HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P56/2021

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 OF THE COMMONWEALTH (INTERVENING)

PART I: FORM OF SUBMISSIONS

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

PARTS II & III: INTERVENTION

2. The Attorney-General of the Commonwealth intervenes under s 78A of the *Judiciary Act 1903* (Cth) in support of the respondents.

PART IV: ARGUMENT

3. The appellant's submissions in support of the proposition that *High Risk Serious Offenders Act 2020* (WA) (**HRSO Act**) infringes the principle stated in *Kable v Director of Public Prosecutions (NSW)*[1] (the ***Kable* principle**) proceed on the basis that it is first necessary to identify whether the power conferred by the HRSO Act is properly characterised as judicial power. The Commonwealth contends that it is neither necessary nor of significant assistance to commence the analysis by asking that question.

4. Focusing on the *Kable* principle, the Commonwealth submits that, on its proper construction, including in its application to an offender convicted of the offence in s 392 of the *Criminal Code* (WA), the scheme created by the HRSO Act is not relevantly

[1] (1996) 189 CLR 51 (***Kable***).

distinguishable from the scheme created by the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (**DPSO Act**), the validity of which this Court upheld in *Fardon v Attorney-General (Qld)*.[2]

5. The principal basis on which the appellant seeks to draw a relevant distinction between the HRSO Act and the DPSO Act is a comparison between the seriousness of the offence in s 392 of the *Criminal Code* (WA) and the offences that were the subject of the scheme created by the DPSO Act. For the reasons explained below, it cannot be said that the offence in s 392 of the *Criminal Code* (WA) is of such a nature that the Supreme Court could never be satisfied:

10 5.1 that the risk of an offender committing that offence carried a threat of harm to the community sufficient to make the risk of the commission of the offence "unacceptable"; or

5.2 that it was necessary to make a restriction order to ensure adequate protection of the community against that unacceptable risk.

6. In so far as the appellant's approach is premised on whether the HRSO Act would infringe Ch III if the Commonwealth Parliament enacted it, the Commonwealth submits that his approach:

6.1 is unduly narrow, in that it focuses almost exclusively on seeking to identify a precise historical antecedent for the power; and

20 6.2 fails to pay sufficient regard to the reasoning of the majority of this Court in *Minister for Home Affairs v Benbrika*.[3]

A. THE *KABLE* PRINCIPLE

7. In *Attorney-General (NT) v Emmerson*, French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ summarised the *Kable* principle as follows:[4]

> The principle for which *Kable* stands is that because the Constitution establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State

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2 (2004) 223 CLR 575 (***Fardon***).

3 (2021) 95 ALJR 166 (***Benbrika***).

4 (2014) 253 CLR 393 (***Emmerson***) at [40] (citations omitted). See also *Fardon* (2004) 223 CLR 575 at [15] (Gleeson CJ); *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 (***Vella***) at [55] (Bell, Keane, Nettle and Edelman JJ). The *Kable* principle can also apply where a power or function is conferred on a person rather than a court: see *Wainohu v New South Wales* (2011) 243 CLR 181 (***Wainohu***) at [6]-[7] (French CJ and Kiefel J), [104]-[105] (Gummow, Hayne, Crennan and Bell JJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 (***NAAJA***) at [123] (Gageler J).

> Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid.

8. That principle "does not imply into the Constitutions of the States the separation of judicial power mandated for the Commonwealth by Ch III".[5] Rather, the "essential notion" at the heart of the principle "is that of repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system".[6]

10 9. Determining whether a power or function conferred on a State court is incompatible with the court's institutional integrity requires regard to the defining characteristics of such courts.[7] Those defining characteristics include the appearance and reality of independence and impartiality,[8] the application of procedural fairness,[9] and the provision of reasons for the court's decisions.[10]

10. The appellant devotes a considerable portion of his written submissions to an argument that the HRSO Act would infringe Ch III if the Commonwealth Parliament had enacted it (AS [29]-[58]). He goes so far as to suggest that the question whether the HRSO Act

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5 *Fardon* (2004) 223 CLR 575 at [86] (Gummow J); see also at [36] (McHugh J), [198] (Hayne J), [219] (Callinan and Heydon JJ). See further *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 (***K-Generation***) at [84] (French CJ); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 (***Condon***) at [22] (French CJ), [124]-[126] (Hayne, Crennan, Kiefel and Bell JJ).

6 *Fardon* (2004) 223 CLR 575 at [101] (Gummow J); see also at [15], [23] (Gleeson CJ), [37] (McHugh J), [198] (Hayne J), [219] (Callinan and Heydon JJ). See further *South Australia v Totani* (2010) 242 CLR 1 (***Totani***) at [205] (Hayne J); *Condon* (2013) 252 CLR 38 at [123] (Hayne, Crennan, Kiefel and Bell JJ).

7 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 (***Forge***) at [63] (Gummow, Hayne and Crennan JJ); *K-Generation* (2009) 237 CLR 501 at [89] (French CJ); *Totani* (2010) 242 CLR 1 at [62] (French CJ), [443] (Kiefel J); *Condon* (2013) 252 CLR 38 at [67] (French CJ), [125] (Hayne, Crennan, Kiefel and Bell JJ); *Wainohu* (2011) 243 CLR 181 at [44] (French CJ and Kiefel J); *NAAJA* (2015) 256 CLR 569 at [39] (French CJ, Kiefel and Bell JJ), [119]-[121] (Gageler J).

