed to this Court.[10]

Part VI: Submissions

THE HIGH RISK SERIOUS OFFENDERS ACT 2020 (WA)

10. The Act was enacted in 2020 and replaced the *Dangerous Sexual Offenders Act 2006* (WA). That Act was limited in its application to persons who had been convicted of a serious sexual offence. In contrast, the *High Risk Serious Offenders Act 2020* applies to persons who have been convicted of offences listed in Schedule 1.

11. The Act provides for "restriction orders", being either "continuing detention orders" (s.26) or "supervision orders" (s.27). Certain provisions of the latter are mandatory (s.30(2)) and others discretionary (ss.30(3)-(6)). As to continuing detention orders, their effect is that an "offender" (defined in s.3) is to be "detained in custody for an indefinite term for control, care, or treatment". The first stated object of the Act is to provide for

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[2] AB, p.12 [1].
[3] AB, p.12 [2].
[4] AB, p.12 [3]-[4].
[5] AB, p.5.
[6] AB, p.13-14 [7]-[10].
[7] AB, p.14-15 [14].
[8] AB, p.101.
[9] AB, p.102.
[10] AB, p.105.

the detention in custody or the supervision of high risk serious offenders to ensure adequate protection of the community and of victims of serious offences (s.8(a)). The relevance of this is to be assessed having regard to s.48(2). Applicants for restriction orders are stated in s.11.

12. Restriction orders can be sought in respect of the "serious offenders under custodial sentence" (defined in s.3) for whom release is imminent (s.35). "Serious offences" are those provided for in s.5 and invoke Schedule 1. The application does not need to specify the type of restriction order sought (s.35(4)).

13. After an application is commenced there is a preliminary hearing (s.46). The material upon which the Supreme Court makes the decision required by s.46(1) is not prescribed but is provided for in s.37(1). Section 45 provides that an applicant may rely on hearsay evidence in affidavits.

14. Section 46(2) provides that if the Supreme Court makes a decision under s.46(1), it must then order that "the offender undergo examination by a psychiatrist and a qualified psychologist for the purpose of preparing reports in accordance with section 74 to be used on the hearing of the restriction order application". Section 74(1) provides that the State nominated psychiatrist and psychologist must examine the offender.

15. There are disclosure obligations on the applicant prior to a final hearing (ss.39, 40).

16. The power exercised by the Court at the final hearing is provided for in s.48. The Court must order a restriction order if it finds that the offender is a "high risk serious offender". Section 48 (read with s.29) requires that, upon such finding, the Court must make a continuing detention order (and not a supervision order), unless "it is satisfied, on the balance of probabilities, that the offender will substantially comply with the standard conditions" of a supervision order being those provided for in section 30(2). The standard conditions include that the offender will not commit a serious offence during the period of the order (s.30(2)(f)). The onus of so satisfying the Court is on the offender: s.29(2). Section 48(2) is notable.

17. Section 7(3) requires that at the final hearing the Court must have regard to reports from the compelled psychiatric and psychological examinations "and the extent to which the offender cooperated in the [required] examination", along with the other matters provided for in s.7(3).

18. The Act in effect operates on the definition in section 7(1) of "high risk serious offender".

19. Section 64 provides that a continuing detention order must be reviewed after one year and thereafter every two years. Such review is simply a hearing as to whether the offender remains a high risk serious offender

20. Section 69(3)(e) prohibits the making of an application for special leave to appeal to this Court in respect of the making of a restriction order.

THE APPELLANT'S CONTENTIONS

21. The appellant's contentions are as follows.

22. *First*, the appellant does not challenge the proposition that if a Court created by the Commonwealth Parliament under s.71 of the *Constitution* (a s.71 Court) could validly exercise the impugned powers, then the *Kable*[11] principle is not engaged. It follows that the logical starting point is whether a s.71 Court could validly exercise the impugned powers. If so, no issue as to the application of the principle arising from *Kable* arises.

23. *Second*, the reasoning of Gummow J in *Fardon*[12] should be accepted.

24. *Third*, the impugned provisions[13] and the regime created by the Act is not a consequential step in the adjudication of criminal guilt of a person for past acts.

25. *Fourth*, definition of, and understanding of what constitutes, judicial power is informed by whether there are long and constant antecedents of such power being exercised by Common Law Courts and understanding of what constitutes "exceptional cases" is informed by whether there are long and constant antecedents of such power being exercised by Common Law Courts.

26. *Fifth*, there are no antecedents, direct or by analogy, of a power to order preventive detention *per se,* or detention as provided for in the impugned provisions of the Act, being exercised by Common Law Courts.

27. *Sixth*, accordingly, the power exercisable pursuant to the impugned provisions is not a judicial power.

28. *Seventh*, the exercise of power pursuant to the impugned provisions substantially impairs the institutional integrity of the Supreme Court of Western Australia in requiring the exercise of non-judicial power.

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[11] *Kable v The Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51.

[12] *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 223 CLR 575, 612 [80]: "'exceptional cases' aside, the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts".

[13] The appellant impugns item 34 of Division 1 of Schedule 1 of the Act. However, any consideration of that provision's validity must be considered alongside the validity of the following provisions insofar as they operate in respect of an offender convicted of robbery.

THE FIRST CONTENTION – the relevance of whether a s.71 Court could validly exercise the powers provided for in the impugned provisions of the Act

29. The appellant does not challenge the proposition that if a Court created by the Commonwealth Parliament under s.71 of the *Constitution* could validly exercise the powers provided for in the impugned provisions of the Act, then no issue of validity arises and this appeal should be dismissed.[14]

30. Because of this, the logical starting point is whether a s.71 Court could validly exercise the impugned powers, because, if it could, no issue as to the application of the *Kable* principle arises.

10 31. In a number of cases invoking the *Kable* principle this sequence has not been followed, but logically all *Kable* cases proceed on an assumption, even if *sub silentio,* that the impugned power is not a judicial power.

THE SECOND AND THIRD CONTENTIONS – "exceptional cases"

32. Precise definition of "judicial power" or "exclusively judicial powers" is problematic.[15] The need for definition can arise in several contexts, one of which is this case: whether a power conferred on a Court is judicial, and if not, invalidly conferred. This is the second (and more controversial[16]) aspect of *Boilermakers.* Understanding of what constitutes judicial power requires consideration of whether the issue required by a s.71 Court to be resolved is amenable to resolution by the exercise of judicial power (the

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[14] The "*Bachrach* principle"; see *HA Bachrach Pty Ltd v Queensland* [1998] HCA 54; (1998) 195 CLR 547, 561-562 [14] (per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). It is unnecessary to consider a (perhaps) antecedent question of whether the Commonwealth Parliament has power to enact a law providing a Court with powers such as those provided for in the impugned provisions of the Act; that is, whether the Commonwealth Parliament has power to enact laws with respect to robbery. In *Benbrika* no issue arose as to the power of the Commonwealth Parliament under s.51 of the *Constitution* to enact Division 105A of the *Criminal Code* (Cth).

