HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN:

PETER ROBERT GARLETT
Appellant

and

THE STATE OF WESTERN AUSTRALIA
First Respondent

THE ATTORNEY-GENERAL FOR WESTERN AUSTRALIA
Second Respondent

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SUBMISSIONS OF THE ATTORNEY-GENERAL FOR VICTORIA (INTERVENING)

PARTS I, II AND III — CERTIFICATION AND INTERVENTION

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

2 The Attorney-General for Victoria (**Victoria**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Second Respondent.

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PART IV — ARGUMENT

A INTRODUCTION

3 Under the *High Risk Serious Offenders Act 2020* (WA) (**HRSO Act**), the State of Western Australia may apply to the Supreme Court of Western Australia for a "restriction order" — being a "continuing detention order" (s 26) or a "supervision order" (s 27) — in relation to a person who is a "serious offender under custodial sentence" (s 35). The court must then determine, by orthodox judicial process, if the person is a "high risk serious offender". A person will meet that description 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 in relation to the offender to ensure adequate protection of the community against an unacceptable risk that the offender will commit a serious offence" (s 7). If the

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court finds that a person meets this description, the court must make a restriction order (s 48).

4 The Appellant contends that the involvement of the Supreme Court in that scheme infringes the principle identified in *Kable v Director of Public Prosecutions (NSW)*[1] (the "***Kable* principle**") in so far as it operates by reference to a person who is a "serious offender under custodial sentence" by reason of a conviction for "robbery". That challenge must be rejected for the reasons given in *Fardon v Attorney-General (Qld)*,[2] in which the Court rejected a challenge based on the involvement of the Supreme Court of Queensland in an analogous scheme. The authority of *Fardon* has been reinforced by *Thomas v Mowbray*,[3] *Vella v Commissioner of Police (NSW)*[4] and *Minister for Home Affairs v Benbrika*.[5]

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5 Like each of the schemes considered in those decisions, which may be described as "**protective order schemes**", the HRSO Act contains the following combination of features:

5.1 the object of the court's power to make a restriction order is to protect the community from future harm that may be caused by an individual;

5.2 the court's power is conditioned on the court making evaluative judgements about the risk posed by the individual and what is needed to protect the community from that risk, by reference to criteria that are readily capable of judicial application; and

20 5.3 the court's power is to be exercised in accordance with procedures that are ordinary incidents of the exercise of judicial power.

6 The combination of those features ensures that the HRSO Act does not substantially impair the institutional integrity of the Supreme Court of Western Australia. The appeal to this Court must therefore be dismissed.

B THE *KABLE* PRINCIPLE

7 The *Kable* principle derives from Ch III of the Constitution and limits the legislative power of the States and Territories. A State or Territory law will infringe the *Kable*

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1 (1996) 189 CLR 51.

30 2 (2004) 223 CLR 575.

3 (2007) 233 CLR 307.

4 (2019) 269 CLR 219.

5 (2021) 95 ALJR 166.

principle if it purports to confer on a State or Territory "court" a power or function that substantially impairs the court's "institutional integrity".[6] That is because the conferral of a power or function that has that effect is incompatible with the court's role as a repository of federal jurisdiction in the integrated court system established by the Constitution.[7] A court with that role must remain an "independent and impartial tribunal".[8]

8 Those statements of principle are not in dispute (**AS [59]**, **WA [52]**). However, in light of the Appellant's submissions, it is necessary to clarify two points.

9 *First*, "[p]erception as to the undermining of public confidence is an indicator, but not the touchstone, of invalidity; the touchstone concerns institutional integrity" (cf **AS [66]-[68], [74]-[75]**).[9] It is always necessary to undertake a holistic assessment of the impugned law to determine whether it has the effect of "substantially impairing" the institutional integrity of the court upon which the power or function has been conferred (see **WA [53]**, and paragraphs 17 to 18 below).