8 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Forge* (2006) 228 CLR 45 at [41] (Gleeson CJ), [64], [66] (Gummow, Hayne and Crennan JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [10] (Gummow, Hayne, Heydon and Kiefel JJ); *Totani* (2010) 242 CLR 1 at [72] (French CJ), [427]-[428] (Crennan and Bell JJ), [443] (Kiefel J); *Condon* (2013) 252 CLR 38 at [125] (Hayne, Crennan, Kiefel and Bell JJ); *Emmerson* (2014) 253 CLR 393 at [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

9 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 (***International Finance***) at [4], [54]-[55] (French CJ); *Condon* (2013) 252 CLR 38 at [194] (Gageler J); *NAAJA* (2015) 256 CLR 569 at [39] (French CJ, Kiefel and Bell JJ).

10 *Wainohu* (2011) 243 CLR 181 at [7], [44], [54]-[56] (French CJ and Kiefel J), [104] (Gummow, Hayne, Crennan and Bell J); *NAAJA* (2015) 256 CLR 569 at [39] (French CJ, Kiefel and Bell JJ).

would infringe Ch III in those circumstances is the logical starting point for analysis of the validity of that Act (AS [22], [30]).[11]

11. It is well established that the "occasion for the application of [the *Kable* principle] does not arise" in respect of a State law if that law "would not offend Ch III had it been enacted by the Commonwealth Parliament for a Ch III court".[12] If a power could be conferred as part of the judicial power of the Commonwealth, the exercise of that power by a State court could not logically be incompatible with that court's role as a repository of federal jurisdiction.

12. However, it is not necessary, or logical, in every case to analyse whether a State law infringes the *Kable* principle by reference in the first instance to whether the Commonwealth Parliament could enact the law. The limits that Ch III imposes on Commonwealth laws are broader than those it imposes on State laws. Consistently with the limits on Commonwealth legislative power, the focus in relation to a Commonwealth law that confers power on a Ch III court is whether that power is judicial power (or incidental to the exercise of judicial power) and, if so, whether the law requires the court to exercise the power in a manner that is inconsistent with the essential character of a court or with the nature of judicial power.[13] The focus of the *Kable* principle, by contrast, is whether a State Parliament has conferred a function or power (judicial or non-judicial) which is repugnant to or inconsistent with the institutional integrity of a court.

13. Responding to a *Kable* challenge through the prism of the limits of Commonwealth judicial power can be useful for the reason identified in paragraph 11 above. However, it does not follow from a negative answer to the question posed at the Commonwealth

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11 The appellant notes that most cases involving the application of the *Kable* principle do not approach the analysis in this way, and suggests that it can therefore be inferred that the laws in those cases did not confer judicial power (AS [31], [53]). The Court should not accept this suggestion. Because the separation of powers mandated by Ch III does not apply to the States, it is not necessary, in a case involving a State law, for the Court to decide whether the power conferred by the law is judicial power. The absence of a decision on that point does not stand as authority for the proposition that the relevant power was not judicial power.

12 *Condon* (2013) 252 CLR 38 at [126] (Hayne, Crennan, Kiefel and Bell JJ), citing *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at [14] (the Court). See also *Benbrika* (2021) 95 ALJR 166 at [82] (Gageler J), [158] (Gordon J).

13 See *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151-152 (the Court); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 289 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 607 (Deane J), 689 (Toohey J), 703-704 (Gaudron J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (***Lim***) at 27 (Brennan, Deane and Dawson JJ).

level that a State law which confers the impugned function or power on a State court is invalid by reason of the *Kable* principle: "[n]ot everything by way of decision-making denied to a federal judge is denied to a judge of a State".[14] In the present case, even if the Commonwealth Parliament could not have enacted the HRSO Act, the Court would still need to consider whether that Act infringes the *Kable* principle.

14. Accordingly, rather than first ask whether the HRSO Act would infringe Ch III if enacted by the Commonwealth Parliament, this matter can be resolved by turning directly to the *Kable* principle. It is necessary in that context to examine the provisions of the Act against the background of the defining characteristics of courts and the decisions of this Court in cases concerning the application of the *Kable* principle to comparable schemes.

B. THE HRSO ACT

15. The objects of the HRSO Act include "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" (s 8(a)). The scope of community protection which the HRSO Act affords is defined by reference to the class of persons in respect of whom the State may apply for a restriction order, the types of offences in respect of which the State may apply for such an order, and the procedure by which, and criteria pursuant to which, the Supreme Court may make such an order.

16. As to the first of those matters, the State may apply for a restriction order under the Act only in respect of an offender who is under a custodial sentence for a serious offence (or who has been under a custodial sentence for another offence since being discharged from a custodial sentence for a serious offence) (ss 3, 35(1)). Such an application may only be made if the offender might be released from custody within one year after the application is made (s 35(3)).

17. As to the types of offences in respect of which the State may apply for a restriction order, a "serious offence" is defined to include any offence specified in Division 1 of Schedule 1 to the HRSO Act (s 5(1)), or an offence of conspiracy, attempt or incitement to commit such an offence (s 5(3)).

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[14] *Fardon* (2004) 223 CLR 575 at [219] (Callinan and Heydon JJ). See also the cases cited in footnote 5 above, in particular *Condon* (2013) 252 CLR 38 at [124]-[126] (Hayne, Crennan, Kiefel and Bell JJ).

18. Relevantly for present purposes, Division 1 of Schedule 1 includes an offence against s 392 of the *Criminal Code* (WA), which provides:

> A person who steals a thing and, immediately before or at the time of or immediately after doing so, uses or threatens to use violence to any person or property in order —
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> (a) to obtain the thing stolen; or
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> (b) to prevent or overcome resistance to its being stolen,
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> is guilty of a crime and is liable —
>
> (c) if immediately before or at or immediately after the commission of the offence the offender is armed with any dangerous or offensive weapon or instrument or pretends to be so armed, to imprisonment for life; or
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> (d) if the offence is committed in circumstances of aggravation, to imprisonment for 20 years; or
>
> (e) in any other case, to imprisonment for 14 years.

