HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA P54/2021
PERTH REGISTRY

BETWEEN: **PETER ROBERT GARLETT**
Appellant
and
THE STATE OF WESTERN AUSTRALIA
First Respondent
and
THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA
Second Respondent

PROPOSED SUBMISSIONS OF DEREK RYAN

PART I: CERTIFICATION

1. These submissions are suitable for publication on the internet.

PART II: BASIS OF LEAVE TO BE HEARD AS AMICUS CURIAE

2. Mr Ryan seeks leave to be heard as amicus curiae pursuant to the implied powers of the High Court.

PART III: WHY LEAVE SHOULD BE GRANTED

3. Mr Ryan seeks leave to be heard as amicus curiae on the basis that he seeks to make written submissions "which the Court should have to assist it to reach a correct determination", and which have not been presented as yet.[1] In particular, Mr Ryan seeks leave to make submissions drawing attention to the effect of the provisions of the Act on the decisional freedom of the Supreme Court of Western Australia, as one reason

[1] *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at 39 [3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

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that the provisions of the Act substantially impair the institutional integrity of the Court contrary to the *Kable*[2] principle not presently addressed by the appellant.

4. Although Mr Ryan does not seek to intervene in the proceedings, it is relevant to the Court's discretion to note that Mr Ryan also has a legal interest that is likely to be substantially affected by the outcome of the proceedings.[3] In this respect Mr Ryan seeks leave to rely on his affidavit dated 31 January 2022. As his affidavit explains, like the Appellant, Mr Ryan was a serious offender under custodial sentence arising from his conviction for robbery and was the subject of an application under the *High Risk Serious Offenders Act 2020* (WA) (**the Act**) while he was in custody.[4] Mr Ryan is currently subject to a supervision order made under the Act.[5] As a result, Mr Ryan falls within the class of offenders that define the field of operation of the Act at issue in these proceedings, being serious offenders under custodial sentence who have been convicted of the offence of robbery.[6] If the legislation were held invalid by this Court, this is likely also to invalidate Mr Ryan's supervision order.

5. If the Court would be assisted by Mr Ryan's submissions, any costs or delay from hearing him as amicus will not be disproportionate to the expected assistance.[7] Mr Ryan's proposed submissions are unlikely to entail disproportionate delay or cost in circumstances where they articulate an argument under an existing ground of challenge raised by the appellant.

PART IV: SUBMISSIONS ON APPEAL

6. Mr Ryan submits that the provisions of the Act invalidly enlist the Supreme Court of Western Australia to give effect to legislative and executive policy, in the sense that phrase and its variants were used in *Totani*.[8]

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[2] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[3] *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at 39 [2] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

[4] Affidavit of Derek Charles Ryan dated 31 January 2022 at [2] to [4], [6].

[5] *ibid* at [7].

[6] Order of Gordon J dated 21 December 2021 at [1].

[7] *ibid* at [4].

[8] See, eg, *South Australia v Totani* (2010) 242 CLR 1 (***Totani***) at 52 [82] (French CJ), 67 [149] (Gummow J), 88 [226] (Hayne J) and 173 [481] (Kiefel J).

Connection to *Kable* principle

7. The *Kable* principle focuses on whether a law "substantially impairs the institutional integrity of a court", so as to render it incompatible with the role of that court as a repository of federal jurisdiction.[9] The reference to "*substantial* impairment" recognises that the task of the Court is evaluative and normative. Whether a law has that effect has in the past been judged *both*: (i) from the perspective of its effect on public confidence;[10] *and* (ii) from the perspective of its effect on the defining characteristics of the court.[11] In the present appeal, the appellant's submissions focus on the former. Mr Ryan's submissions focus exclusively on the latter, and proceed on
10 the assumption that the term "institutional integrity" directs attention to the "defining characteristics of a State Supreme Court".[12] As a result, if the institutional integrity of the court is substantially impaired in the requisite sense, it is because the court "no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies".[13]

8. The defining characteristic at issue in this case is the "independence" [14] of the court. This characteristic defines "all of the courts of the Australian judicial system",[15] and requires "decisional independence from influences external to proceedings in the court"[16] including from the executive and the legislature.[17] To the extent that the Act does not observe the foundational requirement of independence, ie "enlists the court in

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[9] *Knight v State of Victoria* (2017) 261 CLR 306 at 317 [5] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[10] See, eg, *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 (***Fardon***) at 617–618 [102], citing *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 172 [65] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

[11] See, eg, *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45 (***Forge***) at 76 [63] (Gummow, Hayne and Crennan JJ), cited with approval in *North Australian Aboriginal Justice Agency Limited v Northern Territory of Australia* (2015) 256 CLR 569 (***North Australian Aboriginal Justice Agency***) at 594 (French CJ, Kiefel and Bell JJ).

[12] *ibid*.