[15] Sir Anthony Mason, "A New Perspective on Separation of Powers" (1996) 82 *Canberra Bulletin of Public Administration* 1, 2: "The lesson of history is that the separation of powers doctrine serves a valuable purpose in providing safeguards against the emergence of arbitrary or totalitarian power. The lesson of experience is that the division of powers is artificial and confusing because the three powers of government do not lend themselves to definition in a way that leads readily to a classification of functions". See also, *R v Davison* (1954) 90 CLR 353, 366; *The Queen v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 373 (Kitto J); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188-189 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron, McHugh JJ); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 257 (Mason CJ, Brennan and Toohey J), 267 (Deane, Dawson, Gaudron, McHugh JJ).

[16] See *R v Joske; Ex parte Australian Building Construction Employees & Builders Labourers Federation* (1974) 130 CLR 87, 90 (Barwick CJ), 102 (Mason J). It now matters not, but this aspect of *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 likely also over-ruled *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 and was the subject of Williams J's dissent; *Boilermakers* at 313-315.

"what question") and whether the means imposed upon the exercise of such power are compatible with the proper exercise of judicial power (the "how question").[17]

33. In respect of the "what question", the reasoning of Gummow J in *Fardon*, that "'exceptional cases' aside, the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts" should be accepted. In *Benbrika*,[18] Kiefel CJ, Bell, Keane and Steward JJ proceeded from this premise.

34. Plainly, the regime created by the Act is not a consequential step in the adjudication of criminal guilt of a person for past acts.

THE FOURTH – SIXTH CONTENTIONS – definition of judicial power and preventive detention as a judicial power

35. Whether a power is judicial (or incidental to it) is informed by whether there are "long antecedents"[19] of such power being exercised by Common Law Courts.[20] A lodestone of defining judicial power is what Courts have long done, even if "[h]istory alone does not provide a sufficient basis for defining the exercise of a power as judicial power".[21]

36. This historicist mode of reasoning requires characterisation of impugned powers and purported antecedents and then consideration of whether the impugned power and powers long exercised by Common Law Courts are the same or analogous or that the latter truly antecedes.[22] Although in many instances this might be unproblematic, it is not so in respect of preventive detention.

First, a negative question: whether preventive "orders" are antecedent

37. In *Vella,* Bell, Keane, Nettle and Edelman JJ concluded that s.5(1) of the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) conferred power to make a "type

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17 *Vella v Commissioner of Police (NSW)* [2019] HCA 38; (2019) 269 CLR 219, 295 [200] (Gordon J); *Brandy*, 267 (Deane, Dawson, Gaudron, McHugh JJ). Put otherwise - conferral of a power can be invalid having regard to *what it requires a court to do* and by *how a court is required to do it*.

18 *Minister for Home Affairs v Benbrika* [2021] HCA 4; (2021) 95 ALJR 166, 179 [24] read with 180 [31] (Kiefel CJ, Bell, Keane, Steward JJ).

19 *Vella*, 236-237 [29] (Bell, Keane, Nettle and Edelman JJ).

20 *Davison*, 368 (Dixon CJ and McTiernan J).

21 *Palmer v Ayres* [2017] HCA 5; (2017) 259 CLR 478, 494 [37] (Kiefel, Keane, Nettle and Gordon JJ), citing *Davison*, 366-369, 382 and *White v Director of Military Prosecutions* [2007] HCA 29; (2007) 231 CLR 570, 595 [48]. See also *Benbrika*, 204 [147] (Gordon J); *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 11-12 (Jacobs J). As stated by Deane, Dawson, Gaudron and McHugh JJ in *Brandy*, 267: "One is tempted to say that, in the end, judicial power is the power exercised by courts and can only be defined by reference to what courts do and the way in which they do it, rather than by recourse to any other classification of functions. But that would be to place reliance upon the elements of history and policy which, whilst they are legitimate considerations, cannot be conclusive."

22 As postulated by Gordon JS, "Imprisonment and the Separation of Judicial Power" (2012) 36 *Melbourne University Law Review* 41, 93, it is likely also relevant whether such purported antecedent power has ceased to have been exercised and if its exercise has been in abeyance for significant periods.

of order that has been described as a civil 'preventive order'",[23] and that "[s]uch orders have long antecedents".[24] *Vella* concerned an application under the Act for orders restraining and prohibiting the plaintiffs, for two years, from various activities.[25] Incarceration or detention could not be ordered under the Act.

38. In discussing *Fardon,* Bell, Keane, Nettle and Edelman JJ in *Vella,* described the powers conferred as a species of "preventive orders".[26] This characterisation of the power of a Court to order detention, as a form of "preventive order", should be abjured.[27] Detention, and the power to order detention, is fundamentally different to the types of order considered in *Vella* and *Thomas v Mowbray*.[28] Detention or incarceration
10 is different. A mode of reasoning that equates "preventive detention" and "preventive orders" that do not encompass detention is false.[29] It would be erroneous to reason that "preventive detention" is a form of preventive order, and, therefore, the "antecedents" considered in *Vella* relate.[30] None of the antecedents noted by Bell, Keane, Nettle and Edelman JJ in *Vella* as relevant to consideration of power to make the orders sought in that matter, relate to detention.[31]

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23 *Vella*, 180 [29] (Bell, Keane, Nettle, Edelman JJ).

24 *Vella*, 180 [29] (Bell, Keane, Nettle, Edelman JJ).

25 They are set out in *Vella*, 235 [26] (Bell, Keane, Nettle, Edelman JJ).

26 *Vella,* 25-251 [65], [68] (Bell, Keane, Nettle and Edelman JJ).

27 Critical with categorisation is to avoid what Professor Llewellyn famously referred to as "lump concept thinking". Perhaps best known is his consideration of concepts of "property" and "contract" in, *Cases and Materials on the Law of Sales* (Callaghan and Co) (1930).