19. The offence is a property offence in the sense that it requires the offender to have stolen a "thing". However, establishing the offence also requires that, "immediately before or at the time of or immediately after doing so", the offender used or threatened to use violence to any person or property in order to obtain the thing or overcome resistance to the thing being stolen. The offence of which the appellant was convicted, for example, involved his threatening the victims with an object which he pretended was a handgun.[15]

20. The inclusion of an offence in Schedule 1 to the HRSO Act constitutes a legislative judgment as to the types of offences from the commission of which the community requires protection. An offender who has committed a Schedule 1 offence and is under custodial sentence may be the subject of an application under the HRSO Act (s 35(1)). However, it does not follow from the HRSO Act applying to an offender by reason of past offending conduct and current custodial status that the offender will be the subject of a restriction order.

21. Whether such an order is made rests on a judicial determination of whether the offender the subject of the application is a "high risk serious offender" within the meaning of s 7(1) of the HRSO Act. Section 7(1) provides:

> An offender is a ***high risk serious offender*** if the court dealing with an application under this Act finds that it 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

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15 *Western Australia v Garlett* [2021] WASC 387 at [1].

offender to ensure adequate protection of the community against an unacceptable risk that the offender will commit a serious offence.

22. In order to find that an offender is a high risk serious offender in accordance with s 7(1), the Supreme Court must be satisfied of two matters:

22.1 *first*, that there is an unacceptable risk that the offender will commit a serious offence; and

22.2 *second*, that it is necessary to make a restriction order in relation to the offender to ensure adequate protection of the community against that unacceptable risk.

23. Determining whether there is an unacceptable risk that a person will commit an offence and whether some preventive measure is "necessary … to ensure adequate protection of the community" involve tasks that courts often perform in the context of legislation similar to the HRSO Act.[16]

24. Section 7(1) requires the Supreme Court to consider not only the likelihood that the offender will commit a serious offence, but also the consequences for the community if the offender were to do so.[17] The relevance of these matters is reinforced by s 7(3)(h) and (i), which require the Court to have regard not only to the risk that the offender will commit a serious offence, but also the need to protect members of the community from that risk. The weight to be given to the need to protect the community from a risk will necessarily depend on the gravity of the harm if that risk were to eventuate.

25. The Supreme Court is also required to consider whether there are other measures by which the community could be adequately protected against the identified unacceptable risk which are less restrictive of the offender's liberty.[18] If adequate protection of the

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16 As to assessment of unacceptable risk, see *Fardon* (2004) 223 CLR 575 at [22] (Gleeson CJ), [34] (McHugh J), [97]-[98] (Gummow J), [225] (Callinan and Heydon JJ); *Thomas v Mowbray* (2007) 233 CLR 307 (***Thomas***) at [15]-[16], [28] (Gleeson CJ), [109]-[110] (Gummow and Crennan JJ); *Condon* (2013) 252 CLR 38 at [23]-[24] (French CJ), [143] (Hayne, Crennan, Kiefel and Bell JJ); *Vella* (2019) 269 CLR 219 at [57], [66]-[68], [73]-[75], [84]-[89] (Bell, Keane, Nettle and Edelman JJ); *Benbrika* (2021) 95 ALJR 166 at [2], [11] (Kiefel CJ, Bell, Keane and Steward JJ), [192]-[193] (Edelman J). As to necessity of orders, see *Thomas* (2007) 233 CLR 307 at [19]-[27] (Gleeson CJ), [101]-[103] (Gummow and Crennan JJ), [651] (Heydon J).

17 See *Benbrika* (2021) 95 ALJR 166 at [46]-[47] (Kiefel CJ, Bell, Keane and Steward JJ), [192]-[193] (Edelman J). See also *Nigro v Secretary, Department of Justice* (2013) 41 VR 359 at [130] (the Court).

18 See *Thomas* (2007) 233 CLR 307 at [21]-[22] (Gleeson CJ), [102]-[103] (Gummow and Crennan JJ), [651] (Heydon J). In relation to the term "appropriate", see *Vella* (2019) 269 CLR 219 at [17] (Kiefel CJ), [51] (Bell, Keane, Nettle and Edelman JJ). The Commonwealth submits that the observations made in relation to the term "appropriate" in *Vella* apply with even greater force to the term "necessary".

community against the unacceptable risk can be ensured by such measures, a restriction order is unlikely to be "necessary" for that same purpose.[19]

26. The plurality in *Benbrika* observed of a continuing detention order under s 105A.7 of the *Criminal Code* (Cth) that such an order would not be made "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".[20] The same result would obtain in the context of s 7(1) of the HRSO Act, whether the assessment as to seriousness of consequences occurs pursuant to the first limb or the second limb of the inquiry referred to in paragraph 22 above.

27. In considering whether it is satisfied in accordance with s 7(1), the Supreme Court must have regard to the matters listed in s 7(3). That list is not exhaustive, and permits the Court to have regard to other matters that it considers relevant (s 7(3)(j)). However, the factors that are expressly included in the list direct the Court's attention to the circumstances of the particular offender: their history of offending behaviour, any pattern of offending that history demonstrates, attempts by the offender to rehabilitate, and the reports prepared by the court-appointed experts.

28. Section 48(1) provides that, if the Supreme Court finds that an offender is a high risk serious offender, the Court "must" (rather than "may") make a restriction order. That the parliament has legislated to require the Supreme Court to make specified orders in the event that the court determines certain conditions are satisfied is unexceptional.[21] It is well established that a law of that description cannot be characterised on that ground alone as an attempt to direct the court as to the outcome of the exercise of its jurisdiction.[22] Notably, members of the Court in both *Fardon* and *Vella* treated the

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19 See, by analogy, *McCloy v New South Wales* (2015) 257 CLR 178 at [2], [81] (French CJ, Kiefel, Bell and Keane JJ).

