HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	P56/2021
File Title:	Garlett v. The State of Western Australia & Anor
Registry:	Perth
Document filed:	Form 27C - Intervener's submissions - NSW
Filing party:	Interveners
Date filed:	18 Feb 2022

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY P56 of 2021

BETWEEN

PETER ROBERT GARLETT
Appellant

AND

THE STATE OF WESTERN AUSTRALIA
First Respondent

THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA
Second Respondent

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I Form of Submissions

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

Part II Basis of Intervention

2. The Attorney General for the State of New South Wales ("NSW Attorney") intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the Second Respondent.

Part III Argument

3. In summary, the NSW Attorney submits:

   (a) that if the principle identified by Brennan, Deane and Dawson JJ in Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 ("Lim") applies to State legislation conferring power on a State court, the High Risk Serious Offenders Act 2020 (WA) ("the Act") does not contravene that principle. The restriction order scheme created by the Act is non-punitive and has as its object the protection of the community from harm. Justice Gummow's proposed reformulation of that principle has not been accepted by this Court;

(b) that the Act does not confer non-judicial power on the Supreme Court of Western Australia ("WA Supreme Court"). The appellant's proposed "historicist mode of reasoning" is unsupported by authority. Even if an historical approach to defining judicial power is adopted, historical considerations support the conclusion that the powers conferred by the Act are judicial in nature; and

(c) that the Act does not impair the institutional integrity of the WA Supreme Court as a repository of federal jurisdiction, so does not contravene the principle in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 ("Kable").

4. In those circumstances, the Act does not infringe Ch III of the Constitution insofar as it applies to a person convicted of robbery, as referred to in item 34 of Division 1 of Schedule 1 to the Act, or otherwise.

Background

5. The factual background to this matter is summarised at [5]-[20] of the Second Respondent's written submissions ("RWS") and is adopted by the NSW Attorney.

Statutory scheme

6. The objects of the Act are "to provide for 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" and "to provide for continuing control, care or treatment of high risk serious offenders" (s 8). The Act creates a scheme for the making of "restriction orders" – which is defined to mean a continuing detention order ("CDO") or a supervision order (s 3) – in respect of "high risk serious offenders". The State may only apply for a restriction order in relation to a "serious offender under custodial sentence" (s 35(1)), which is relevantly defined to mean a person under a custodial sentence for a "serious offence" (s 3). "Serious offence" is relevantly defined to mean an offence specified in Division 1 or 2 of Schedule 1 to the Act (s 5(1)).

7. The ordinary rules of evidence apply to evidence given or called in proceedings under the Act, except as modified by s 84(5) (s 84(4)). Within seven days after making a restriction order application, the State must give the offender a copy of the application and any accompanying affidavits (s 37(2)). As soon as practicable after the preliminary hearing, the State must disclose to the offender any evidentiary material in the possession of the applying agency that may be relevant to the application, as well as any other

"prescribed document" that is in the possession of the applying agency (s 39(1)). The State remains under a continuing obligation to disclose additional evidentiary material that may be relevant to the application (s 39(2)). An offender in respect of whom a restriction order application is made is entitled to appear at the hearing of the application (s 86(2)) and to give or call evidence (s 84(3)).

8. The WA Supreme Court may only make a restriction order if it is satisfied that the person is a "high risk serious offender" as defined in s 7(1) of the Act, which requires the court to be "satisfied, by acceptable and cogent evidence and to a high degree of probability":

   (a) that it is "necessary" to make a restriction order "to ensure adequate protection of the community"; and

   (b) that there is an "unacceptable risk" that the offender will commit a "serious offence".

9. In considering whether it is satisfied that an offender is a high risk serious offender, the court must have regard to the matters set out in s 7(3) of the Act, including a report prepared by a psychiatrist or a qualified psychologist prepared under s 74, information indicating whether or not the offender has a propensity to commit serious offences in the future and any other relevant matter (ss 7(3)(a), (c) and (j)). The onus of proving that an offender is a high risk serious offender is on the State (s 7(2)).

10. If the court finds that the offender is a high risk serious offender, the court must make a CDO or, except as provided in s 29, a supervision order (s 48(1)). Section 29(1) provides that a court cannot make a supervision order unless it is satisfied, on the balance of probabilities, that the offender will substantially comply with the "standard conditions of the order" set out in s 30(2). The onus of proof as to that matter is on the offender (s 29(2)). In deciding whether to make a CDO or a supervision order, the paramount consideration for the court is the need to ensure adequate protection of the community (s 48(2)). A court must give "detailed reasons" for making a restriction order (s 28).

11. Subject to the exceptions in s 69(3), an appeal lies from a decision made under the Act (s 69(1)). In any appeal, the Court of Appeal has all the powers and duties of the court making the decision against which the appeal is made (s 71(2)(a)), which is to be conducted by way of rehearing (s 71(1)). The State must apply to the Supreme Court for a review of an offender's detention under a CDO after the first year spent in custody

pursuant to the order and every two years thereafter (s 64(2)). The Supreme Court may also grant leave to an offender who is subject to a CDO to apply for his or her detention to be reviewed if at least one year has passed since the last review and there are "exceptional circumstances" (s 65). If, on a review, the court does not find that the offender remains a high risk serious offender, it must rescind the CDO (s 68(1)(a)).