28 *Thomas v Mowbray* [2007] HCA 33; (2007) 233 CLR 307. The interim control orders considered there did not empower detention: see 339 [49] (Gummow and Crennan JJ). As observed by Gummow and Crennan JJ in *Thomas v Mowbray,* 356 [116]: "Detention in the custody of the State differs significantly in degree and quality from what may be entailed by observance of an interim control order." This passage is cited in *Benbrika*, 204 [147] (Gordon J). See also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1; (2016) 257 CLR 42, 84 [91] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).

29 Perhaps *contra* is Edelman J in *Benbrika,* 225 [233].

30 It informs to note that Professors Ashworth and Zedners' pioneering work *Preventive Justice* deals separately with "Civil Preventive Orders" (chapter 4) and "Preventive Detention of the Dangerous" (chapter 7), and that Bell, Keane, Nettle and Edelman JJ in *Vella* refer to chapter 4; *Vella*, 236 [29], footnote 49. What characterises "Civil Preventive Orders" is explained in *Preventive Justice,* p. 77. Such orders are akin to restraining orders.

31 The first antecedent is in [29] and footnote 49 (that elaborates on the "type of order that has been described as a civil "preventive order") and refers to chapter 4 of Professors Ashworth and Zedner's *Preventive Justice.* The "civil preventive orders" there considered are, as stated, orders that "originated [in the United Kingdom] in the late 1990's".

The second antecedent (to which footnote 50 in *Vella* relates), are binding-over orders. A full understanding of the history of binding over orders requires thorough consideration of the history of justices of the peace. That this is so can be seen from the judgment of Lord Parker CJ in *Sheldon v Bromfield Justices* [1964] 2 QB 573, 577. *Sheldon v Bromfield Justices* is cited in footnote 50 in *Vella.* For present purposes it is perhaps sufficient to note that such orders were issued by justices and not superior Courts: *Sheldon v Bromfield Justices,* 577. As Professor Feldman has clarified, such orders were akin to a convicted accused consenting to the equivalent of a good behaviour bond and the equivalent of a restraining order. So, binding over orders are not antecedents of preventive detention (see Feldman, "The King's Peace, the Royal Prerogative and Public

The antecedents considered in *Fardon*

39. Kiefel CJ, Bell, Keane and Steward JJ in *Benbrika*[32] stated that, in *Fardon,* Gummow J "acknowledged" that, "schemes for preventative detention have a long history in common law countries". The passage in Gummow J's judgment that is cited[33] is:

> Preventative detention regimes attached by legislation to the curial sentencing process upon conviction have a long history in common law countries. The *Habitual Criminals Act 1905* (NSW) and Pt II of the *Prevention of Crime Act 1908* (UK) are examples of such legislation.

40. Gummow J's reference to "[p]reventative detention regimes attached by legislation to the curial sentencing process upon conviction", says little of schemes for preventative detention that are not so attached. Indeed, it is the historical absence of such stand-alone regimes that is significant. Both of the *Habitual Criminals Act 1905* (NSW) and Pt II of the *Prevention of Crime Act 1908* (UK) empowered the ordering of post sentence

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Order: the Roots and Early Development of Binding Over Powers" (1988) 47 *Cambridge Law Journal* 101, 101).

The third antecedent (to which footnote 51 in *Vella* relates), is the writ of supplicavit. Dr Jenks, whose paper is cited at footnote 52, postulates that the writ succeed the writ de minis in the fourteenth century (Jenks p.259). Dr Jenks at p.259 outlines the nature of the writ: "[it] was addressed either to keepers of the peace or to sheriffs, who were told to order the individual who had 'seriously and openly threatened' the petitioner to appear before them in person and find sufficient [sureties]…If the peace-breaker refused to provide [sureties], the keepers of the peace or the sheriffs were ordered to send him to the nearest gaol to be kept there until he voluntarily complied. Information on the surety thus taken was to be sent to the Chancery under their seal without delay". Professor Maitland discusses this in his paper, "Register of Original Writs" (1889) 3 *Harvard Law Review* 212. It emerges from the work of Margaret Avery ("The History of the Equitable Jurisdiction of Chancery before 1460" (1969) 42 *Bulletin of the Institute of Historical Research* 129) and Professor Barbour ("Some Aspects of Fifteenth Century Chancery" (1918) 31 *Harvard Law Review* 834) and Tucker ("The Early History of the Court of Chancery: A Comparative Study" (2000) 115 *English Historical Review* 791), along with that of Professor Maitland that writs such as supplicavit evolved because in the relevant times applicants were poor while their adversaries were rich and influential (Maitland, *Equity* p.6). Applicants were commonly wives seeking protection form violence from husbands, see Siegel, "The Rule of Love: Wife Beating as Prerogative and Privacy" (1996) 105 *Yale Law Journal* 2117 at 2123, citing Blackstone. In the eighth edition of Harrison *The Practice of the Court of Chancery* at page 168 it is stated that, even in 1796, "this proceeding very rarely happens". Likewise, in *Adams v Adams* Reports of the Supreme Judicial Court of Massachusetts for November 1868 365, 369, Chapman CJ for the Supreme Judicial Court of Massachusetts, in dismissing a petition for a writ of supplicavit, noted that no such writ had ever issued from that Court, and (at page 371) that Chancellor Kent had, in *Codd v Codd* 2 Johns Ch 141, doubted the power of the superior Courts of New York to grant it. That issue of the writ of supplicavit had fallen into disuse by the eighteenth century, if not before, renders it an unlikely "antecedent" for the development of the law of Australia. In any event, the writ provided for the equivalent of arrest and a restraining order backed by surety brought by an individual for a threat to him of her. This is not an antecedent of preventive detention.

The fourth antecedent (to which footnote 53 in *Vella* relates) is the power of the Court of Chancery to order injunctions to restrain the anticipated commission of criminal acts or public wrongs, particularly in cases of "public health or comfort or safety". The authority cited for this is the judgment of Starke J in *Ramsay v Aberfoyle Manufacturing Co (Australia) Pty Ltd* (1935) 54 CLR 230, 249. At the cited pages of Starke J's judgment, his Honour is expounding on the law ("in the field of public law") of injunctions at the suit of the Attorney General to restrain contravention of various statutes. This jurisdiction is not an antecedent of preventive detention, unless there is a case in which incarceration has been ordered pursuant to an injunction. There is a thorough discussion of relevant matters in Amarasekara and Aikers, "Injunctions in Criminal Law: an Anglo-Australian Analysis" (2001) 6 *Deakin Law Review* 1. In particular the discussion of the historical basis of such power, commencing at page 4, is helpful.