20 *Benbrika* (2021) 95 ALJR 166 at [47] (Kiefel CJ, Bell, Keane and Steward JJ).

21 *Palling v Corfield* (1970) 123 CLR 52 at 58-59 (Barwick CJ), 64-65 (Menzies J), 65 (Windeyer J), 67 (Owen J), 69-70 (Walsh J), 70 (Gibbs J); *International Finance* (2009) 240 CLR 319 at [49] (French CJ), [77] (Gummow and Bell JJ), [121] (Hayne, Crennan and Kiefel JJ), [157] (Heydon J); *Totani* (2010) 242 CLR 1 at [133] (Gummow J), [420] (Crennan and Bell JJ); *Emmerson* (2014) 253 CLR 393 at [57]-[58] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

22 *International Finance* (2009) 240 CLR 319 at [77] (Gummow and Bell JJ), [121] (Hayne, Crennan and Kiefel JJ), [157] (Heydon J); *Totani* (2010) 242 CLR 1 at [133] (Gummow J); *Emmerson* (2014) 253 CLR 393 at [57]-[58] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

word "may" in comparable provisions as if it meant "must", without that affecting the validity of the laws in question.[23]

29. In terms of the processes and procedures involved in making a determination under the HRSO Act, the Court must first hold a preliminary hearing, in respect of which it must decide whether it is satisfied that there are reasonable grounds for believing that it might find that the offender is a "high risk serious offender" (s 46(1)).

30. If the Court forms that state of satisfaction, it must order that the offender undergo examination by a psychiatrist and a psychologist (s 46(2)(a)), who must each prepare a report giving their assessment of the level of the risk that, without a restriction order, the offender will commit a serious offence (s 74(2)).

31. On the final hearing, the State has the onus of satisfying the Supreme Court of both of the matters referred to in paragraph 22 above (s 7(2)). The Supreme Court must be satisfied of those matters to a high degree of probability, and on the basis of acceptable and cogent evidence (s 7(1)).

32. It is well established that "the choice of the standard or burden of proof may be fixed by the Parliament without it being repugnant to Ch III".[24] To the extent the HRSO Act requires the Court to be satisfied of the matters in s 7(1) "to a high degree of probability", it has this in common with the legislation considered in both *Fardon*[25] and *Benbrika*.[26]

33. As to the evidentiary material on which the Supreme Court is to make its decision, it does not follow from the requirement of "acceptable and cogent evidence" that the rules of evidence do not apply in deciding whether to make a restriction order (cf AS [76]-[77]).[27] Section 84(4) of the HRSO Act confirms that, except as modified by s 84(5), the rules of evidence apply to evidence given or called at the hearing of an application for a restriction order. Section 84(5) does not require the Court to receive material that

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23 *Fardon* (2004) 223 CLR 575 at [109] (Gummow J); *Vella* (2019) 269 CLR 219 at [49] (Bell, Keane, Nettle and Edelman JJ).

24 *Thomas* (2007) 233 CLR 307 at [113] (Gummow and Crennan JJ), [651] (Heydon J). See also *Nicholas v The Queen* (1998) 193 CLR 173 at [23]-[24] (Brennan CJ), [55] (Toohey J), [152]-[156] (Gummow J), [234]-[238] (Hayne J); *Kuczborski v Queensland* (2014) 254 CLR 51 at [240] (Crennan, Kiefel, Gageler and Keane JJ); *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

25 *Fardon* (2004) 223 CLR 575 at [6] (Gleeson CJ), [34], [44] (McHugh J), [97] (Gummow J), [223] (Callinan and Heydon JJ).

26 *Benbrika* (2021) 95 ALJR 166 at [40] (Kiefel CJ, Bell, Keane and Steward JJ), [191] (Edelman J).

27 See *Fardon* (2004) 223 CLR 575 at [225] (Callinan and Heydon JJ).

would not otherwise be admissible, although it permits it to do so. Any decision to receive such material will be made in light of the requirement that the Court act only on evidence that is acceptable and cogent. In giving effect to that requirement, it may be expected that the Court would pay close regard to the rules of evidence.

34. Once the threshold for making a restriction order is reached, the Supreme Court must make either a continuing detention order or a supervision order (s 48). In exercising the discretion as to which order to make, the paramount consideration is the need to ensure adequate protection of the community (s 48(2)).

35. A continuing detention order requires that the offender be detained in custody for an indefinite term for control, care, or treatment (s 26(1)). Although it is expressed to be an order for an indefinite term, a continuing detention order is subject to periodic review (ss 64 and 65). If, on review, the Supreme Court does not remain satisfied that the offender is a "high risk serious offender" (entailing satisfaction as to an unacceptable risk that the offender will commit a serious offence, and that a restriction order is necessary to ensure adequate protection of the community from that risk), the Court must rescind the continuing detention order (s 68).

36. A supervision order requires that the offender, when not in custody, be subject to certain conditions (s 27(1)). It must include the conditions in s 30(2), and may include other conditions the Court thinks appropriate to ensure adequate protection of the community, or for the rehabilitation, care or treatment of the offender, or to ensure adequate protection of victims of serious offences committed by the offender (s 30(2) and (5)).

37. There is a statutory limitation on the power of the Supreme Court to make a supervision order. The Court cannot make (or affirm or amend) such an order unless satisfied, on the balance of probabilities, that the offender will substantially comply with the conditions set out in s 30(2) (s 29(1)). The offender bears the onus of satisfying the Court, on the balance of probabilities, that he or she will substantially comply with those conditions (s 29(2)).

