HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	P56/2021
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Important Information

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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

OUTLINE OF ORAL 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 Argument

2. 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.

3. It is the protective purpose that qualifies a power as an exception to the Lim principle. As a matter of substance, the power must have as its object the protection of the community from harm: Minister for Home Affairs v Benbrika (2021) 95 ALJR 166 ("Benbrika") at 181 [36]. The restriction order scheme created by the Act is non-punitive and has as its object the protection of the community from harm. This is made clear by the objects of the Act; the definition of "high risk serious offender, which provides that a restriction order 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; the requirement that there be periodic reviews of an offender's detention to ensure that detention only continues where necessary; and the fact that an offender may initiate a review of a restriction order.

4. 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. To take one example, the Habitual Criminals Act 1905 (NSW) relevantly provided that any person who was convicted of an offence included in class V in the schedule to that Act – including 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) – and who had been previously so convicted on at least three occasions of an offence within the same class, could be declared, in the exercise of the judge's discretion, to be an habitual criminal (s 3(b)). 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).

5. 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 v Attorney-General for the State of Queensland (2004) 223 CLR 575 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.

6. 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 principle in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51: Benbrika at 178 [20].

7. 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.

8. The appellant's claim that the features of the process for which the Act provides depart from the manner in which courts customarily exercise judicial power is without merit. It is well-established that the legislature may alter the rules of evidence and the onus and standard of proof without impairing a court's institutional integrity. 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 does not support a finding that the Act is invalid; rather, it is a safeguard which supports the conclusion that the statute *is* valid: see Fardon at 656 [224] and 658 [229] (Callinan and Heydon JJ); see also at 592 [19] (Gleeson CJ). Those reports are relevant to determining whether the "unacceptable risk" test and the "adequate protection of the community" test in s 7(1) of the Act are satisfied.

Dated: 10 March 2022

M G Sexton SC SG

J S Caldwell