10 *Second*, and relatedly, because the operation of the *Kable* principle hinges upon the maintenance of the court's "institutional integrity",[10] the question of whether a power can be characterised as "judicial" or "non-judicial" is not determinative of whether the principle has been infringed. Contrary to an assumption made by the Appellant (**AS [31], [53], [65]**), it is possible for the conferral of a "judicial" power or function to infringe the principle (see also **WA [74]**).[11]

11 Nonetheless, if a law confers upon a court a "judicial" power, that is a powerful indication that the law will not infringe the principle. That is because, so long as the power is to be

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6 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), quoted in *Vella* (2019) 269 CLR 219 at [55] (Bell, Keane, Nettle and Edelman JJ). See also *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569 at [39] (French CJ, Kiefel and Bell JJ).

7 *Emmerson* (2014) 253 CLR 393 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

8 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

9 *Fardon* (2004) 223 CLR 575 at [102] (Gummow J), see also at [23] (Gleeson CJ); *Vella* (2019) 269 CLR 219 at [80] (Bell, Keane, Nettle and Edelman JJ).

10 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ).

11 See *Benbrika* (2021) 95 ALJR 166 at [82] (Gageler J), citing *Kable* (1996) 189 CLR 51. See also *New South Wales v Kable* (2013) 252 CLR 118 at [17]-[18], [24]-[27] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), [69]-[77] (Gageler J); Stellios, "*Kable*, preventative detention and the dilemmas of Chapter III" (2014) 88 *Australian Law Journal* 52; *Emmerson* (2014) 253 CLR 393 at [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

exercised in a "manner" that is consistent with the essential character of a court and with the nature of judicial power,[12] the law could be enacted by the Commonwealth Parliament. And, as the as the Appellant acknowledges (**AS [22], [29]-[31]**), the "'occasion for the application of *Kable* does not arise' if the impugned State law would not offend Ch III had it been enacted by the Commonwealth Parliament for a Ch III court".[13]

C STRIKING SIMILARITY WITH VALID PROTECTIVE ORDER SCHEMES

12 The HRSO Act does not substantially impair the institutional integrity of the Supreme Court of Western Australia. It is not "extreme" legislation of the kind that has been held to infringe the principle, such as the law in *Kable* itself.[14]

10 13 To the contrary, the HRSO Act is not relevantly distinguishable from the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) upheld in *Fardon* (**WA [22]-[23]**). Like the HRSO Act, the legislation upheld in *Fardon* allowed for the making of both continuing detention orders and supervision orders. Further:

13.1 in so far as the HRSO Act permits the making of *supervision orders*, it is not relevantly distinguishable from Div 104 of the *Criminal Code* (Cth), upheld in *Thomas*, or the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW), upheld in *Vella*.

13.2 in so far as the HRSO Act permits the making of *continuing detention orders*, it is not relevantly distinguishable from Div 105A of the *Criminal Code* (Cth), upheld in *Benbrika*.

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14 In each of those cases, the Court upheld the validity of the relevant scheme in the face of Ch III challenges (*Thomas and Benbrika* not being *Kable* challenges but being relevant for the reasons explained in paragraph 11 above). The Appellant does not ask the Court to overrule any of those cases (see also **WA [61]**, **[63]**).

15 The Appellant does, however, focus heavily on whether the nature of the power conferred by the HRSO Act is "judicial". It is in that context that the second point of clarification

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[12] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

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[13] *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [126] (Hayne, Crennan, Kiefel and Bell JJ), quoting *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at [14] (the Court).

[14] See *Vella* (2019) 269 CLR 219 at [56] (Bell, Keane, Nettle and Edelman JJ). See also *Fardon* (2004) 223 CLR 575 at [33] (McHugh J), [144(1)] (Kirby J).

discussed at paragraphs 10 to 11 above becomes significant. Because the protective order schemes considered in *Thomas* and *Benbrika* concerned federal — rather than State — adjudicative authority, the decisions necessarily involved the Court accepting that those schemes involved the exercise of judicial power (**WA [62]**, **[68]**).[15] Contrary to **AS [53]**, the nature of the power conferred by the scheme considered in *Fardon* can also be understood as having that character, reflecting the view expressed by McHugh J in that case and subsequently endorsed by the plurality in *Benbrika*.[16]

16 Consistent with those authorities, the power to make a restriction order, when conferred upon the Western Australian Supreme Court, is "judicial" (**WA [72]**). The Appellant's submissions to the contrary are inconsistent with those authorities and must be rejected (**AS [52]-[58]**). It follows also that the Appellant's submissions regarding the existence of historical antecedents can be put to one side (**AS [25], [37]-[51], [65]-[66]**). It is now too late to suggest that a lack of a historical antecedent is fatal to the validity of protective order schemes.