38. Although the appellant is critical of the imposition of that requirement on the offender (AS [76]), it must be considered in the context of the Court having reached the state of satisfaction to the relevant standard as to both the unacceptable risk that the offender will commit a serious offence as defined, and the necessity of an order to ensure adequate protection of the community against that risk (cf AS [76]). The State having

discharged the onus as to those matters, the onus shifts to the offender to establish future compliance with the conditions of a supervision order, the focus of which are managing the risk presented by the offender. The legislature has not imposed that requirement in absolute terms, but rather by reference to substantial compliance.

39. Finally, the Supreme Court is required to give detailed reasons for the order (s 28). Its decision may be appealed to the Court of Appeal (s 69).[28] Such an appeal is to be by way of rehearing (s 71(1)).

C. NO INFRINGEMENT OF THE *KABLE* PRINCIPLE

40. The above assessment of the provisions of the HRSO Act demonstrates that:

40.1 the Act has a protective purpose, which is given effect through the preventive detention or supervision of an offender who is found to be a "high risk serious offender";

40.2 the matters of which the Supreme Court is required to be satisfied in order to find that an offender is a high risk serious offender in accordance with s 7(1), as explained in paragraphs 22 to 26 above, have substance;[29]

40.3 the procedure by which the Court is to reach a state of satisfaction (or otherwise) as to those matters is consistent with a judicial process; and

40.4 there is nothing in the provisions of the HRSO Act to suggest that, in making a restriction order, the Supreme Court is acting as a mere instrument of the legislature or the executive.

41. Those features of the HRSO Act make the Act relevantly indistinguishable from the preventive detention regime upheld in *Fardon*, a decision which the appellant does not seek to challenge.

42. *Fardon* concerned the DPSO Act, which conferred power on the Supreme Court of Queensland to make a continuing detention order or supervision order in relation to a person serving a custodial sentence for a serious sexual offence if the Court was

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28 Contrary to the appellant's contention (AS [20]), s 69(3)(e) does not purport to limit the availability of an appeal to this Court. Rather, on its proper construction, s 69(3) limits the availability of an appeal to the Court of Appeal under s 69(1), such an appeal otherwise being available in respect of any "decision under [the HRSO Act]" (which, in the absence of s 69(3)(e), might be said to include a decision on an appeal under s 69(1)).

29 Cf *Totani* (2010) 242 CLR 1 at [35], [81]-[82] (French CJ), [142] (Gummow J), [225]-[226] (Hayne J), [436] (Crennan and Bell JJ). See also *Vella* (2019) 269 CLR 219 at [13]-[15] (Kiefel CJ).

satisfied, by acceptable and cogent evidence and to a high degree of probability, that there was an unacceptable risk that the person would commit a serious sexual offence if released from custody. A "serious sexual offence" was defined as an offence of a sexual nature involving violence or against children.

43. The appellant in *Fardon* argued that the power conferred by the DPSO Act was incompatible with the institutional integrity of the Supreme Court, principally because it authorised the Court to detain a person in prison on the basis of what the person might do in future.[30] The majority of the Court rejected that argument. In holding that the power conferred by the DPSO Act was not incompatible with the Supreme Court's institutional integrity, the majority emphasised that:

43.1 the detention for which the DPSO Act provided was not imposed as punishment, and was instead for a protective purpose;[31]

43.2 the power under that Act was to be exercised according to a judicial process,[32] and by reference to criteria susceptible of judicial application;[33] and

43.3 nothing in the DPSO Act indicated that the Supreme Court was acting at the behest of the legislature or executive government.[34]

44. For the reasons explained above, like the law considered in *Fardon*, the detention for which the HRSO Act provides is not imposed as punishment, and instead has as its object the protection of the community from harm. Further, the power to make a restriction order under the HRSO Act is to be exercised according to a judicial process, by reference to criteria susceptible of judicial application, and nothing in the HRSO Act indicates that the Supreme Court is acting at the behest of the legislature or executive government.

45. As noted above, the principal basis on which the appellant seeks to distinguish the HRSO Act from the law considered in *Fardon* is a comparison between the seriousness

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30 See *Fardon* (2004) 223 CLR 575 at 577.

31 *Fardon* (2004) 223 CLR 575 at [7]-[14], [19] (Gleeson CJ), [34] (McHugh J), [74] (Gummow J), [198] (Hayne J), [214]-[217] (Callinan and Heydon JJ).

32 *Fardon* (2004) 223 CLR 575 at [19] (Gleeson CJ), [34], [44] (McHugh J), [115] (Gummow J), [198] (Hayne J), [220]-[222], [233] (Callinan and Heydon JJ). McHugh J expressly characterised the power as judicial power (cf AS [53]): *Fardon* (2004) 223 CLR 575 at [34] (McHugh J); see also *Benbrika* (2021) 95 ALJR 166 at [2], [35] (Kiefel CJ, Bell, Keane and Steward JJ). Gummow J emphasised that there was a connection between the operation of the DPSO Act and anterior conviction by the usual judicial process: *Fardon* (2004) 223 CLR 575 at [108] (Gummow J).

33 *Fardon* (2004) 223 CLR 575 at [22] (Gleeson CJ), [34] (McHugh J), [225] (Callinan and Heydon JJ).

34 *Fardon* (2004) 223 CLR 575 at [34], [44] (McHugh J), [107], [116] (Gummow J), [198] (Hayne J).

of the offence in s 392 of the *Criminal Code* (WA) and the offences that were the subject of the scheme created by the DPSO Act (AS [56], [69]-[70], [72]). The appellant submits that, because the s 392 offence is not as serious as those offences, this may contribute to a shift in the public perception of courts to become "the governmental institution principally responsible for … protection from crime" (AS [70]).