Constitutional validity of other preventative order regimes

12. The High Court has dismissed constitutional challenges to preventive order legislation involving sexual offenders, terrorism and organised criminal activity in Fardon v Attorney-General for the State of Queensland (2004) 223 CLR 575 ("Fardon"); Minister for Home Affairs v Benbrika (2021) 95 ALJR 166 ("Benbrika"); Thomas v Mowbray (2007) 233 CLR 307 ("Thomas v Mowbray"); Wainohu v New South Wales (2011) 243 CLR 181 ("Wainohu"); and Condon v Pompano Pty Ltd (2013) 252 CLR 38 ("Pompano"). The Court of Appeal of New South Wales has also upheld the constitutional validity of preventive order legislation concerning sexual offenders and terrorism in Kamm v State of New South Wales (No 4) (2017) 95 NSWLR 179 ("Kamm") and Lawrence v State of New South Wales (2020) 103 NSWLR 401 ("Lawrence") respectively. In Vella v Commissioner of Police (NSW) (2019) 269 CLR 219 ("Vella") at 253 [75], Bell, Keane, Nettle and Edelman JJ observed that the "underlying premise" of the decisions in Wainohu and Pompano was that "fine distinctions could not be drawn to distinguish the terrorism and sexual offender preventive order regimes that were upheld in Thomas v Mowbray and Fardon from these criminal organisation preventive order regimes".

13. As was the case with the impugned legislation in Vella, the Act has "striking similarities" with other regimes that have been previously held to be constitutionally valid: Vella at 246 [57]. In particular, the Act has much in common with the Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) ("Dangerous Prisoners Act"), considered in Fardon.

14. Although there are differences between the terms and operation of the Act and the Dangerous Prisoners Act – such as the fact that the Act applies to different offences and requires standard conditions to be imposed if a supervision order is made – the similarities between the two statutory regimes is demonstrated by Gleeson CJ's summary of the central features of the latter statute in Fardon at 587-588 [6] (see also McHugh J at 596-597 [34]):

> Under Pt 2, Div 3 of the Act, the Supreme Court may order, in respect of a prisoner serving imprisonment for a serious sexual offence, that the prisoner be detained in custody for an indefinite term, or that, upon release, the prisoner be subject to continuing supervision. Any continuing detention order is subject to periodic review. The Court may make such an order only if satisfied that the person would constitute a serious danger to the community, the danger taking the form of "an unacceptable risk that the prisoner [would] commit a serious sexual offence" (s 13(2)). The onus of establishing the serious danger to the community rests on the Attorney-General. It can only be discharged by acceptable, cogent evidence which satisfies the Court to a high degree of probability (s 13(3)). Detailed reasons must be given for any order (s 17). There is an appeal to the Court of Appeal. Provision for interim orders is made (s 8).

15. A majority of the High Court found that, although the Dangerous Prisoners Act invested the Supreme Court of Queensland with powers which might be thought to be at odds with the traditional judicial process because their exercise impinged upon a person's liberty after their sentence had expired, that Act did not compromise the institutional integrity of the Court. The adjudicative process required in making supervision or detention orders supported the maintenance of the Court's institutional integrity and the adjudicative process could be performed independently of any instruction, advice or wish of the legislative or executive branches of government: Fardon at 592-593 [19]-[22] (Gleeson CJ), 596-598 [34]-[35] and 600-602 [41]-[44] (McHugh J), 621 [114]-[117] (Gummow J), 648 [198] (Hayne J) and 658 [234] (Callinan and Heydon JJ). See also Attorney-General (NT) v Emmerson (2014) 253 CLR 393 at 425-426 [43] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

16. The Act also has similarities with Division 105A of the Criminal Code (Cth), the legislation considered in Benbrika, which empowers a Supreme Court of a State or Territory to make a CDO with respect to a "terrorist offender". One of the conditions of making a CDO under Division 105A is that the Court must be "satisfied to a high degree of probability, on the basis of the admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community"(s 105A.7(1)(b)). Key features of that statutory scheme were summarised by Kiefel CJ, Bell, Keane and Steward JJ in Benbrika at 175 [11] as follows:

> A continuing detention order may only be made following an inter partes hearing in open court (subject to the power to close the court under general statutory powers) at which the rules of evidence and procedure apply. The offender has the opportunity to examine and cross-examine witnesses and to make submissions. The onus is on the Minister to establish the conditions for

> the making of the order. The criterion of "unacceptable risk of committing a serious Part 5.3 offence" is capable of judicial application. The Court has a discretion whether to make the order and as to the terms of the order. The Court must give reasons for its decision and the making of the decision is subject to appeal by way of rehearing as of right. (citations omitted)

17. Despite the similarities between the Act and the legislation considered in Fardon and Benbrika, the appellant argues that the Act contravenes Ch III of the Constitution on the basis that it infringes Gummow J's proposed reformulation of the principle identified in Lim, confers non-judicial power on the WA Supreme Court and breaches the Kable principle. For the reasons set out below, each of these arguments should be rejected.