[13] *Forge* at 76 [63] (Gummow, Hayne and Crennan JJ), cited with approval in *North Australian Aboriginal Justice Agency* at 618 (Gageler J).

[14] *Condon v Pompano* (2013) 252 CLR 38 at 89 [125] (Hayne, Crennan, Kiefel and Bell JJ).

[15] *ibid*.

[16] *Totani* at 43 [62] (French CJ).

[17] *Fardon* at 656 [219] (Callinan and Heydon JJ), cited with approval in *Totani* at 66 [145] (Gummow J).

the implementation of the legislative or executive policies of the relevant State",[18] it will be invalid.

Totani

9. The law at issue in *Totani* was s 14(1) of the *Serious and Organised Crime (Control) Act 2008* (SA). Section 14(1) obliged the Magistrates Court to make a control order on satisfaction of the factum in that provision.[19] Despite the objects of the Act making reference to crime-prevention and community protection from organisations involved in serious crimes,[20] s 14(1) required no consideration of this premise in the court's determination of an application for a control order. Rather, the Magistrates Court was required to make a control order against a defendant if the Court was satisfied that the defendant was a member of a "declared organisation",[21] with organisations meeting that description being decided by the Attorney-General.[22] If the Magistrates Court made a control order against a defendant, the control order was required, except as specified in the control order, to prohibit the defendant from associating with other persons who were members of declared organisations and from possessing various dangerous articles or prohibited weapons.[23]

10. By majority, the Court held that s 14(1) was invalid. Of the majority, French CJ, Hayne J, and Bell and Crennan JJ held that s 14(1) enlisted the Magistrate Court to give effect to executive policy;[24] Gummow J and Kiefel J held that s 14(1) enlisted the Magistrates Court to give effect to executive and legislative policy.[25] The unifying theme is the emphasis on the absence of any "independent curial determination" of the underlying premise of applications made by the Act,[26] namely that "a particular defendant poses risks in terms of the objects of the Act."[27] By requiring the Magistrates Court to act on

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[18] *Kuczborski v The State of Queensland* (2014) 254 CLR 51 at 98 [140] (Crennan, Kiefel, Gageler and Keane JJ).

[19] *Totani* at 24 [17] (French CJ).

[20] *ibid* at 53 [85] (Gummow J).

[21] *ibid* at 24 [17] (French CJ).

[22] *ibid* at 23 [12] (French CJ).

[23] *ibid* at 25 [18] (French CJ).

[24] *ibid* at 25 [18] (French CJ), 92 [236] (Hayne J) and 160 [436] (Crennan and Bell JJ).

[25] *ibid* at 67 [149] (Gummow J) and 173 [481] (Kiefel J).

[26] *ibid* at 160 [436] (Crennan and Bell JJ). See also 50 [75] (French CJ), 65 [139] (Gummow J), 89 [228] (Hayne J) and 172 [478] (Kiefel J).

[27] *ibid* at 160 [436] (Crennan and Bell JJ).

the basis of a factum which did not invite consideration of this issue, the Magistrates Court was enlisted into implementing legislative policy (as expressed in the objects of the Act)[28] or executive policy (as expressed in the declarations that made an organisation a "declared organisation") directed at the curtailment of the liberty of defendants that were the subject of applications under the Act.[29]

The Act

11. The Act infringes this principle, when applied (relevantly to the present case) to an offender under custodial sentence who has been convicted of robbery. As in *Totani*, this characteristic of the Act may be discerned from the relationship between the objects of the Act, the factum enlivening the court's power to make orders curtailing personal liberty, and the consequences which attach to the enlivening of the factum. To understand why this is so, it is necessary to turn first to these four features.

12. The *first* feature is the objects of the Act which, as in *Totani*, express the legislative policy from which the analysis of institutional incompatibility proceeds.[30] Section 8 of the Act states that the objects of the Act are:

> a) to provide for the detention in custody or the supervision of high risk serious offenders to ensure adequate protection of the community and of victims of serious offences; and
>
> b) to provide for continuing control, care or treatment of high risk serious offenders.

13. The relevant objective in the present context is to "ensure adequate protection of the community and of victims of serious offences".

14. The *second* feature is that the class of "serious offences", in respect of which restriction orders may be made, are dictated by the Parliament. Section 5 defines an offence against the law of Western Australia to be a "serious offence" if it is an offence specified in Schedule 1, Division 1 (offences that are serious offences in all circumstances) or Schedule 1, Division 2 (offences that are serious offences in specified circumstances).[31] There is no consistent methodology for inclusion of offences in Schedule 1. Although the Explanatory Memorandum presented to the Legislative Assembly (**EM**) refers to a

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[28] *ibid* at 67 [149] (Gummow J), 173 [481] (Kiefel J). See also 160 [436] (Crennan and Bell JJ) for discernment of the legislative policy from the objects.