[32] *Benbrika*,180-181 [33] (Kiefel CJ, Bell, Keane and Steward JJ).

[33] *Fardon*, 613 [83] (Gummow J).

detention at the time of sentencing. The validity of these regimes is well established,[34] as discussed at paragraphs 45 to 47 below.

41. Gleeson CJ in *Fardon*[35] stated that:

> Legislative schemes for preventive detention of offenders who are regarded as a danger to the community have a long history.

42. The only authority cited by Gleeson CJ for this is a paper of Professor Dershowitz.[36] It is an American law journal article. Although seemingly concerned with "The Origins of Preventive Confinement", the paper does not appear to deal with preventive detention. "Confinement", though not defined by Professor Dershowitz seems to refer to preventive orders that confine freedom, but does not include detention. Professor Dershowitz refers to imprisonment for vagrancy.[37] Vagrancy laws, such as the *Vagrancy Act 1902* (NSW) in effect punished the offence of vagrancy.[38]

43. In *Fardon*,[39] Gleeson CJ also refers to the *Habitual Criminals Act 1905* (NSW) and the *Inebriates Act 1912* (NSW).[40] Section 3 of that latter Act empowered a Court, Judge or Magistrate if satisfied that a person was an inebriate "and would benefit from the making of an order" to make various orders. Detention was not such an order that could be made. The orders provided for in s.3 were not for the protection of the community from harm by the inebriate but redemptive and rehabilitative of the inebriate.[41] This is, with respect, not an antecedent of the power conferred by the Act here.

44. None of the historical instances considered in *Fardon* are antecedents in the relevant sense of this Act.

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[34] See, for example, *McGarry v The Queen* [2001] HCA 62; (2001) 207 CLR 121; *Crump v State of New South Wales* [2012] HCA 20; (2012) 247 CLR 1; *Minogue v Victoria* [2018] HCA 27; (2018) 264 CLR 252.

[35] *Fardon*, 590 [13] (Gleeson CJ).

[36] Dershowitz, "The Origins of Preventive Confinement in Anglo-American Law" (1974) 43 *University of Cincinnati Law Review 1* (Pt 1) and 781 (Pt II).

[37] Dershowitz, "The Origins of Preventive Confinement in Anglo-American Law" (1974) 43 *University of Cincinnati Law Review* 1 at 18, 22.

[38] See *Tajjour v New South Wales* [2014] HCA 35; (2014) 254 CLR 508, 534-535 [7]-[10] (French CJ). See the discussion, particularly in respect of the 1835 Act, in Kimber, "Poor Laws: A Historiography of Vagrancy in Australia" (2013) 11 History Compass 537.

[39] *Fardon*, 590 [13] (Gleeson CJ).

[40] *Fardon*, 590 [13] (Gleeson CJ).

[41] For instance, s.3(1)(e); "the inebriate be placed for any period mentioned in the order not exceeding twenty-eight days under the care and control of some person or persons to be named in the order, in the house of the inebriate, or in the house of a friend of the inebriate, or in a public or private hospital, or in an institution, or in an admission centre".

Preventative detention regimes attached by legislation to sentencing are not antecedents

45. Kiefel CJ, Bell, Keane and Steward JJ in *Benbrika*[42] allude to sentencing regimes such as that considered in *McGarry*.[43] Their Honours cited the observation of Gleeson CJ in *Fardon*,[44] to the effect that:

> … if the lawful exercise of judicial power admits of the judge assessing the danger an offender poses to the community at the time of sentencing it is curious that it does not admit of the judge making such an assessment at or near the time of imminent release when that danger might be assessed more accurately.

46. The process considered in *McGarry* is plainly an exercise of judicial power. Detention was a consequential step in the adjudication of criminal guilt for past acts. Section 98 of the *Sentencing Act 1995* (WA), considered in *McGarry,* provided that the "preventive detention order" was part of the sentence.[45] *McGarry* expressly did not consider the validity of s.98 of the *Sentencing Act 1995* (WA).[46] Sentencing regimes such as that considered in *McGarry* followed the decision in *Veen (No. 2)*.[47] *Veen (No. 2)* decided that the sentencing principle of proportionality precluded imposing a sentence beyond what was otherwise proportionate so as to protect society. It followed that, if "protection of society" was to be a factor that could extend a sentence beyond what was proportionate, it would have to be legislatively imposed as a discrete and distinct integer in sentencing. Laws such as section 98 of the *Sentencing Act 1995* (WA) followed.

47. As the observation of Gleeson CJ in *Fardon* that is extracted above makes plain, *McGarry* gives rise to a curiosity. It is not an authority supportive of validity in this matter. Curiosity in this area of law abounds. To some it is curious that the possibility of an offender being subject to a post-sentence detention or supervision order is not a relevant factor in sentencing.[48]

The reasoning in *Benbrika* to the effect that preventive detention falls within a *Lim* exception

48. Preventive detention was the heart of the issue in *Benbrika*, which was argued and decided on grounds that did not require consideration of *Kable.* In *Benbrika*,[49] Kiefel CJ, Bell, Keane and Steward JJ proceeded from the premise of Gummow J's statement

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42 *Benbrika*, 180-181 [33]-[34] (Kiefel CJ, Bell, Keane, Steward JJ).

43 *McGarry v R* [2001] HCA 62; (2001) 207 CLR 121.

44 *Fardon*, 586 [2] (Gleeson CJ).

45 That section 98 of the *Sentencing Act* considered in *McGarry* defined part of the sentence as "nominal" does not detract from the totality of the time ordered to be served as being the sentence of the Court.

46 *McGarry*, 124 [1] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne JJ).

47 *Veen v R (No 2)* [1988] HCA 14; (1988) 164 CLR 465.

48 See *DPP (Cth) v Besim; DPP (Cth) v MHK (No 3)* [2017] VSCA 180; (2017) 52 VR 303, 320 [60]-[62] (Warren CJ, Weinberg and Kaye JJA); *Hickling v The State of Western Australia* [2016] WASCA 124; (2016) 260 A Crim R 33, 45 [60] (Mazza JA, Mitchell J) as to the irrelevance in the sentencing exercise.