The Act does not breach the Lim principle

18. The appellant contends that this Court should accept the reasoning of Gummow J in Fardon at 612 [80], namely, 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" (appellant's written submissions ("AWS") [23] and [33]). In that paragraph of Gummow J's reasons in Fardon, his Honour sought to reformulate the principle identified by Brennan, Deane and Dawson JJ in Lim at 27-28, namely that, subject to exceptions, "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt" ("the Lim principle"). The appellant asserts that, in Benbrika at 179 [24] and 180 [31], the plurality proceeded from the premise that Gummow J's reasoning in Fardon was correct (AWS [33] and [48]). He submits that the regime created by the Act is not a consequential step in the adjudication of criminal guilt for past acts, thereby contravening Gummow J's reasoning (AWS [24] and [34]).

19. At the outset, it should be noted that the Lim principle, which establishes that it would be beyond the power of the *Commonwealth* Parliament to invest the executive with an arbitrary power to detain citizens in custody due to the doctrine of the separation of powers, arguably does not apply here. The power to make a CDO in the Act is conferred by a *State* Parliament on a State court. This Court has consistently declined to find that there is a separation of powers at the State level: see, for example, Kable at 65 (Brennan CJ), 77-78 (Dawson J), 93-94 (Toohey J), 109 (McHugh J) and 137 (Gummow J); Kirk v Industrial Court (NSW) (2010) 239 CLR 531 at 573 [69] (French CJ,

Gummow, Hayne, Crennan, Kiefel and Bell JJ); and Pompano at 53 [22] (French CJ) and 89-90 [125] (Hayne, Crennan, Kiefel and Bell JJ).

20. Even if the Lim principle does apply to State legislation, Gummow J's preferred formulation of that principle – which "eschews the phrase 'is penal or punitive in character'" and emphasises that the "concern is with the deprivation of liberty without adjudication of guilt rather than with the further question whether the deprivation is for a punitive purpose" (Fardon at 612-613 [81]) – has not been accepted by this Court. In Fardon itself, Callinan and Heydon JJ stated that the relevant question was whether the "impugned law provides for detention as punishment or for some other legitimate non-punitive purpose" (at 653 [215]). In Thomas v Mowbray, Gleeson CJ stated at 330 [18] that it is not correct to say as an absolute proposition that restraints on liberty, whether or not involving detention in custody, exist only as an incident of adjudging and punishing criminal guilt. A majority of the High Court subsequently adopted the traditional formulation of the Lim principle in North Australian Aboriginal Justice Agency v Northern Territory (2015) 256 CLR 569 at 592-593 [37] (French CJ, Kiefel and Bell JJ) and 651-652 [236] (Nettle and Gordon JJ).

21. In Falzon v Minister for Immigration and Border Protection (2018) 262 CLR 333 ("Falzon") at 342 [24], Kiefel CJ, Bell, Keane and Edelman JJ stated, in the context of considering the validity of a law conferring power on the executive to detain non-citizens who were to be removed from Australia:

> It is doubtless correct to observe that the detention of a person by the Executive without more is likely to permit an inference to be drawn that, for some reason, the legislature wishes to punish the person to be detained. That means that the legislature must provide a reason consonant with a non-punitive purpose if the detention is to be justified. (citations omitted)

22. In that case, the plurality rejected a submission that there was a "constitutionally guaranteed freedom from executive detention" which was subject to proportionality analysis and found that the relevant question was whether the legislative power of detention was necessary, which was "an enquiry as to the true purpose of the law authorising detention" (at 343 [25] and 344 [31]). Their Honours accepted that "a legislative power to detain must be justified, in the sense that it must be shown to be directed to a purpose other than to punish" (at 344 [33]). Justice Nettle also stated that detention "derives its character from its purposes" (at 360 [96]).

23. More recently, in Benbrika, Kiefel CJ, Bell, Keane and Steward JJ noted that Gummow J favoured reformulating the Lim principle by removing reference to whether the detention is "penal or punitive in character" in order to emphasise that the "constitutional concern is with the deprivation of liberty without adjudication of guilt" (at 179 [24]). Their Honours observed that the traditional formulation of the Lim principle has a "long pedigree under our inherited common law tradition" (at 177 [19]) and stated that the exceptions to the principle identified in Lim, involving the involuntary detention of those suffering from mental illness or infectious disease, "share a purpose of protection of the community from harm". Their Honours considered that Gummow J "did not explain why an appropriately tailored scheme for the protection of the community from the harm that particular forms of criminal activity may pose is incapable of coming within an analogous exception" (at 180 [32]).

24. Contrary to the appellant's claim, the plurality did not accept Gummow J's reformulation of the Lim principle. Rather, Kiefel CJ, Bell, Keane and Steward JJ endorsed the distinction between laws that are "penal or punitive" and those that are protective. Their Honours stated:

> 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.