17 Of course, "the constitutional validity of one law cannot be decided simply by taking what has been said in earlier decisions of the Court about the validity of other laws and assuming, without examination, that what is said in the earlier decisions can be applied to the legislation now under consideration".[17] However, the authorities illustrate the utility of undertaking a close assessment of the statutory schemes in other cases involving the *Kable* principle.[18] Indeed, as a matter of principle, that approach is desirable, because it will assist in the principled, coherent and systemic development of categories where legislation will infringe the *Kable* principle.[19]

18 Bearing that in mind, the authorities demonstrate that whether a law infringes the *Kable* principle depends upon an evaluative assessment of the "combination" of features of the statutory scheme in question.[20] For example, it was the "particular combination of

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15 See *Benbrika* (2021) 95 ALJR 166 at [14] (Kiefel CJ, Bell, Keane and Steward JJ).

16 *Fardon* (2004) 223 CLR 575 at [34] (McHugh J), quoted in *Benbrika* (2021) 95 ALJR 166 at [14], see also at [35] (Kiefel CJ, Bell, Keane and Steward JJ). See also *Thomas* (2007) 233 CLR 307 at [15]-[16] (Gleeson CJ).

17 *Pompano* (2013) 252 CLR 38 at [137] (Hayne, Crennan, Kiefel and Bell JJ).

18 See *Vella* (2019) 269 CLR 219 at [58]-[75] (Bell, Keane, Nettle and Edelman JJ).

19 *Vella* (2019) 269 CLR 219 at [56] (Bell, Keane, Nettle and Edelman JJ).

20 *K-Generation Pty Ltd v Liquor Licencing Court* (2009) 237 CLR 501 at [90] (French CJ). See also *Kuczborski v Queensland* (2014) 254 CLR 51 at [224] (Crennan, Kiefel, Gageler and Keane JJ).

features" of the law considered in *Kable* that led to its invalidity.[21] Conversely, a different "combination" of features underpinned the validity of the law upheld in *Fardon*.[22] That same combination of features underpinned the validity of the schemes considered in *Thomas*, *Vella* and *Benbrika*, being those features identified at paragraph 5 above.

19 Those same features are present in the HRSO Act. We consider each in turn.

D PROTECTIVE OBJECT

20 The **first** common feature of the protective order schemes upheld by the Court is that the court's power has as its "object the protection of the community from harm".[23] That is also the object of the power to make a restriction order under the HRSO Act.

21 The protective character of a restriction order is reflected in the objects provision of the Act (s 8).[24] The protective purpose is given effect by the substantive criteria for the making of a continuing detention order or a supervision order, which are found in the definition of "high risk serious offender" (s 7). In particular, that provision expressly requires consideration of whether a restriction order is necessary to "ensure adequate protection of the community against an unacceptable risk that the offender will commit a serious offence". In considering that matter, the court must have regard, among other things, to "the risk that, if the offender were not subject to a restriction order, the offender would commit a serious offence" (s 7(3)(h)) and "the need to protect members of the community" from the relevant risk (s 7(3)(i)). And, in deciding whether to make a continuing detention order or a supervision order, the paramount consideration for the court is "the need to ensure adequate protection of the community" (s 48(2)).[25] Each of those matters confirms the protective object of the power. That "evident non-punitive, protective, purpose" displaces the prima facie penal or punitive character of a continuing detention order.[26]

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21 *Fardon* (2004) 223 CLR 575 at [100] (Gummow J), see also at [43] (McHugh J).

22 See *Fardon* (2004) 223 CLR 575 at [19] (Gleeson CJ), [34], [44] (McHugh J), [117] (Gummow J), [223]-[234] (Callinan and Heydon JJ), cf at [149] (Kirby J).