46. There is nothing incompatible with the institutional integrity of the Supreme Court in the legislature determining that the offence in s 392 of the *Criminal Code* (WA) should be within the class of offences in respect of which an application may be made under the HRSO Act, having regard to the likelihood of the person committing the offence and the harm that may be caused. As noted in paragraph 19 above, one of the elements of the offence is the use, or a threat of the use, of violence. In circumstances where the offender is armed, or pretends to be armed (as in the present case), the maximum sentence for robbery is life imprisonment. It cannot be said that the offence in s 392 of the *Criminal Code* (WA) is of such a nature that the Supreme Court could never be satisfied that the risk of an offender committing that offence carried a threat of harm to the community sufficient to make the risk of the commission of the offence "unacceptable", or that it was necessary to make a restriction order to ensure adequate protection of the community against that unacceptable risk.

47. The appellant's related submissions in this regard, which assert likely "incredulity" of members of the public at the "absurdity" of aspects of the scheme created by the HRSO Act deriving from the inclusion of the offence (AS [74]-[75]), should not be accepted. This Court has rejected the suggestion that legislation could be declared invalid "based upon [the Court's] perception of the reaction of the public to the application of that legislation".[35]

48. Further, the appellant's arguments in this respect overlook the placement of the power to make a restriction order in hands of a superior court, resting upon matters of evaluative judgment with which the court is familiar and which it is well placed to make, at a particular standard and on the basis of evidence. Properly understood, the arguments rise no higher than disagreements with the policy behind the HRSO Act,[36]

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35 *Vella* (2019) 269 CLR 219 at [80] (Bell, Keane, Nettle and Edelman JJ), citing *Nicholas v The Queen* (1998) 193 CLR 173 at [37] (Brennan CJ).

36 See *Fardon* (2004) 223 CLR 575 at [23] (Gleeson CJ).

and do not explain why any aspect of the scheme it creates is incompatible with the Supreme Court's role as a repository of federal jurisdiction.

D. THE APPELLANT'S APPROACH SHOULD BE REJECTED

49. The appellant's challenge to the validity of the HRSO Act starts with the question whether the power that the legislation confers can properly be characterised as "judicial power", for the purposes of determining whether the Act would offend Ch III if it were enacted by the Commonwealth Parliament for a Ch III court. For the reasons outlined in paragraphs 12 to 14 above, that is not the necessary starting point, and should not be the starting point in this case.

50. In any event, the analysis on which the appellant proceeds is premised on an unduly narrow conception of judicial power. In support of his argument that the HRSO Act would infringe Ch III if it had been enacted by the Commonwealth Parliament, the appellant focuses on comparing the powers conferred by the HRSO Act to various historical antecedents (AS [35]-[51]). He appears to do so with a view to establishing that there is no precise historical antecedent for the powers conferred by the HRSO Act, which he says has the consequence that the HRSO Act does not confer judicial power (AS [65]). This approach is apparently informed by Gummow J's statement in *Fardon* that:[37]

> the "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.

51. Even if the appellant's analysis of historical antecedents were accepted as accurate,[38] one of the difficulties that attends the appellant's approach of looking at existing categories of exceptional case and seeking to classify legislation as within or without those categories is that it comes at the expense of examining the provisions in issue

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37 *Fardon* (2004) 223 CLR 575 at [80] (Gummow J). Being informed by Gummow J's statement in *Fardon*, it appears that this argument is confined to the provisions of the HRSO Act that confer power to make a continuing detention order, rather than the provisions that confer power to make a supervision order.

38 It is not necessary for the Court to determine the accuracy of the appellant's analysis of historical antecedents in order to determine the appeal. If the Court decides to consider that matter, the Commonwealth notes that many pre-Federation statutes conferred power on justices of the peace to make orders for the detention of "dangerous" mentally ill persons: see, eg, *Dangerous Lunatics Act 1843* (NSW), s 1; *Lunacy Act 1844* (SA), s 1; *Lunacy Act 1871* (WA), s 38; *Lunacy Act 1890* (Vic), s 4. Similar powers were available to justices of the peace in England: see *Vagrancy Act 1714* (13 Anne c 26), s 22; Suzuki, "Lunacy in seventeenth- and eighteenth-century England: analysis of Quarter Sessions records Part I", (1991) 2 *History of Psychiatry* 437 at 452-453; Suzuki, "Lunacy in seventeenth- and eighteenth-century England: analysis of Quarter Sessions records Part II", (1992) 3 *History of Psychiatry* 29 at 30-35.

against the recognised indicia of judicial power and its exercise. Additionally, it assumes there is a clear delineation between categories of cases which are "exceptional" and thus permissible, and those which are not, in circumstances where it is well established that the class of permitted exceptions is not closed.[39]

52. In so far as the appellant contends that there is no category of exceptional case within which the HRSO Act would fall, that contention pays insufficient regard to decisions of this Court which have characterised a power to authorise detention in custody other than as an incident of adjudging and punishing criminal guilt as judicial power. One such decision was *Fardon*,[40] which is discussed above. Another is this Court's decision in *Benbrika* which, as discussed below, establishes that the Commonwealth Parliament can confer on a Ch III court a power to detain a person in custody other than as an incident of adjudging and punishing criminal guilt in circumstances where, as a matter of substance, the power has as its object the protection of the community from harm.

53. In *Benbrika*, this Court rejected a challenge to the validity of Div 105A of the *Criminal Code* (Cth). Division 105A conferred power on State and Territory courts to make a continuing detention order if satisfied that a person who was serving a sentence of imprisonment for a serious terrorism offence and who was due to be released within 12 months posed an unacceptable risk of committing a serious terrorism offence if released into the community, and that there was no other less restrictive measure that would be effective in preventing the unacceptable risk. The effect of a continuing detention order was to commit the offender to detention in custody for the period the order was in force.