25. Justice Edelman also concluded in Benbrika at 220-221 [215]-[216] that there is "insufficient constitutional foundation" to expand the Lim principle from one which is concerned with the separation of powers to one founded upon the liberty of the individual which "denies to the State the power to implement a policy choice that deprivation of liberty is required for an orderly society".

26. These passages reveal that Gummow J's proposed modification of the Lim principle has not been adopted by this Court. The relevant inquiry, in considering whether the Lim principle has been infringed, is the "true purpose of the law authorising detention": Falzon at 344 [31]. A scheme for preventative detention will not infringe the Lim

principle if the scheme is non-punitive and has as its object the protection of the community from harm: Benbrika at 181 [36] (Kiefel CJ, Bell, Keane and Steward JJ).

27. It is well established that preventive order regimes are protective in nature: Fardon at 592 [19]-[20] (Gleeson CJ), 597 [34] (McHugh J) and 654 [217] and 655 [219] (Callinan and Heydon JJ); Thomas v Mowbray at 357 [121] (Gummow and Crennan JJ); and Hogan v Hinch (2011) 243 CLR 506 at 548 [69] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). In Vella at 254-255 [78], the plurality stated, in rejecting a submission that the Crimes (Serious Crime Prevention Orders) Act 2016 undermined the criminal justice system of State courts:

> The error in these submissions is that they seek to equate the civil preventive order regime with the regime for prosecution and punishment for past criminal offences … The relevant point is that the regime is separate and distinct from traditional criminal justice … Prosecutions for criminal offences involve trials for offences based upon past conduct. The civil preventive order regime for serious crime is not a trial of any offence. It anticipates future risk, albeit with the past commission of an offence as "a step in the decision" about future risk. The regimes thus involve different responses to a different subject matter. (citations omitted)

28. The powers in the Act are protective, not punitive. This is made clear by the first object of the Act, which is "to provide for 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". The means of attempting to ensure there is adequate community protection is by providing not only for the continuing control of high risk serious offenders, but also for their care and treatment, as reflected in the second object of the Act. The protective purpose of the Act is also demonstrated by the requirement that there be periodic reviews of an offender's detention to ensure that detention only continues where necessary; the fact that an offender may initiate a review of a restriction order; and the requirement that, in deciding whether to make a CDO or a supervision order, the court give paramount consideration to the need to ensure adequate protection of the community.

29. Most significantly, the protective purpose of the statutory scheme is reflected in the definition of "high risk serious offender" itself – the definition on which "[t]he Act in effect operates" (AWS [18]) – which provides that a CDO can only be made if the court is satisfied, by acceptable and cogent evidence and to a high degree of probability, that it is "necessary to make a restriction order … to ensure adequate protection of the

community". This definition makes clear that the Act is "focussed upon the unacceptable risk of harm, or potential harm, caused by the possible offending", rather than with "the offender committing an offence regardless of the consequences of that offending for the community": Benbrika at 209 [170] and 210 [176] (Gordon J).

30. For these reasons, the Act does not infringe the Lim principle. Justice Gummow's proposed reformulation of that principle does not reflect the state of the law.

The Act does not confer non-judicial power on the WA Supreme Court

31. The appellant challenges the validity of the Act on the ground that it purports to confer a non-judicial power on the WA Supreme Court (AWS [27]). He does so on three bases.

32. *First*, the appellant asserts that the Act confers non-judicial power because there are no "long and constant antecedents" of the kind of power conferred by the Act on common law courts (AWS [35]). The appellant asks this Court to adopt a "historicist mode of reasoning", which is said to require "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" (AWS [36]). Applying that mode of reasoning, the appellant submits that the power conferred by the Act "is not a judicial power – because it requires the court to do something that Courts have not historically done" (AWS [65]).

33. The appellant cites no authority for the proposition that the question of whether a power is judicial in nature should be resolved by applying a "historicist mode of reasoning". The authorities support the contrary conclusion. In Palmer v Ayres (2017) 259 CLR 478 at 494 [37], Kiefel, Keane, Nettle and Gordon JJ found that "[h]istory alone does not provide a sufficient basis for defining the exercise of power as judicial … [I]t is neither necessary nor appropriate to rely on a purely historical basis to define [a] power and its processes as an exercise of judicial power". Similarly, in White v Director of Military Prosecutions (2007) 231 CLR 570 at 595 [48], Gummow, Hayne and Crennan JJ observed that there are several difficulties in an "historical approach" to defining judicial power, such as the fact that modern legislation is "of a nature and with a scope for which there is no readily apparent analogue in the pre-federation legal systems of the colonies". Their Honours also noted that such an approach does not allow for "what has become a significant category of legislation where a power or function takes its character as judicial or administrative from the nature of the body in which the Parliament has located it".

34. The appellant has identified no reason why his proposed approach should be adopted. An historicist mode of reasoning "would be to place reliance upon the elements of history and policy which, whilst they are legitimate considerations, cannot be conclusive": Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245 at 267 (Deane, Dawson, Gaudron and McHugh JJ).