23 *Benbrika* (2021) 95 ALJR 166 at [36] (Kiefel CJ, Bell, Keane and Steward JJ). See also *Fardon* (2004) 223 CLR 575 at [34] (McHugh J); *Thomas* (2007) 233 CLR 307 at [9], [13] (Gleeson CJ).

24 See *Fardon* (2004) 233 CLR 575 at [216] (Callinan and Heydon JJ); *Thomas* (2007) 233 CLR 307 at [43] (Gummow and Crennan JJ); *Benbrika* (2021) 95 ALJR 166 at [39] (Kiefel CJ, Bell, Keane and Steward JJ), [237] (Edelman J).

25 See *Fardon* (2004) 223 CLR 575 at [112] (Gummow J), [228] (Callinan and Heydon JJ).

26 *Benbrika* (2021) 95 ALJR 166 at [40], see [41] (Kiefel CJ, Bell, Keane and Steward JJ), cf [183] (Edelman J).

D.1 Specification of "serious offences"

22 The protective object of the power under the HRSO Act is not undermined by the fact that "robbery" is specified as a "serious offence".

23 The seriousness of an offence can be judged by the maximum penalty Parliament has prescribed for its commission.[27] The specification of maximum penalties by Parliament necessarily involves the resolution of "broad issues of policy by the exercise of legislative power".[28] As Keane J explained in *Magaming v The Queen*:[29]

> A sentence enacted by the legislature reflects policy-driven assessments of the desirability of the ends pursued by the legislation, and of the means by which those ends might be achieved. It is distinctly the province of the legislature to gauge the seriousness of what is seen as an undesirable activity affecting the peace, order and good government of the [polity] and the soundness of a view that condign punishment is called for to suppress that activity, and to determine whether a level of punishment should be enacted as a ceiling or a floor.

24 Where Parliament has fixed for a particular offence a maximum penalty of a term of imprisonment that is of significant length, it can be inferred that the Parliament decided that the commission of that offence would have "grave or serious" consequences for at least some part of society.[30] There is no reason to "second-guess" that decision.[31] As Gleeson CJ observed in *Fardon*, "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".[32] It is therefore not to the point that the schemes in *Fardon* and *Benbrika* were concerned with specific categories of offences (cf **AS [72]**). And the scheme under consideration in *Vella* was not confined to those specific categories of offences, yet that did not cause it to be invalid.[33]

25 Further, the risk that an offender will commit a serious offence is neither the sole nor the primary focus of the Court's inquiry under the HRSO Act. If there is an unacceptable risk

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[27] The maximum penalty for "robbery" ranges from life imprisonment (where the offender is armed with any dangerous or offensive weapon or instrument or pretends to be so armed), to 20 years (if the offence is committed in circumstances of aggravation), to 14 years (in any other case): Criminal Code, s 392(c)-(e).

[28] *Magaming v The Queen* (2013) 252 CLR 381 at [105] (Keane J).

[29] (2013) 252 CLR 381 at [105]. See also at [50]-[52] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[30] *Benbrika* (2021) 95 ALJR 166 at [43], see also at [46] (Kiefel CJ, Bell, Keane and Steward JJ), [228]-[231] (Edelman J), cf at [79], [93] (Gageler J).

[31] See *Benbrika* (2021) 95 ALJR 166 at [228], [230] (Edelman J).

[32] (2004) 223 CLR 575 at [23].

[33] See *Vella* (2019) 269 CLR 219 at [36] (Bell, Keane, Nettle and Edelman JJ).

that the offender will commit a serious offence, the Court must then decide whether the adequate protection of the community necessitates a restriction order. That decision-making process is discussed in further detail in Part E below.

D.2 No requirement for "correlation" between past offence and future risk

26 The protective object of the power conferred by the HRSO Act is also not undermined by the fact that the court may make a restriction order based on an assessment of the risk that an offender will commit a serious offence that is not the same type of offence as the serious offence which has led to their status as a "serious offender under custodial sentence".

