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 of 2021**

BETWEEN:

PETER ROBERT GARLETT
Appellant

and

THE STATE OF WESTERN AUSTRALIA
First Respondent

and

THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA
Second Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND

Filed on behalf of the Attorney-General for the State of Queensland (Intervening)

9 March 2022

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PART I: Internet publication

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART II: Outline

Judicial power

2. State Parliaments may confer on courts either judicial or non-judicial powers which do not impair a court's institutional integrity (**QS [8]**).

   - *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 424 [40], 426 [44] (**JBA 3:15:506,508**).

3. Accordingly, in applying the *Kable* principle, the characterisation of a power as *non*-judicial is neither determinative, nor in many cases a 'significant factor to be taken into account' (cf **AR [3]**).

4. In this case, given the similarity of the *High Risk Serious Offenders Act 2020* (WA) ('*HRSO Act*') and the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), the logical starting point is *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 (**QS [5(a)]**), not whether the power is judicial (cf **AS [22], [30]**). *Fardon* is not relevantly distinguishable.

Distinguishing robbery

5. Contrary to **AR [4]**, **[8]** the key question is not whether there is a 'principled basis' for 'expanding the categories of offenders' to which a scheme for preventive detention may apply. Nor is it necessary to identify something 'exceptional' about robbery (cf **AR [11]-[13]**).

6. Rather, the question is whether there is a coherent or principled basis on which to distinguish between protection of the community from the potential harm of sexual offending, and protection of the community from the potential harm of robbery. There is none: **QS [21]-[24]**.

7. Statements about the severity of the harm potentially caused by sexual offending (**AR [11]**) do not provide a basis on which to 'second guess' Parliament's treatment of

robbery as also having the potential to involve harm to the community sufficiently serious as to be capable of constituting an 'unacceptable risk'.

- *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166, 224 [228]-[229] (Edelman J) (**JBA 8:43:2625**); see also 185 [47] (Kiefel CJ, Bell, Keane and Steward JJ) (**JBA 8:43:2586**).

R v Moffatt

8. The history of legislation providing for 'sentences longer than would be commensurate with the seriousness of a particular offence, by way of response to an apprehension of danger to the community' supports the validity of the *HRSO Act*.

- *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 592 [20] (Gleeson CJ) (**JBA 4:20:855**).

9. The legislation considered in *R v Moffatt* appears to have been in effect, a statutory predecessor of the *DPSO Act* and the *HRSO Act* (see **QS [22], fn 40**). It applied to a 'very long' catalogue of offences, including armed robbery.

- *R v Moffatt* [1998] 2 VR 229, 246 (Hayne JA) (**JBA 8:45:2716**).

10. The relevance of *Moffatt* (in which a *Kable* challenge was rejected) cannot be put to one side on the basis that a power exercised at the time of sentencing is 'plainly judicial' (**AS [45]-[46]**).

(a) *Moffatt* is not distinguishable on that basis. The *Sentencing Act 1991* (Vic) required the Court, upon a 'review' at the completion of the 'nominal sentence', to discharge the indefinite sentence 'unless it is satisfied (to a high degree of probability) that the offender is still a serious danger to the community'.

R v Moffatt [1998] 2 VR 229, 232 (Winneke P) (**JBA 8:45:2702**).

(b) In any event, characterisation of a power as 'judicial' is neither determinative nor necessarily significant in a *Kable* context.

11. The 'curiosity' that would result if the legislation considered in *Moffatt* was valid, but the *HRSO Act* was invalid in its application to robbery, points to the underlying incoherence of such a result (cf **AS [47]**).

- *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 586 [2] (Gleeson CJ) (**JBA 4:20:849**).
- *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166, 181 [34] (Kiefel CJ, Bell, Keane and Steward JJ) (**JBA 8:43:2582**).
- *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 252 [72] (Bell, Keane, Nettle and Edelman JJ) (**JBA 7:37:2355**).

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