54. The principal argument[41] advanced by the respondent in *Benbrika* was that Div 105A was invalid because it conferred on a Ch III court a power to detain a person in custody other than as an incident of adjudging and punishing criminal guilt, in circumstances that did not fall within any of the recognised exceptions to the following principle stated in *Lim*:[42]

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39 *Benbrika* (2021) 95 ALJR 166 at [32], [36] (Kiefel CJ, Bell, Keane and Steward JJ), [75] (Gageler J).

40 See *Fardon* (2004) 223 CLR 575 at [34] (McHugh J). See also *Benbrika* (2021) 95 ALJR 166 at [2], [35] (Kiefel CJ, Bell, Keane and Steward JJ).

41 The respondent also argued that particular incidents of the power conferred under Div 105A deprived that power of the character of judicial power. The Court rejected those arguments: *Benbrika* (2021) 95 ALJR 166 at [13]-[14] (Kiefel CJ, Bell, Keane and Steward JJ), [232]-[233] (Edelman J).

42 (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

> putting to one side the exceptional cases to which reference is made below, 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.

55. That argument was rejected by a majority of the Court. Although the detention of terrorist offenders for the purpose of protecting the community from harm was not identified in *Lim* as one of the exceptions to the *Lim* principle, the plurality in *Benbrika* expressly rejected the contention (central to the appellant's argument in this appeal) that "the exceptions to the *Lim* principle are confined by history and are insusceptible of analogical development".[43]

56. Their Honours went on to say:[44]

> 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.

57. The plurality considered that Div 105A had as its object the protection of the community from the risk of harm posed by the threat of terrorism, and that it validly conferred the judicial power of the Commonwealth on State and Territory courts.[45]

58. It follows from *Benbrika* that it is possible for the Commonwealth Parliament to confer on a Ch III court the power to interfere with or restrict a person's liberty, or to detain a person in custody, on the basis of what the person might do in future — provided that:

58.1 the incidents of the power are such that the power is properly characterised as judicial power, and the power is not required to be exercised in a manner that is contrary to Ch III; and

58.2 in the case of a power to detain a person in custody, the power is properly characterised as non-punitive, and falls within an exception to the *Lim* principle

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43 *Benbrika* (2021) 95 ALJR 166 at [36] (Kiefel CJ, Bell, Keane and Steward JJ); see also at [75], [77]-[78] (Gageler J).

44 *Benbrika* (2021) 95 ALJR 166 at [36] (Kiefel CJ, Bell, Keane and Steward JJ) (emphasis added).

45 *Benbrika* (2021) 95 ALJR 166 at [47]-[48] (Kiefel CJ, Bell, Keane and Steward JJ).

because, for example, as a matter of substance, it has as its object the protection of the community from harm.

59. The appellant has not sought leave to re-open that case. Rather, he seeks to distinguish *Benbrika* on the basis that terrorism offences are "extraordinary", and "create a category that is a *sui generis* exception" to the *Lim* principle (AS [57]-[58]).[46] The appellant appears to treat "laws that protect the adult community from violent sexual offending and children from sexual offending" — that is, laws of the kind considered in *Fardon* — as a separate *sui generis* exception to that principle (AS [56], [58]).

60. The appellant's attempt to characterise the law considered in *Benbrika* as falling within a *sui generis* exception to the *Lim* principle pays insufficient regard to the reasoning in *Benbrika*.

61. As noted in paragraph 56 above, the plurality in *Benbrika* expressly reasoned on the basis that "[i]t 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".[47] Their Honours identified that protective purpose as an object of "protect[ing] the community from harm" — not protecting the community from the harm caused by terrorism specifically.[48]

62. Further, although in dissent as to the characterisation of the purpose of Div 105A, both Gageler J and Gordon J reasoned on the basis that a law authorising detention in custody other than as an incident of adjudging and punishing criminal guilt may fall within an exception to the *Lim* principle if it has as its object the protection of the community from harm. Justice Gageler described prevention of harm as a legitimate non-punitive objective, at least where the harm is grave and specific.[49] Justice Gordon said that, in order for the power to detain a person in custody after the conclusion of their sentence

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46 In his written submissions (AS [48], [58]), the appellant refers to what was identified in *Benbrika* as "the *Lim* principle" as "Gummow J's statement in *Fardon*". As explained by the plurality in *Benbrika*, Gummow J's reasoning in *Fardon* involved a reformulation of the *Lim* principle: *Benbrika* (2021) 95 ALJR 166 at [24] (Kiefel CJ, Bell, Keane and Steward JJ). The principle applied by the plurality in *Benbrika* was that stated in *Lim*, rather than Gummow J's reformulation: *Benbrika* (2021) 95 ALJR 166 at [36] (Kiefel CJ, Bell, Keane and Steward JJ).

47 *Benbrika* (2021) 95 ALJR 166 at [36] (Kiefel CJ, Bell, Keane and Steward JJ).

48 *Benbrika* (2021) 95 ALJR 166 at [36] (Kiefel CJ, Bell, Keane and Steward JJ); see also at [230] (Edelman J).

49 *Benbrika* (2021) 95 ALJR 166 at [79] (Gageler J).

to be characterised as judicial, it must be legislatively tailored to the achievement of a sufficiently specified protective outcome.[50]

63. Thus, none of the members of the Court in *Benbrika* who considered it necessary to identify an exception to the *Lim* principle reasoned on the basis that the relevant exception was confined to laws that had as their object the protection of the community from the harm caused by terrorist acts.

64. In any event, for the reasons given in paragraphs 12 to 14 above, it is not necessary in this case for the Court to determine whether the HRSO Act would offend Ch III if it were enacted by the Commonwealth Parliament for a Ch III court.