27 The Appellant's submission to the contrary (**AS [73]**) does not explain why the maintenance of institutional integrity requires precise correlation between the serious offence which has led to a person's status as a "serious offender under custodial sentence" and the serious offence, the future risk of which might justify a restriction order being made in relation to the person.[34] Protective order schemes, of the kind upheld by the Court, are "forward-looking",[35] being concerned with the protection of the public against *future* harm. They are not schemes that are directed to the "punishing" offenders for *past* conduct (see paragraph 20 above), but rather are "separate and distinct from traditional criminal justice".[36] The scheme established by the HRSO Act falls into that same category.

28 The cause removed to this Court is confined to a challenge to that aspect of the declaration made by Corboy J (**CAB 101**) concerning the provisions of the HRSO Act in so far as they apply to a "serious offender under custodial sentence" by reason of that person having a prior conviction for "robbery" (**CAB 105**). The resolution of the constitutional question will determine whether the Supreme Court may make a restriction order in

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[34] To the extent that Gummow J in *Fardon* (2004) 223 CLR 575 at [108] suggests otherwise, that suggestion must be understood in a context where it appears "his Honour's conception of the *Kable* limitation was influenced by an understanding of the content of judicial power as much as the institutional integrity of the Court": Stellios, *The Federal Judicature: Chapter III of the Constitution* (2nd ed, 2020) at [9.41]. Of course, the content of judicial power may be relevant for the reasons identified at paragraph 10 to 11 above. But it is not a critical determinate of the validity of a law assessed against the *Kable* principle.

[35] *Vella* (2019) 269 CLR 219 at [43] (Bell, Keane, Nettle and Edelman JJ).

[36] *Vella* (2019) 269 CLR 219 at [78] (Bell, Keane, Nettle and Edelman JJ).

relation to a "serious offender under custodial sentence" by reason of a conviction for robbery, such as the Appellant.[37]

29 However, for the purpose of the Appellant's argument about the need for correlation, it is important to note that the term "serious offence" operates in two distinct senses in the HRSO Act: a person who is the subject of an application for a restriction order must not only have a *past* conviction for a "serious offence", but for a restriction order to be made, an assessment must also be undertaken of the *future* risk that the person will commit a "serious offence". Although the material before the Court does not expressly identify the "serious offence" (or offences) the State contends the Appellant presents an unacceptable risk of committing in the future, the relevant offence or offences appear to have been of the same nature as the Appellant's past conviction.[38] In any event, at most, the Court is confined to considering the validity of the HRSO Act by reference to the future risk that a person will commit an offence that has, in fact, been specified as a "serious offence". Thus, the Appellant's hypothetical about a scenario in which every offence in the *Criminal Code* (WA) were designated a "serious offence" for the purpose of the HRSO Act can be put to one side (**AS [70]**).

E EVALUATIVE JUDGEMENTS — RISK AND BALANCING

30 The **second** common feature of the protective order schemes upheld by the Court is that the court's power is conditioned on the court undertaking an evaluative assessment of the nature and degree of the risk posed by the individual to the community, by reference to judicially applicable criteria.

31 Here, as noted above, the substantive criteria are to be found in s 7(1), which defines "high risk serious offender". That provision requires the court to assess whether it is satisfied "that it is necessary to make a restriction order in relation to the offender to ensure adequate protection of the community against an unacceptable risk that the

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[37] The scope of the proceeding therefore accords with the "general prudential approach" of the Court to resolving a question of constitutional validity, namely that it will only do so where "there exists a state of facts which makes it necessary to decide [the] question in order to do justice in the given case and to determine the rights of the parties": *Mineralogy v Western Australia* (2021) 95 ALJR 832 at [56] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (Dixon CJ). It can be accepted that the issues raised by the Proposed Amicus, and his circumstances, fall within the scope of the constitutional question. However, if the law is held to be invalid, that will not invalidate the supervision order made in relation to the Proposed Amicus: see *New South Wales v Kable* (2013) 252 CLR 118.

[38] See **CAB 25-27 [51](fn 11), [53]-[54]**.

offender will commit a serious offence". That task involves two evaluative steps (see **WA [28]-[29]**):

31.1 *first, a risk assessment* — the court must assess whether there is an "unacceptable risk" that the offender will commit a serious offence; and

31.2 *second, a balancing exercise* — if the court concludes that there is such a risk, it must then assess whether it is "necessary"[39] to make a restriction order to ensure adequate protection of the community against the risk.