35. In any event, an historical approach to defining judicial power militates against the conclusion that the Act confers non-judicial power on the WA Supreme Court. As Edelman J observed in Benbrika at 226 [233], "even if there were doubt about whether the making of continuing detention orders by courts involved an exercise of judicial power, historical considerations would provide confirmation". This Court his repeatedly observed that legislative schemes for preventative detention of offenders who are regarded as a danger to the community have a "long history" in common law countries: see eg Fardon at 590 [13] (Gleeson CJ) and 613 [84] (Gummow J); Benbrika at 180-181 [33] (Kiefel CJ, Bell, Keane and Steward JJ).

36. To take one example, the Habitual Criminals Act 1905 (NSW), referred to in both Fardon and Benbrika, provided that any person who was convicted on indictment of an offence included in classes II, III or IV in the schedule to that Act, and who had previously been convicted of an offence of the same class on at least two occasions, may be declared as part of the sentence to be an habitual criminal (s 3(a)). Where such person was convicted of an offence included in any other class in the schedule to that Act, and who had been previously so convicted on at least three occasions of an offence within the same class, the judge could, in his or her discretion, also declare the person to be an habitual criminal (s 3(b)). Various offences contrary to the Crimes Act 1900 (NSW) were listed in the schedule, including, in class V, robbery (s 94), robbery with striking (s 95), robbery with wounding (s 96), armed robbery or robbery in company (s 97) and armed robbery or robbery in company causing wounding (s 98). A habitual criminal was to be detained until the Governor determined that the person was sufficiently reformed, or directed his release for other good cause (ss 5 and 7).

37. The appellant seeks to distinguish the Act from the Habitual Criminals Act on the basis that the latter statute "empowered the ordering of post sentence detention at the time of sentencing". The appellant has identified no principled basis as to why this consideration should determine whether a power to order preventative detention is judicial in nature.

As Gleeson CJ stated in Fardon at 586 [2], a passage cited by the plurality in Benbrika at 181 [34]:

> If it is lawful and appropriate for a judge to make an assessment of danger to the community at the time of sentencing, perhaps many years before an offender is due to be released into the community, it may be thought curious that it is inappropriate for a judge to make such an assessment at or near the time of imminent release, when the danger might be assessed more accurately.

38. Of course, the preventative detention schemes considered in Fardon, Kamm, Lawrence and Benbrika are also antecedents to the Act, albeit relatively recent ones. For these reasons, the appellant's contention that the Act confers a non-judicial power on the WA Supreme Court because there are no antecedents of such powers being exercised by common law courts should not be accepted.

39. *Secondly*, the appellant contends that the Act purports to confer non-judicial power on the WA Supreme Court on the ground that the offences to which the Act applies are neither "crimes of the utmost seriousness, involving the 'worst class of offender'", nor "necessarily extraordinary", in alleged contrast to the offences to which the legislation examined in Fardon and Benbrika apply (AWS [56]-[57]). In essence, this amounts to an argument that the Act confers a non-judicial power on the WA Supreme Court because the factum which triggers its operation – the offender's commission of a "serious offence" – is different to the factums which engage the Dangerous Prisoners Act and Division 105A of the Criminal Code, which are that the offender has committed a "serious sexual offence" and a "terrorist offence" respectively.

40. This Court concluded in Fardon that the power conferred by the Dangerous Prisoners Act to order the continuing detention of a prisoner who was found to be a danger to society was a "judicial power" that did not compromise the Supreme Court's institutional integrity: see Benbrika at 181 [35]. Similarly, a majority of this Court concluded in Benbrika that Division 105A of the Criminal Code validly conferred the judicial power of the Commonwealth on the Supreme Court of a State or Territory: Benbrika at 185 [48] (Kiefel CJ, Bell, Keane and Steward JJ), 211 [182] and 227 [239] (Edelman J). The selection of a different factum to trigger the operation of the Act does not transform the exercise of power to order preventative detention from a judicial into a non-judicial one.

41. In substance, as was found by the primary judge in the present case (The State of Western Australia v Garlett [2021] WASC 387 ("Garlett") at [157] (Appeal Book ("AB") 63)), the appellant's submission amounts to:

> an objection to the policy embodied in the legislative decision to include robbery and assault with intent to rob as serious offences – and the point of departure for the respondent's submission were subjective views about the nature and seriousness of the offences, the circumstances in which they are likely to be committed and the efficacy of the … Act as applied to the offences (the inclusion of the offences was not a 'carefully crafted response' to a problem that warranted legislative intervention of the kind provided for by the Act). Further, the submission, paid little heed to the operation of the Act – the process of risk assessment and the balancing exercise involved in determining whether it is necessary to make a restrictive order to ensure adequate protection of the community.

42. *Thirdly*, the appellant appears to make a similar argument to one made in Benbrika, namely, that a "scheme for preventative detention of the kind considered in Fardon is not an exception to the Lim principle and for that reason may not be conferred as … judicial power": Benbrika at 177 [16]; see AWS [23]-[24], [32]-[34] and [39]-[44]. For the reasons outlined above, a preventative detention scheme of the kind established by the Act *is* an exception to the Lim principle. Accordingly, the appellant's apparent submission that the Act confers a non-judicial power on the WA Supreme Court because it breaches the Lim principle is without foundation.