E. SUBMISSIONS OF THE PROPOSED AMICUS CURIAE

65. Derek Ryan seeks leave to be heard as amicus curiae, in order to submit that the HRSO Act infringes the *Kable* principle for different reasons than those advanced by the appellant. In summary, relying primarily on *Totani*, Mr Ryan submits that, by operation of the HRSO Act, the Supreme Court is "impermissibly beholden to implement the policy of the legislature" by reference to the following consequences:

65.1 in certain types of case, the HRSO Act enlists the Supreme Court to impose a continuing detention order without an independent curial determination that the detention in custody of the offender is necessary to ensure adequate protection of the community (ACS [22]); and

65.2 the requirement that a supervision order must include the conditions set out in s 30(2) of the HRSO Act enlists the Supreme Court to impose conditions as part of a supervision order without an independent curial determination that those conditions are necessary to ensure adequate protection of the community (ACS [29]-[30]).

66. The vice of the legislation considered in *Totani* was that it gave the Magistrates Court of South Australia such a limited role in the legislative scheme as to permit the conclusion that the court had been "enlisted by the legislature to do the work of the executive".[51] That conclusion arose because the Act required the Court to make a control order "without undertaking any independent curial determination, or

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50 *Benbrika* (2021) 95 ALJR 166 at [160] (Gordon J).
51 *Vella* (2019) 269 CLR 219 at [5] (Kiefel CJ). See also *NAAJA* (2015) 256 CLR 569 at [123] (Gageler J).

adjudication, of the claim or premise of an application for a control order … that a particular defendant poses risks in terms of the objects of the Act".[52] However, as Kiefel CJ observed in *Vella*:[53]

> Such a conclusion is not open where the statute gives the court the task, when making an order to prevent future wrongdoing, of undertaking its own assessment of the connection between the order proposed and the past or likely future conduct of the person, or its own assessment of the connection between the orders and a continuation of past and possible future acts.

67. The HRSO Act gives the Supreme Court the task of making independent curial determinations about those matters, as discussed in Part B above, consistently with the protective purpose at which the Act is directed (see s 8). Each of the assessments that the Court is required to make entails regard to the particular circumstances of the offender in relation to whom the order is sought, including evidence as to their past conduct and likely future conduct. It could not be said that the role of the Court under the HRSO Act is so limited that the Court has been enlisted by the legislature to implement decisions of the executive.

68. The fact that, in some cases, the Supreme Court may conclude that it is necessary to make a restriction order in relation to an offender to ensure adequate protection of the community against an unacceptable risk, and further conclude that it is not able to make a supervision order in relation to that offender, does not call for a contrary conclusion. To reach such a point, the Court must have been satisfied: that there is an unacceptable risk of the offender committing a serious offence; that it is necessary to make a restriction order to ensure adequate protection of the community against that risk; and that the offender would not substantially comply with the standard terms of a supervision order. Satisfaction of each of those matters requires an independent curial determination about the connection between the proposed order, the likely future conduct of the offender and the ability of the proposed order to protect the community.

69. True it is that if the Court is satisfied of those three matters, then it must make a continuing detention order in relation to the offender. However, it does not follow from the fact that the Act requires the Supreme Court to make specified orders in the event

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52 *Totani* (2010) 242 CLR 1 at [436] (Crennan and Bell JJ).
53 (2019) 269 CLR 219 at [15] (Kiefel CJ), citing *Totani* (2010) 242 CLR 1 at [219] (Hayne J).

that it determines certain conditions are satisfied that the legislation impermissibly directs the Court as to the outcome of the exercise of its jurisdiction.[54]

70. Much the same point can be made in answer to Mr Ryan's argument relying on s 30(2). It was open to the legislature to specify that a supervision order must include at least the conditions in s 30(2). The fact that the Court must include those conditions in a supervision order does not warrant the conclusion that the Court is being directed as to the outcome of the exercise of its jurisdiction, in circumstances where, before making such an order, the Court must make an independent curial determination about the matters referred to in paragraph 68 above.

PART V: ESTIMATE OF TIME

71. It is estimated that up to 20 minutes will be required for the presentation of the Commonwealth's oral argument.

Dated: 18 February 2022

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[54] *Palling v Corfield* (1970) 123 CLR 52 at 58-59 (Barwick CJ), 64-65 (Menzies J), 65 (Windeyer J), 67 (Owen J), 69-70 (Walsh J), 70 (Gibbs J); *International Finance* (2009) 240 CLR 319 at [49] (French CJ), [77] (Gummow and Bell JJ), [121] (Hayne, Crennan and Kiefel JJ), [157] (Heydon J); *Totani* (2010) 242 CLR 1 at [133] (Gummow J), [420] (Crennan and Bell JJ); *Emmerson* (2014) 253 CLR 393 at [57]-[58] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

No. P56/2021

BETWEEN:

PETER ROBERT GARLETT
Appellant

and

THE STATE OF WESTERN AUSTRALIA
First Respondent

THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA
Second Respondent

ANNEXURE TO THE ATTORNEY-GENERAL OF THE COMMONWEALTH'S SUBMISSIONS

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the Commonwealth Attorney-General sets out below a list of the particular constitutional provisions and statutes referred to in her submissions.

Commonwealth		**Provision(s)**	**Version**
1.	Commonwealth Constitution	Ch III	Current
2.	*Criminal Code* (Cth)	Div 105A	Compilation No. 134, 20 July 2020 – 6 September 2020
3.	*Judiciary Act 1903*	s 78A	Current (Compilation No. 48, 1 September 2021 – present)
State			
4.	*Criminal Code* (WA)	s 392	Current (24 December 2021 – present)

5.	*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)		No. 40 of 2003, 6 June 2003 – 7 December 2005
6.	*High Risk Serious Offenders Act 2020* (WA)	ss 3, 5, 7, 8, 26, 27, 28, 29, 30, 35, 46, 48, 64, 65, 68, 69, 71, 74, 84, Sch 1, item 34	Current (No. 20 of 2020, 26 August 2020 – present)