32 The judgements required by each of these steps are to be made by reference to criteria — "unacceptable risk" and "necessity" — that are readily capable of judicial application.[40] Further, the specification (in s 7(3)) of matters to which the court must have regard places an additional "safeguard" on the court's evaluative task by giving guidance about the focus of those judgements.[41]

33 In undertaking a balancing exercise the court will consider, on the one hand, whether the making of a restriction order will "ensure adequate protection of the community against an unacceptable risk that the offender will commit a serious offence". On the other hand, the court will consider the impact of the order upon the circumstances of the person who would be subject to it, including the extent to which it would intrude on their liberty (**WA [41]**).[42]

34 If, having undertaken the balancing exercise, the court concludes that neither a continuing detention order nor a supervision order is "necessary" to ensure adequate protection of the community from the relevant risk, then s 48(1) will neither oblige nor empower the court to make either kind of restriction order (see **WA [41]**). The scheme thus contemplates that "no order" may be made.[43] However, if, having undertaken the balancing exercise, the court finds that it is necessary to make a continuing detention

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39 *Vella* (2019) 269 CLR 219 at [57] (Bell, Keane, Nettle and Edelman JJ). See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [39] (Gleeson CJ) See also *Thomas* (2007) 233 CLR 307 at [20]-[27] (Gleeson CJ), [102]-[103] (Gummow and Crennan JJ).

40 *Fardon* (2004) 223 CLR 575 at [34] (McHugh J), see also at [22] (Gleeson CJ); *Thomas* (2007) 233 CLR 307 at [95] (Gummow and Crennan JJ); *Pompano* (2013) 252 CLR 38 at [134] (Hayne, Crennan, Kiefel and Bell JJ).

41 *Fardon* (2004) 223 CLR 575 at [224] (Callinan and Heydon JJ), see also at [97]-[98] (Gummow J).

42 *Vella* (2019) 269 CLR 219 at [51], [60] (Bell, Keane, Nettle and Edelman JJ).

43 See *Fardon* (2004) 223 CLR 575 at [19] (Gleeson CJ), [34] (McHugh J), [227] (Callinan and Heydon JJ).

order or a supervision order to ensure adequate protection of the community from that risk, s 48(1) will oblige the court to make such an order.

35 That the court is obliged to make an order in those circumstances poses no constitutional difficulty.[44] Those circumstances are very different from the circumstances in which a court was obliged to make a particular order under the scheme in *South Australia v Totani*[45] (cf **Ryan [6], [22]**). Under that scheme, once an application for a control order was made by the Executive to the court, the only question for the court was whether the person the subject of the application was a "member" of a declared organisation. If so, the court was required to make an order. But the determination of whether a person was a "member" of a declared organisation did not involve the court undertaking any evaluative assessment for itself. Instead, a person was a "member" of a declared organisation if the Executive made a determination to that effect. The vice in that scheme was identified by Hayne J as follows:[46]

> It is the Executive which chooses whether to apply for an order, and the Executive which chooses the members of a declared organisation that are to be made subject to a control order. So long as the person named as a defendant falls within the definition of "member", the Court cannot refuse the Executive's application; the Court must make a control order … [T]he Court is acting at the behest of the Executive.

36 That vice is not present in the HRSO Act. The obligation to make a restriction order only arises in circumstances where the court has undertaken an independent and impartial assessment of the evaluative criteria contained in s 7[47] and concluded that such an order is "necessary" to ensure adequate protection of the community.

F JUDICIAL PROCESS

37 The **third** common feature of the protective order schemes upheld by the Court is that the power to make an order is to be exercised in accordance with procedures that are the ordinary incidents of the exercise of judicial power.[48] In the HRSO Act, those ordinary incidents are expressly guaranteed:

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44 See *Fardon* (2004) 223 CLR 575 at [109] (Gummow J).

45 (2010) 242 CLR 1.

46 (2010) 242 CLR 1 at [229], quoted in *Vella* (2019) 269 CLR 219 at [79] (Bell, Keane, Nettle and Edelman JJ).