43. In any event, even if the Act *does* confer non-judicial power on the WA Supreme Court (which it does not), this will not, in itself, result in the invalidity of the legislation. A conferral of non-judicial power by a State legislature on a State court will only be incompatible with Ch III if it infringes the Kable principle. As Kiefel CJ, Bell, Keane and Steward JJ observed in Benbrika at 178 [20] in discussing the Dangerous Prisoners Act:

> The absence of separation of powers under the Constitutions of the States allows that non-judicial functions may be conferred on the Supreme Courts provided the conferral does not substantially impair the institutional integrity of the Court as one in which federal jurisdiction is invested. On the authority of Kable v Director of Public Prosecutions (NSW), the conferral of a non-judicial function that undermines the appearance of the independence and impartiality of the Court will be beyond legislative power. (citation omitted)

44. For these reasons, the appellant's claim that the Act contravenes a requirement of Ch III of the Constitution because it confers non-judicial power on the WA Supreme Court cannot be sustained.

The Act does not impair the institutional integrity of the WA Supreme Court

45. For the reasons outlined at [18]-[30] above, the preventative detention scheme established by the Act falls within an exception to the Lim principle. Accordingly, this appeal "does not raise consideration of the Kable limitation, if any, on legislative power to confer on the Supreme Court of a State or Territory the function of ordering the detention in custody of a person in circumstances that do not fall within an exception to the Lim principle": Benbrika at 181 [35]. To the extent that the appellant challenges the validity of the Act on Kable grounds, the question is "the effect of the legislation upon the institutional integrity of the Supreme Court, rather than its effect upon the personal liberty of the appellant", which requires consideration of "the involvement of the Supreme Court in the decision-making process as to detention": Fardon at 586 [2] and 591 [18] (Gleeson CJ).

46. The Chief Justice elaborated upon the constitutional question in Fardon at 586-587 [3] and 592 [20] as follows:

> The outcome turns upon a relatively narrow point, concerning the nature of the function which the Act confers upon the Supreme Court. If it is concluded that the function is not repugnant to the institutional integrity of that Court, the argument for invalidity fails.
> …
> Unless it can be said that there is something inherent in the making of an order for preventive, as distinct from punitive, detention that compromises the institutional integrity of a court, then it is hard to see the foundation for the appellant's argument.

47. More recently, in Vella at 253-254 [75], Bell, Keane, Nettle and Edelman JJ stated – after surveying the cases in which the High Court had concluded that preventive order regimes did not infringe the Kable principle – that the "material features [of those regimes] were the risk assessment and the balancing exercise. The validity turned upon the risk and balancing criteria, with a focus upon the conduct of an organisation in the criminal organisation context, as well as a focus on the conduct of an individual in the terrorism preventive order legislation and the sexual offender preventive order legislation upheld in Thomas v Mowbray and Fardon".

48. The appellant has not demonstrated that the risk assessment and balancing exercise for which the Act provides, nor the factum which engages its operation, effect an "impermissible executive intrusion into the processes or decisions of a court; which would authorise the executive to enlist a court to implement decisions of the executive

in a manner incompatible with that court's institutional integrity; or which would confer upon any court a function (judicial or otherwise) incompatible with the role of that court as a repository of federal jurisdiction": Wainohu at 210 [46] (French CJ and Kiefel J) (citations omitted). By conferring the powers under the Act on the WA Supreme Court, Parliament has attempted to "ensure that the powers [will] be exercised independently, impartially, and judicially": Fardon at 592 [20] (Gleeson CJ).

49. The appellant makes four arguments in support of his claim that the Kable principle has been infringed.

50. *First*, he asserts that the "nature of the crimes" captured by the Act are such that a scheme for preventative detention in respect of such crimes would affect public confidence in the WA Supreme Court. He contrasts those crimes with the offences that are the subject of the Dangerous Prisoners Act, contending that 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" (AWS [69]).

51. This argument does not withstand scrutiny. As Gleeson CJ stated in Fardon at 593 [23], "nothing would be more likely to damage public confidence in the integrity and impartiality of courts than judicial refusal to implement the provisions of a statute upon the ground of an objection to legislative policy". It is "rarely the role of a court to second-guess Parliament's decision about the seriousness of the harm that various crimes will have to the community": Benbrika at 224 [228] (Edelman J).

52. The WA Supreme Court may only make a CDO if it is satisfied to a high degree of probability that it is necessary to make a restriction order to ensure adequate protection of the community and that there is an unacceptable risk that the offender will commit a "serious offence". Some of the serious offences listed in Division 1 or 2 of Schedule 1 to the Act, such as robbery, may satisfy those statutory tests less regularly than is the case for other offences listed in that Schedule, such as murder and sexual offences against children. In this respect, the following comments of the plurality in Benbrika at 185 [47] in discussing Division 104 of the Criminal Code are instructive:

> Correctly understood, a continuing detention order could not properly be made by a Court … in a case where the only risk of offending identified by the authorities did not carry a threat of harm to members of the community

> that was sufficiently serious in the assessment of the Court as to make the risk of the commission of the offence "unacceptable" to that Court.