49 *Benbrika*, 179 [24] read with 180 [31] (Kiefel CJ, Bell, Keane, Steward JJ).

in *Fardon*,[50] to then address whether the regime created by Division 105A of the *Criminal Code* (Cth) was an "exceptional case", referring specifically to whether it was analogous to the exception recognised in *Lim* of "involuntary detention of those suffering from mental illness or infectious disease".[51] The essence of the reasoning resulting in their Honours' conclusion in *Benbrika* is at [36].[52]

49. The passage in *Lim* to which their Honours in *Benbrika* refer is at page 28 in the joint judgment of Brennan, Deane and Dawson JJ. The issue in *Lim*, being whether the power to order detention was (exclusively) judicial and incapable of being validly conferred on executive government. As part of the reasoning of Brennan, Deane and Dawson JJ, their
10 Honours referred to, "qualifications which must be made to the general proposition that the power to order that a citizen be involuntarily confined in custody is … part of the judicial power of the Commonwealth entrusted exclusively to Chapter III Courts".[53] Brennan, Deane and Dawson JJ articulated the exceptions.[54]

50. The qualification to the general proposition of "involuntary detention in cases of mental illness or infectious disease" is not footnoted. Powers to involuntarily confine those suffering mental illness do not vest in courts at common law.[55] As regards mental

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[50] *Benbrika*, 180 [31] (Kiefel CJ, Bell, Keane, Steward JJ).

[51] *Benbrika*, 180 [32] (Kiefel CJ, Bell, Keane, Steward JJ).

[52] "The contention that the exceptions to the *Lim* principle are confined by history and are insusceptible of analogical development cannot be accepted. There is no principled reason for distinguishing the power of a Ch III court to order that a mentally ill person be detained in custody for the protection of the community from harm and the power to order that a terrorist offender be detained in custody for the same purpose. It is the protective purpose that qualifies a power as an exception to a principle that is recognised under our system of government as a safeguard on liberty. Demonstration that Div 105A is non-punitive is essential to a conclusion that the regime that it establishes can validly be conferred on a Ch III court, but that conclusion does not suffice. As a matter of substance, the power must have as its object the protection of the community from harm."

[53] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 28 (Brennan, Deane, Dawson JJ).

[54] *Lim*, 28-29 (Brennan, Deane, Dawson JJ): "The most important is … the arrest and detention in custody, pursuant to executive warrant, of a person accused of crime to ensure that he or she is available to be dealt with by the courts. Such committal to custody awaiting trial is not seen by the law as punitive or as appertaining exclusively to judicial power. Even where exercisable by the Executive, however, the power to detain a person in custody pending trial is ordinarily subject to the supervisory jurisdiction of the courts, including the 'ancient common law' jurisdiction, 'before and since the conquest', to order that a person committed to prison while awaiting trial be admitted to bail ... [footnotes omitted]. Involuntary detention in cases of mental illness or infectious disease can also legitimately be seen as non-punitive in character and as not necessarily involving the exercise of judicial power. Otherwise, and putting to one side the traditional powers of the Parliament to punish for contempt … [footnotes omitted] and of military tribunals to punish for breach of military discipline ... [footnotes omitted], the citizens of this country enjoy, at least in times of peace ... [footnotes omitted], a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth."

[55] Professor Holdsworth notes that there were powers exercisable by the Exchequer and then Chancery to deal with the property of "lunatics"; Holdsworth *A History of English Law* Vol. 1 pages 473-476. Professor Holdsworth cites *Beall v Smith* (1873) 9 Ch. App. 85, 92*:* "…unsoundness of mind gives the Court of Chancery no jurisdiction whatever. It is not like infancy in that respect. The Court of Chancery is by law the guardian of infants, whom it makes its wards. The Court of Chancery is not the curator either of the person or

illness, there was a long history of legislation in the United Kingdom prior to Federation dealing with confinement of the mentally ill.[56] Such legislation did not, it seems, invoke judicial power. The powers were invariably exercised by what would now be considered executive bodies. It is doubtful that, as a matter of historical fact, legislation passed in the United Kingdom and in Australian States, from the very first, are properly characterised as providing for detention of those suffering from mental illness to protect the community from the risk of crime.[57] Indeed the more appropriate characterisation of such legislation (though the choice may not be binary) is that it was protective of the mentally ill person.

10 51. If these matters be so, then it must be doubted that the power of a s.71 Court to order that a mentally ill person be detained in custody is an historical precedent for the power of a s.71 Court to order preventive detention.

***Fardon* and *Benbrika* do not decide that preventive detention *per se* is a judicial power**

52. In *Benbrika*,[58] Kiefel CJ, Bell, Keane and Steward JJ characterise the "conclusion in *Fardon*" as being that:

> … the power conferred by the Qld Act to order the continuing detention of a prisoner who is found to be a danger to society is a judicial power that does not compromise the Supreme Court's institutional integrity as a Court that may be invested with federal jurisdiction …

53. This passage invites interpretation. As noted above, many cases where the *Kable*
20 principle has been addressed do not deal, first, or really at all, with whether the impugned power is a judicial power. *Fardon* was one such case. *Kable* only arises if the impugned power is not a judicial power, because if it is a judicial power it is valid. Because of this it is difficult to extract much from the conclusion in *Fardon* as to what is or is not judicial power. Indeed, logically, because *Fardon* considered the *Kable* principle*, ex hypothesi,* the power was not judicial. This says too much because regard must be had to the manner in which cases are put.

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the estate of a person *non compos mentis* whom it does not, and cannot make its ward...It can no more take upon itself the management and disposition of a lunatic's property than it can the management or disposition of the property of a person abroad, or confined to his bed by illness. The Court can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself, if of sound mind."

[56] As explained in the European Commission Report, *Compulsory Admission and Involuntary Treatment of Mentally Ill Patients – Legislation and Practice in EU-Member States*, commencing at page 138 and accessible at https://ec.europa.eu/health/ph_projects/2000/promotion/fp_promotion_2000_frep_08_en.pdf. See also, McLemens and Bennett, "Comment: Historical Notes on the Law of Mental Illness in New South Wales" (1962) 4 *Sydney Law Review* 49.

[57] See European Commission Report, Compulsory Admission and Involuntary Treatment of Mentally Ill Patients – Legislation and Practice in EU-Member States, commencing at page 138; Holdsworth, *A History of English Law*, Vol. 13 page 192, Vol. 16 page 54.

[58] *Benbrika*, 181 [35] (Kiefel CJ, Bell, Keane, Steward JJ).