47 See also *Emmerson* (2014) 253 CLR 393 at [60], [65] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

48 See *Thomas* (2007) 233 CLR 307 at [30] (Gleeson CJ); *Vella* (2019) 269 CLR 219 at [81] (Bell, Keane, Nettle and Edelman JJ); *Benbrika* (2021) 95 ALJR 166 at [11] (Kiefel CJ, Bell, Keane and Steward JJ). See also *Emmerson* (2014) 253 CLR 393 at [65] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

37.1 The State has the onus of satisfying the court that an individual is a "high risk offender" (s 7(2)).[49]

37.2 The onus must be discharged having regard to the requirement that the court must be satisfied "by acceptable and cogent evidence and to a high degree of probability" (cf **AS [76]**).[50] That reflects the language used in the schemes considered in *Fardon* and *Benbrika*. It is a *higher* standard of proof than would ordinarily be required in a civil proceeding. And the fact that is a *lower* standard of proof than what would be required in a criminal proceeding is irrelevant, because a proceeding for a restriction order is not a proceeding for the punishment of a criminal offence: see paragraph 27 above.[51]

10 37.3 The State must (subject to certain exceptions) disclose to the individual any "evidentiary material" in the possession of the applying agency that may be relevant to the application (ss 39(1)(a), 39(5)).[52] The duty of disclosure is ongoing (s 39(3)).

37.4 A court must give detailed reasons for making a restriction order (s 28).[53] That is a "judicial hallmark".[54] The presence of this requirement means that the HRSO Act does not suffer from the flaw that led to the invalidity of the scheme considered in *Wainohu v New South Wales*.[55]

37.5 The individual against whom a restriction order is sought is entitled to appear at the hearing of the application (s 86(2)).[56] The absence of such an entitlement was an important strand of the reasoning that led to the invalidity of the scheme considered
20 in *International Finance Trust Co Ltd v New South Wales Crime Commission*.[57]

37.6 On the hearing of a restriction order application, before a court makes a decision or order, a court must hear any admissible evidence called by the State and evidence

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[49] See *Fardon* (2004) 223 CLR 575 at [19] (Gleeson CJ).
[50] See *Fardon* (2004) 223 CLR 575 at [97] (Gummow J), [223] (Callinan and Heydon JJ).
[51] See *Vella* (2019) 269 CLR 219 at [78] (Bell, Keane, Nettle and Edelman JJ).
[52] See *Fardon* (2004) 223 CLR 575 at [221] (Callinan and Heydon JJ).
[53] See *Fardon* (2004) 223 CLR 575 at [44] (McHugh J).
30 [54] *Fardon* (2004) 223 CLR 575 at [230] (Callinan and Heydon JJ).
[55] (2011) 243 CLR 181.
[56] See *Fardon* (2004) 223 CLR 575 at [94] (Gummow J).
[57] (2009) 240 CLR 319.

called by or on behalf of the offender (if the offender elects to give or call evidence) (s 84(3)).

37.7 The ordinary rules of evidence apply to such evidence, subject to certain modifications (s 84(4)-(5)).[58]

37.8 A decision to make a restriction order is subject to appeal by way of rehearing as of right (s 69(1), s 71(1)).[59] Relatedly, detention under a continuing detention order is subject to mandatory periodic review after one year and then biennially (s 64(1)-(2)).[60] And an individual who is subject to a continuing detention order may, with leave, apply to the Supreme Court for review of their detention under the order (s 65(1)).

10 38 As to the modifications to the rules of evidence, importantly, none of the modifications relax the substantive requirement that the court must be satisfied of the relevant criterion "by acceptable and cogent evidence". In any event, as Brennan CJ explained in *Nicholas v The Queen*, "[t]he rules of evidence have traditionally been recognised as being an appropriate subject of statutory prescription" and "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" (see **WA [59]**, **[81]**, **[83]**).[61]

39 In light of the matters set out above, there is no basis to conclude, for example, that a person who is the subject of an application for a restriction order will be denied procedural
20 fairness,[62] or that the open justice principle is compromised by the HRSO Act.[63] To the contrary, these matters confirm that the power conferred upon the court is to be exercised in a manner that is consistent with the essential character of a court and the nature of

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58 See *Fardon* (2004) 223 CLR 575 at [19] (Gleeson CJ), [44] (McHugh J).