53. The fact that Parliament has chosen a broader range of crimes to trigger the operation of the Act than the legislation examined in Fardon and Benbrika – which could potentially have the consequence that the statutory tests in the Act are more difficult to satisfy for some crimes than might be the case for the other statutes – does not render the Act invalid. Subject to the qualification that the Parliament of a State may not enact a law which subjects a court in reality or appearance to direction from the executive as to the content of its judicial decisions, the Parliament may "select whatever factum that it wishes to trigger a consequence that it determines": Kuczborksi v Queensland (2014) 254 CLR 51 ("Kuczborski") at 139 [303] (Bell J); see also Baker v The Queen (2004) 223 CLR 513 at 532 [43] (McHugh, Gummow, Hayne and Heydon JJ).

54. *Secondly,* the appellant submits that there is no correlation in the Act between the nature of prior offending and the risk against which a detention order is to protect. In support of this claim, the appellant suggests that the Act may be found to apply to an offender who is convicted of rape and who has a risk of committing robbery (AWS [73-[74]]).

55. A simple answer to this submission is that an offender's conduct in committing an offence of rape would not, without more, give rise to an unacceptable risk of the offender committing robbery. As Bell, Keane, Nettle and Edelman JJ stated in Vella at 242 [46] in rejecting an argument that a preventive order could be made under the Crimes (Serious Crime Prevention Orders) Act 2016 against a person who had a single historical conviction for an offence of stealing clothing from a department store:

> Without more, a single historical conviction for such a theft would not be sufficient to give rise to a real or significant risk that the person would commit the same offence, or any other serious offence, in the future.

56. In any event, this question does not arise here. The appellant has an extensive criminal history of committing robbery offences, including four convictions for aggravated armed robbery, one conviction for armed robbery, three convictions for aggravated robbery and one conviction for aggravated armed assault with intent to rob: Garlett at [240] (AB 91). The basis of the State's restriction order application is that the appellant poses an unacceptable risk of committing further armed robberies: Garlett at fn 11 (AB 25). It is "not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order

to do justice in the given case and to determine the rights of the parties": Lambert v Weichelt (1954) 28 ALJ 282 at 283. For a constitutional question to be decided by the Court, it needs to be shown "that there exists a state of facts which makes it necessary for that question to be decided": Duncan v New South Wales (2015) 255 CLR 388 at 410 [52] (the Court). See also Zhang v Commissioner of Police (2021) 95 ALJR 432 at 437 [21] (the Court); LibertyWorks Inc v The Commonwealth (2021) 95 ALJR 490 at 511 [90] (Kiefel CJ, Keane and Gleeson JJ). That condition is not met in the present case.

57. *Thirdly*, the appellant impugns the requirement in s 7(3)(i) that the court have regard to the need to protect "members of the community" from the risk that the offender would commit a serious offence in determining whether an offender is a "high risk serious offender". He points to the fact that "community" is defined in s 4 to include "any community and is not limited to the community of Western Australia or Australia", such that 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". He submits that a fair-minded lay observer would likely be incredulous at such absurdity, resulting in a loss of public confidence in the court (AWS [75]).

58. Judges of the WA Supreme Court can be expected, and trusted, to have regard only to *relevant* communities in considering the need to protect community members from the risk the offender would commit a serious offence. The constitutional validity of the Act should be assessed bearing in mind practical realities and likelihoods, not remote or fanciful possibilities: Wainohu at 241 [153] (Heydon J).

59. *Fourthly,* the appellant argues that there are features of the process for which the Act provides that "depart fundamentally from the manner in which courts customarily exercise judicial power" (AWS [76]), namely, that the Act alters the rules of evidence in a number of ways (AWS [76]-[77]); provides for a different standard and onus of proof to a criminal trial (AWS [76]); and requires the Court to have regard to expert reports "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" (AWS [78]).

60. It is well-established that the legislature may alter the rules of evidence without impairing a court's institutional integrity. As McHugh J noted in Fardon at 601 [41], "State legislation may alter the burden of proof and the rules of evidence and procedure in civil and criminal courts in ways that are repugnant to the traditional judicial process without

compromising the institutional integrity of the courts that must administer that legislation". Similarly, in Nicholas v The Queen (1998) 193 CLR 173 ("Nicholas"), Brennan CJ stated at 189 [23]:

> The rules of evidence have traditionally been recognised as being an appropriate subject of statutory prescription. A law prescribing a rule of evidence does not impair the curial function of finding facts, applying the law or exercising any available discretion in making the judgment or order which is the end and purpose of the exercise of judicial power.