54. It makes too much of *Fardon* to construe it as authority for the proposition that ordering continuing detention of a prisoner "found to be a danger to society" for the "purpose of protection of the community from harm" is a judicial power or a power that does not attract the *Kable* principle. *Fardon* dealt with offenders of a particular type (those convicted of violent sexual offences and sexual offences against children) where the risk, if they were not detained, was of committing these offences.[59]

55. *Fardon* is not a decision on judicial power. It was decided on *Kable* grounds[60] and the nature of the attack on the validity of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) essentially related to the requirements of the Act as to the manner of the exercise of power.[61]

56. *Fardon* is authority for proposition that legislation empowering a State Court to order detention of a person serving a sentence for a serious sexual offence (as defined) on a *factum* that is not criminal guilt for past acts, but where such order of detention is for the purpose of protecting members of the adult community from violent sexual offending and children from sexual offending (and where any hearing for such order is on the terms provided for in the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)) does not attract the *Kable* principle. Such crimes are of the utmost seriousness, involving the "worst class of offender".[62] Victims are invariably amongst the most vulnerable in society. Unlike for those convicted of murder in Western Australia,[63] those convicted of violent sexual offending and sexual offending against children cannot be sentenced to life imprisonment.

57. Because *Benbrika* involved the conferral of a power upon State Courts by a Commonwealth Act, it appears that the contentions put as to invalidity focused on characterising the impugned law as punitive. *Benbrika* decided 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

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[59] Section 13 of the *Dangerous Prisoners (Sexual Offenders) Act 2003,* considered in *Fardon,* empowered the Supreme Court to make an order for detention upon being satisfied that "the prisoner" was or would be a "serious danger to the community" if released. A prisoner was a serious danger to the community if it was found that there was an unacceptable risk that the prisoner would commit a serious sexual offence if released. Serious sexual offence was an offence of a sexual nature (against an adult) involving violence and an offence of a sexual nature against children. A "prisoner" was, and could only be, a person imprisoned for a serious sexual offence.

[60] See *Benbrika*, 206 [155] (Gordon J).

[61] Note the reasoning in respect of *Fardon* in *Vella* at 250-251 [65]-[68] (Bell, Keane, Nettle and Edelman JJ).

[62] See, for example, Western Australian Hansard, *Dangerous Sexual Offenders Bill 2005*, Second Reading, 15 November 2005, p. 7274-7276 (the Hon. Attorney General).

[63] The effect of s.279(4) of the *Criminal Code* is that virtually all people convicted of murder will receive a life sentence with a minimum non-parole period.

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.[64] Critical is that the offences for which the appellant was in prison in *Benbrika,* and the relevant risk of future offending, concerned terrorism. Terrorism offences are, necessarily, extraordinary. Terrorism offences, enacted after the contemporary rise of extreme violent terrorism, respond to an existential threat to the Australian community and societies of the world more generally.[65] As stated by the majority in *Benbrika*:[66] "[t]errorism poses a singular threat to civil society".

10 58. Because of this singular existential threat of such offending, such laws create a category that is a *sui generis* exception to Gummow J's statement in *Fardon.*[67] As with the category of laws that protect the adult community from violent sexual offending and children from sexual offending, laws considered in *Benbrika* are an "exceptional case" for the purposes of his Honour's statement of principle.[68]

THE SEVENTH CONTENTION – *KABLE*

59. The *Kable* principle can be taken to be articulated in *Emmerson.*[69] This formulation is now to be understood having regard to the majority judgment in *Vella*:[70]

> Although it is only extreme legislation that will substantially impair the institutional integrity of a State court, the boundaries of the *Kable* principle are not sharp. The contours of the
20 categories where State legislation will substantially impair a court's institutional integrity will necessarily emerge slowly. But the categories must develop in a principled, coherent, and systematic way rather than as evaluations of specific instances.

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64 This understanding of *Benbrika* is subject also to the manner in which the Court is required to exercise such power.

65 *Vella*, 293 [193] (Gordon J).

66 *Benbrika*, 181 [36] (Kiefel CJ, Bell, Keane, Steward JJ).

67 That "the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts".

68 See also *Vella*, 296-297 [204], where Gordon J described the legislation dealing with terrorism offences, considered in *Thomas v Mowbra*y as "directed at a narrow class in exceptional circumstances". See also *Thomas v Mowbray*, 349-350 [83]-[87] (per Gummow and Crennan JJ), 192 [553] (Callinan J); *Lodhi v R* [2006] NSWCCA 121; (2006) 199 FLR 303, 318 [66] (Spigelman CJ). It is perhaps relevant that prior to 11 September 2001 there were no Commonwealth laws dealing specifically with terrorism.

69 *Attorney-General (NT) v Emmerson* [2014] HCA 13; (2014) 253 CLR 393, 424 [40] (French CJ, Hayne, Crennan, Kiefel, Bell, Keane JJ) (cited with approval in *Vella*, 245-246 [55] (Bell, Keane, Nettle, Edelman JJ)): "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." [footnotes omitted].

70 *Vella*, 246 [56] (Bell, Keane, Nettle, Edelman JJ).

60. This notwithstanding, there is no reason to doubt the ongoing salience of the observation of Gummow J in *Fardon*,[71] in respect of the principle derived from *Kable,* that:

> Reflection upon the range of human affairs, the scope of executive and legislative activity, and the necessity for close analysis of complex and varied statutory schemes will indicate that this may be a strength rather than a weakness of constitutional doctrine.

61. Similarly, there is no reason to doubt the ongoing salience of the observation of French CJ in *K-Generation*[72] that:

> The question whether functions, powers or duties cast upon a court are incompatible with its institutional integrity as a court will be answered by an evaluative process which may require consideration of a number of factors. The evaluation process required is not unlike that involved in deciding whether a body can be said to be exercising judicial power.

62. The focus of the majority judgment in *Vella* – on the development of categories – is telling. This focus is not dissimilar in effect to the manner in which the definition and practical understanding of judicial power under the *Constitution* is approached having regard to categorisation of what is required by impugned legislation and consideration of antecedents of such category.[73]

63. The majority of matters dealing with *Kable* involve arguments that the manner in which State Courts are required to exercise the powers imposed on them substantially impairs the Court's institutional integrity. So, affecting Courts' power to accord procedural fairness,[74] affecting open hearings[75] and the obligation to give reasons.[76]

64. Prior to *Boilermakers,* in deciding whether Chapter III constrained the power of the Commonwealth Parliament to confer non-judicial power on a Court created by the Commonwealth Parliament under s.71 of the *Constitution,* the issue was addressed by asking a question akin to that required by *Kable*.[77] This same sort of inquiry is required in considering the *persona designata* rule in respect of members of such Courts.[78]

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[71] *Fardon*, 618-619, [105] (Gummow J).