59 See *Fardon* (2004) 223 CLR 575 at [19] (Gleeson CJ), [232] (Callinan and Heydon JJ); *Benbrika* (2021) 95 ALJR 166 at [11] (Kiefel CJ, Bell, Keane and Steward JJ).

60 See *Fardon* (2004) 223 CLR 575 at [109]-[115] (Gummow J), [231] (Callinan and Heydon JJ); *Benbrika* (2021) 95 ALJR 166 at [12] (Kiefel CJ, Bell, Keane and Steward JJ).

61 (1998) 193 CLR 173 at [23]. See also *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
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62 Cf *International Finance Trust Co Ltd* (2009) 240 CLR 319. That is not to say that particular issues of procedural fairness may never arise. But those issues will be decided "in the light of the facts and circumstances of individual cases": *Thomas* (2007) 233 CLR 307 at [31] (Gleeson CJ).

63 See *Hogan v Hinch* (2011) 243 CLR 506 at [85]-[91] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

judicial power.[64] In this way, they assist in ensuring that the institutional integrity of the Supreme Court is maintained.

G CONCLUSION

40 The combination of features discussed in Parts D to F above means that there are "striking similarities"[65] between the HRSO Act and the laws upheld in *Fardon*, *Thomas, Vella* and *Benbrika*. That combination of features is sufficient to ensure that the HRSO Act does not substantially impair the institutional integrity of the Supreme Court of Western Australia. To adapt what Gleeson CJ said in *Fardon*:[66]

> The [HRSO Act] is a general law authorising the preventive detention of a [high risk serious offender] in the interests of community protection. It authorises and empowers the Supreme Court to act in a manner which is consistent with its judicial character. It does not confer functions which are incompatible with the proper discharge of judicial responsibilities or with the exercise of judicial power. It confers a substantial discretion as to whether an order should be made, and if so, the type of order. If an order is made, it might involve either detention or release under supervision. The onus of proof is on the [State]. The rules of evidence apply. The discretion is to be exercised by reference to the [criteria of "adequate protection of the community against an unacceptable risk that the offender will commit a serious offence"]. The Court is obliged, by [s 7(3)] of the Act, to have regard to a list of matters that are all relevant to that criterion. There is a right of appeal. Hearings are conducted in public, and in accordance with the ordinary judicial process. There is nothing to suggest that the Supreme Court is to act as a mere instrument of government policy. The outcome of each case is to be determined on its merits.

41 The appeal should be dismissed.

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64 See *Thomas* (2007) 233 CLR 307 at [30] (Gleeson CJ).

65 See *Vella* (2019) 269 CLR 219 at [57] (Bell, Keane, Nettle and Edelman JJ).

66 *Fardon* (2004) 223 CLR 575 at [19] (Gleeson CJ).

PART V — ESTIMATE OF TIME

42 It is estimated that up to 15 minutes will be required for the presentation of Victoria's oral argument.

Dated: 18 February 2022

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN:

PETER ROBERT GARLETT
Appellant

and

THE STATE OF WESTERN AUSTRALIA
First Respondent

THE ATTORNEY-GENERAL FOR WESTERN AUSTRALIA
Second Respondent

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ANNEXURE TO SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

Pursuant to Practice Direction No.1 of 2019, Victoria sets out below a list of the constitutional provisions, statues and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
	Constitutional provisions		
1.	*Commonwealth Constitution*	Current	Ch III
	Statutory provisions		
2.	*Criminal Code* (Cth)	As in force from 30 December 2006 to 30 June 2007	Div 104
3.	*Criminal Code* (Cth)	Compilation 136 (7 September 2020 to 17 December 2020)	Div 105A
4.	*Crimes (Serious Crime Prevention Orders) Act 2016* (NSW)	Current (26 November 2016 to date)	–
5.	*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)	As made (6 June 2003)	–
6.	*Criminal Code* (WA)	Current	s 392
7.	*High Risk Serious Offenders Act 2020* (WA)	Current	ss 7, 8, 26, 27, 28, 35, 39, 48, 64, 65, 69, 71, 84, 86

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