61. His Honour went on to state that if the impugned provision in that case "had simply declared that evidence … should be admitted, denying any discretion in the trial judge to exclude the evidence, the provision would simply have enlarged the evidentiary material available to a jury to assist it to find the facts truly. It would have been a mere procedural law assisting in the court's finding of material facts. No exception could be taken to such a law consistently with the authorities": Nicholas at 191 [26]; see also at 273 [235] and 278 [251] (Hayne J).

62. It is also well-settled that Parliament can fix the standard of proof without it being repugnant to Ch III: Thomas v Mowbray at 356 [113] (Gummow and Crennan JJ) and 508 [598] (Callinan J). Similarly, it is within the competence of a State Parliament to design a scheme that reverses the onus of proof: Kuczborski at 122 [240] (Crennan, Kiefel, Gageler and Keane JJ); Thomas v Mowbray at 356 [113] (Gummow and Crennan JJ). In Nicholas at 190 [24], for example, Brennan CJ cited Rich and Starke JJ's statement in Williamson v Ah On (1926) 39 CLR 95 at 127 that a grant of power to make laws for the peace, order and good government of a territory carried with it a power to enact laws "regulating the burden of proof, both in civil and criminal cases … and it is not for the courts of law to say whether the power has been exercised wisely or not"; see also at 225 [123] (McHugh J) and 234-236 [152]-[156] (Gummow J).

63. In those circumstances, there is no substance in the appellant's submissions that there is constitutional difficulty arising from the standard of proof specified in s 7(1), the fact that s 29(2) places the onus of proof on the offender to demonstrate that he or she will substantially comply with the standard supervision conditions, or the requirement in s 7(3)(c) that the court have regard to propensity evidence in considering whether it is satisfied that an offender is a high risk serious offender (AWS [76]-[77]). The fact that s 7(1) only requires the court to be satisfied that an offender is a high risk serious offender by "acceptable and cogent evidence", as opposed to admissible evidence, cannot properly

be the source of objection in circumstances where s 13(3) of the Dangerous Prisoners Act contained the same evidentiary standard, the validity of which was upheld in Fardon, a decision which is not sought to be reopened here.

64. The appellant also claims that the institutional integrity of the WA Supreme Court is impaired by the fact that s 46(2) of the Act requires the Court to order that a psychiatrist and a qualified psychologist examine and furnish reports about the offender to be used on the hearing of a restriction order application even if there is no reason to consider that psychiatric or psychological factors played any part in the offending conduct (AWS [76] and [78]). This argument is without merit. The legislation considered in Fardon and Benbrika contained comparable provisions. Sections 11(2) and 13(4) of the Dangerous Prisoners Act, for example, required the court to have regard to psychiatric reports indicating, with reasons, an assessment of the level of risk that the prisoner would commit another serious sexual offence if released from custody or without the making of a supervision order. The fact that s 13(4) required the court to have regard to this and other "relevant and important" matters did not support a finding in Fardon that the Dangerous Prisoners Act was invalid; rather, it was a "safeguard" which supported the conclusion that the statute *was* valid: Fardon at 656-657 [224]-[225] (Callinan and Heydon JJ); see also at 592 [19] (Gleeson CJ) and at 602 [44] (McHugh J).

65. The expert reports merely assist the Court in determining whether the "unacceptable risk" test and the "adequate protection of the community" test in s 7(1) of the Act are satisfied. As Callinan and Heydon JJ noted in Fardon at 658 [229] in relation to s 8(2) of the Dangerous Prisoners Act:

> It should be observed at this point that it is possible, although in practice almost unthinkable that, having regard to the discretion apparently conferred on the Court by s 8(2) of the Act whether to order psychiatric examinations and reports, the Court might make a continuing detention order in their absence. Whether however in doing so, a court would be acting on acceptable, cogent evidence establishing unacceptable risk to a high degree of probability is another matter.

66. No breach of the Kable principle has been established. The Act does not deny the WA Supreme Court an essential characteristic of a court exercising federal jurisdiction, attack the institutional integrity of the Court as an independent and impartial tribunal or derogate from the Court's capacity to act with impartiality and fairness in the discharge of its functions and powers.

Part IV Estimate of time for oral argument

67. It is estimated that 10 minutes will be required for oral argument.

Dated: 18 February 2022

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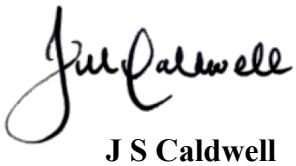

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY P56 of 2021

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 ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

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

	Description	Relevant date in force	Provisions
1.	Commonwealth Constitution	Current	Ch III
Statutes			
2.	Crimes Act 1900 (NSW)	As made	Sections 94 to 98
3.	Criminal Code (Cth)	Current	Division 105A
4.	Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)	As made	Sections 8, 11, 13, 17
5.	Habitual Criminals Act 1905 (NSW)	As made	Sections 3, 5, 7 and the Schedule
6.	High Risk Serious Offenders Act 2020 (WA)	Current	Sections 3, 5, 7, 8, 28, 29, 30, 35, 37, 39, 46, 48, 64, 65, 68,

	Description	Relevant date in force	Provisions
			69, 71, 84 and Schedule 1, Division 1, item 34