[72] *K-Generation Pty Limited v Liquor Licensing Court* [2009] HCA 4; (2009) 237 CLR 501, 530 [90] (French CJ).

[73] This is similar to the point made by French CJ in the extracted passage in *K-Generation.*

[74] *International Finance Trust Company Ltd v NSW Crime Commission* [2009] HCA 49; (2009) 240 CLR 319; *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at 43, [62] (French CJ).

[75] *Totani*, 43 [62] (French CJ).

[76] *Wainohu v New South Wales* [2011] HCA 24; (2011) 243 CLR 181, 228 [104] (Gummow, Hayne, Crennan, Bell JJ). Different in kind is *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531 where the Court's institutional integrity was undermined by excluding the power to review jurisdictional error. *Kirk* is different in kind because it, in effect, considered the excision of an intrinsic judicial power rather than conferral of a non-judicial power.

[77] This is perhaps most starkly seen in Williams J's dissent in *Boilermakers* at 314: "In relation to Chap. III the doctrine means that only courts can exercise the judicial power of the Commonwealth, and that nothing must be done which is likely to detract from their complete ability to perform their judicial functions. The Parliament cannot, therefore, by legislation impose on the courts duties which would be at variance with the

65. In considering *Kable,* where, as here, *ex hypothesi*, the power conferred on a Court is not a judicial power – because it requires the Court to do something that Courts have not historically done – it will be rare indeed that such conferral of power will not substantially impair the Court's institutional integrity. Requiring Courts to do things that Common Law Courts have not historically done – and which executive government can do – inevitably brings into sharp focus the effect of the conferring of such power on the Courts' institutional integrity.

66. Requiring Courts to do things that Courts have not historically done – and requiring Courts to do it in a manner alien from the manner in which judicial power is exercised – affects such Courts' institutional integrity. Such conferral of power, and such prescription of the manner of exercising it, affects public confidence in the Court. The archetypal example of this is *Kable* itself, where the majority justices all reasoned (to the effect) that requiring the Supreme Court of New South Wales to exercise the power required by the *Community Protection Act 1994* (NSW) adversely affected public confidence in the Courts or in the independence of the Court.[79]

67. Assessing public confidence in this sense is akin to a Court determining apprehended bias and "the kind of question that Courts have always dealt with".[80] The assessment of public confidence is assisted by considering whether the non-judicial power imposed on the Court is the kind of "thing" that can be done by executive government or within a genus of matters for which executive government has customarily been associated.

68. Relevant is the sometimes seen aside to the effect that the public would likely be more comforted by a particular extraordinary power being exercised by Courts than by executive government. It is supposed that the basis of this is public confidence in Courts and a correlative lack of confidence in executive government.[81] This kind of reasoning

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exercise of these functions or duties and which could not be undertaken without a departure from the normal manner in which courts are accustomed to discharge those functions." The Privy Council observed that such inquiry was "vague and unsatisfactory": *Attorney General of the Commonwealth v The Queen* (1957) 95 CLR 529, 542.

[78] *Grollo v Palmer* (1995) 184 CLR 348, 365-366. See also *Wainohu*, 228 [105] (Gummow, Hayne, Crennan and Bell JJ): "the reasoning in the decisions in *Wilson* and *Kable v Director of Public Prosecutions*, delivered respectively on 6 and 9 September 1996, share a common foundation in constitutional principle. That constitutional principle has as its touchstone protection against legislative or executive intrusion upon the institutional integrity of the courts, whether federal or State."

[79] *Kable,* 98 (Toohey J), 107-108 (Gaudron J), 116-119 and 122-124 (McHugh J) and 132-134 (Gummow J); *International Finance Trust*, 354 [53] (French CJ) (quoting McHugh J in *Kable*).

[80] Steytler C and Field I, "The Institutional Integrity Principle: Where Are We Now and Where Are We Headed?" (2011) 35 *University of Western Australia Law Review* 227, 264.

[81] *Fardon*, 586 [2] (Gleeson CJ); *Benbrika*, 180 [30] (Edelman J).

would, logically, justify virtually all discretionary powers reposed in and exercised by Courts as opposed to Ministers, and is irrelevant.

The categorisation of the power here

69. For the reasons akin to those submitted above, it would be erroneous to conclude that legislation that confers power to order preventive detention *per se* is a relevant category. *Fardon* does not decide this. *Fardon* decided that the *Kable* principle does not invalidate legislation that empowers a State Court to order detention of a person serving a sentence for a serious sexual offence (as defined) on a *factum* that is not criminal guilt for past acts, where the order of detention is for the purpose of protecting members of the adult community from violent sexual offending and children from sexual offending. Central is the nature of the crimes, the risk of recurrence of which detention will avoid. The risk of violent sexual offending and sexual offending involving children is such that the involvement of s.71 Courts in schemes that provide for post-sentence detention of certain offenders who are at great risk of re-offending does not affect public confidence in such Courts. It may be that there are other categories of crime that are similar,[82] but it cannot be all crimes.

70. Imagine if Schedule 1 of the Act referred to the whole of the *Criminal Code* and all other legislation creating criminal offences. For any offender, executive government could make an application. The public would then perceive that the Court determined, for all offenders, who stayed in jail and for how long, even though sentences had ended. The Court would be a jailer. The Court would be, in the perception of the public, the governmental institution principally responsible for its protection from crime. So, not only would the court be a jailer, but it would also be, in the public's perception, the principal policing body. It would be the governmental institution largely responsible for the prevention of crime. If such were the case, the courts would, no doubt, be the branch of government blamed by other branches of government "for crime". Blame would be attributed in respect of any offender not ordered to be detained by the Court, who then re-offended. Any offence – for any crime – by an offender who had served a term and not been further detained (if executive government sought it) would be attributed to the Courts. "Nothing would be more likely to damage public confidence in the integrity and impartiality of courts"[83] than this.

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[82] State "terrorism" laws are a likely example.

[83] Twisting what was stated by Gleeson CJ in *Fardon,* 593 [23].

71. If the validity of the impugned provisions of the Act is to be upheld, then there is nothing to constrain what the Court is asked to imagine, unless robbery under s.392 of the *Criminal Code* can be differentiated from all other offences.

The features of the Act relevant to categorisation and effect on the institutional integrity of the Supreme Court of Western Australia

72. *First*, the offence of robbery under s.392 of the *Criminal Code* is not of the character of the laws considered in *Fardon* or *Benbrika.* *Fardon* creates a category in respect of violent sexual offences and sexual offences involving children. Robbery is fundamentally different. Such crimes are invariably opportunistic and caused by poverty.

73. *Second,* there is no correlation in the Act between the nature of prior offending and crimes, the risk against which a detention order is to protect. The Act applies equally to sexual offending, as it does property offending.[84]

74. A fair-minded lay observer, knowing that a court was to consider whether or not a person, having served a term for (say) rape, should be released from prison because of the risk that the person might commit (say) robbery, would likely be incredulous at such absurdity. Such incredulity would readily result in a loss of public confidence in the Court and substantially impair its institutional integrity**.**

75. *Third,* s.7 of the Act requires the Court, in assessing adequate protection of the community, to consider the Western Australian and Australian community and all other communities (s.4). So, a person, having served a term for (say) rape, might not be released because of the risk that the person might commit a robbery in (say) Tunisia if released and deported there. A fair-minded lay observer, knowing this would likely be similarly incredulous, with a similar consequence as to public confidence in the Court.

76. *Fourth,* there are features of the process required by the Act that depart fundamentally from the manner in which courts customarily exercise judicial power. The complexity of s.7 is near Byzantine. It requires regard being had to "acceptable and cogent

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[84] Gummow J (with whom Hayne J agreed at 647 [196]) stated in *Fardon*, 619 [108] (Gummow J): "Mention also should be made of several matters of significance which, taken together with others, support the case in opposition to the appellant's attack on the validity of s 13 of the Act. First, the factum upon which the attraction of the Act turns is the status of the appellant to an application by the Attorney-General as a 'prisoner' (s 5(6)) who is presently detained in custody upon conviction for an offence of the character of those offences of which there is said to be an unacceptable risk of commission if the appellant be released from custody. To this degree there remains a connection between the operation of the Act and anterior conviction by the usual judicial processes. A legislative choice of a factum of some other character may well have imperilled the validity of s 13."

evidence", not admissible evidence.[85] No doubt "acceptable and cogent evidence" includes matters that would not be admissible in a criminal or civil trial. The standard is of "high degree of probability". A person tried for commission of a crime cannot be incarcerated without findings of proof beyond reasonable doubt of past facts. The Act provides that a person can be incarcerated, following assessment of the risk of future matters, on a standard less than beyond reasonable doubt. An onus rests on the offender. A supervision order can only be made if the offender proves that he or she will substantially comply with the standard conditions of the order as made: s.29(1). The onus is on the offender to prove this: s.29(2). The Court is required to have regard to the matters stated in s.7(3), one of which are reports prepared pursuant to s.74. Reports prepared under s.74 might not, indeed often would not, be admissible at a trial. As the evidence considered in *Benbrika* as to the VERA-2 tool illustrates, opinions that would not be admissible in a trial, must be considered in these types of regime. Furthermore, a report under s.74 pre-supposes that an opinion of a psychiatrist or psychologist is relevant to the task required of the Court. Section 74(2)(a) requires a qualified expert to express an opinion on the ultimate issue, and in any event, the same issue as that required by s.7(3)(h).

77. Section 7(3)(c) requires the Court to have regard to whether or not the offender has a propensity to commit (any) serious offences in the future. The Common Law's concern as to propensity evidence[86] is done away with without any of the contemporary legislative machinery dealing with its admission.[87] The (conventional) concern as to the prejudicial effect of propensity evidence, when assessing past fact, must be greater when predicting the future. Section 7(3)(c) requires that regard be had to propensity evidence where such evidence would not be admitted in a criminal trial.

78. Section 46(2) requires that "the offender undergo examination by a psychiatrist and a qualified psychologist for the purpose of preparing reports…to be used on the hearing of the restriction order application". Section 74(1) provides for a compelled psychiatric and psychological examination by the State's nominated psychiatrist and psychologist. This is so even if there were no *a priori* or other reason to think that psychiatric or psychological factors played any part in the offender's past offending. What of an offender in jail for robbery, which was due to poverty? After compelled psychiatric or

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[85] Though a similar formulation was considered in *Fardon.* Section 105A(7) (in Division 105A) of the *Criminal Code* (Cth), considered in *Benbrika* operates upon "admissible" evidence.

[86] Starting with *Makin v Attorney-General for New South Wales* (1894) AC 57.

[87] *Evidence Act 1906* (WA), s.31A.

psychological examination it is found that he is compulsive and therefore there is a risk of him lighting a fire?

Part VII: Orders sought

79. The appellant seeks orders that:

a. The appeal be allowed.

b. The declaration of the Hon. Justice Corboy made on 12 November 2021 be set aside in respect of paragraph (a).

c. This Court declare that the *High Risk Serious Offenders Act 2020* (WA) is invalid insofar as it applies to a serious offender under custodial sentence who has been convicted of the offence of robbery as referred to in item 34 of Schedule 1 Division 1 of the Act.

d. The respondents pay the costs of the appellant of the appeal.

Part VIII: Estimate of length of oral argument

80. It is estimated that the oral argument for the appellant will take 3 hours.

Dated: 20 January 2022

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ANNEXURE

List of the particular constitutional provisions, statutes and statutory provisions referred to in the appellant's submissions including the correct version relevant to the case

	Legislation	Correct version
1.	*The Constitution*, Ch III	In force version
2.	*High Risk Serious Offenders Act 2020* (WA), ss.3, 4, 7, 8, 11, 26, 27, 29, 30, 35, 37, 39, 40, 46, 48, 64, 69, 74; Sch 1	In force version
3.	*Criminal Code* (WA), s.392	In force version
4.	*Dangerous Sexual Offenders Act 2006* (WA), s.3	Ceased version as at 26 August 2020
5.	*Community Protection Act 1994* (NSW)	As made
6.	*Crimes (Serious Crime Prevention Orders) Act 2016* (NSW), s.5	As made
7.	*Criminal Code* (Cth), Div 105A	As at 4 September 2020
8.	*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)	As made
9.	*Evidence Act 1906* (WA), s.31A	In force version
10.	*Habitual Criminals Act 1905* (NSW)	As made
11.	*Inebriates Act 1912 (NSW)*, s.3	As made
12.	*Prevention of Crime Act 1908* (UK), Pt II	As made
13.	*Sentencing Act 1995* (WA), s.98	As made
14.	*Vagrancy Act 1902* (NSW)	As made