[29] See *ibid* at 52 [82] (French CJ).

[30] *ibid* at 67 [149] (Gummow J), 160 [436] (Crennan and Bell JJ) and 173 [481] (Kiefel J).

[31] Section 5(1) of the Act.

"threshold" of a maximum penalty of imprisonment of seven years for "violent" offences, the EM notes that the Schedule "contains some offences which fall short of the seven year threshold" because they are "considered sufficiently serious in nature to include."[32] Robbery is an offence included in Schedule 1, Division 1[33] and thus deemed to be a serious offence in *all* circumstances.

15. The *third* feature is the nature of the factum which enlivens the obligation of the Supreme Court to make a restriction order.[34] Section 7(1) provides that:

> 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 offender to ensure adequate protection of the community against an unacceptable risk that the offender will commit a serious offence. (emphasis added)

16. The Court dealing with an application must be satisfied of two distinct matters. The first is that there is an unacceptable risk that the offender will commit a serious offence. The second is that a restriction order is "*necessary* … to ensure *adequate* protection of the community". The statutory requirement for the Court to analyse "necessity" and "adequacy" will involve the Court in a proportionality enquiry. In particular, the Court must be satisfied of the relationship between the "unacceptable threat", the means ("the restriction order"), and the end (the protection of the community). What is *unacceptable*, *necessary* and *adequate* logically require evaluation of the relationship between the threat, the severity of the restriction, and the protection to be achieved by that restriction. The required state of satisfaction is to be formed only on "acceptable and cogent evidence and to a high degree of probability". These features combine to create a perception that the independence of the judicial branch is being preserved by the legislation. But, as developed below, there is an important practical operation in which the reality belies the perception.

17. Here, it is critical to note that a "restriction order" includes *both* a continuing detention order *and* a supervision order. Thus, s 7(1) will necessarily require the Court to engage in a two-tiered proportionality analysis: asking whether *either* a continuing detention order *or* a supervision order are proportionate to the threat to the community. In some cases, the Court may be satisfied that a supervision order but *not* a continuing detention

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[32] EM at 52.

[33] Item 34 of Schedule 1 Division 1 of the Act.

[34] Section 3 of the Act.

order is "necessary". The second feature of the legislation (ie the inconsistent methodology for inclusion of offences), and the requirement that the Court be satisfied "by acceptable and cogent evidence and to a high degree of probability", means that this is not unlikely to occur.

18. In that operation, the constitutional vice in the legislation is in the *fourth* feature: the orders which the Court is required to make. Section 48(1) provides:

> If the court hearing a restriction order application finds that the offender is a high risk serious offender, the court must –
>
> (a) make a continuing detention order in relation to the offender; or
>
> (b) except as provided in section 29, make a supervision order in relation to the offender.

19. This notionally reflects the two-tiered proportionality analysis identified at [17] above. However, the interposition of s 29 in s 48(1)(b) will disengage the mandated orders from that proportionality analysis. Section 29(1) provides that a court *cannot* make a supervision order "unless it is satisfied, on the balance of probabilities, that the offender will substantially comply with the standard conditions of the order as made". Section 29(2) places the onus of proof on the offender. The standard conditions are stated in s 30(2). They include conditions which can only be satisfied if the offender will have a fixed address after being released into the community: the offender must report to the community corrections officer the offender's current address (s 30(2)(a)), receive visits from the community corrections officer (s 30(2)(b)), and notify the community corrections officer of every change of the offender's place of employment 2 days before the change happens (s 30(2)(c)). This inherently discriminates against offenders who (because of long periods of incarceration or inadequate family or community support) do not have a fixed address immediately after leaving prison.

20. The standard conditions also include being under the supervision of the community corrections officer and complying with directions (s 30(2)(d)); not leaving or staying out of Western Australia without permission (s 30(2)(e)); not committing a serious offence during the period of the order (s 30(2)(f)); and being subject to electronic monitoring (s 30(2)(g)). It is an offence to contravene a condition of a supervision order without reasonable excuse: the maximum penalty being imprisonment for three years.[35]

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[35] Section 80 of the Act.

21. Accordingly, of the two kinds of restriction order, the Court *must* make a continuing detention order unless the offender discharges an onus on the balance of probabilities that the offender will substantially comply with the standard conditions of the order, which he cannot do without a fixed address. That being so, to use the words of Archer J in applying these provisions, the Court "will only have a choice" between orders if the offender discharges the onus.[36] This is so even if the Court was not satisfied that a continuing detention order was necessary or appropriate.

Implementation of legislative policy

Continuing detention orders

22. The provisions of the Act summarised above will, in certain types of case enlist the Supreme Court to impose a continuing detention order without involving an "independent curial determination"[37] of the fundamental premise of the application – namely, that that detention in custody of the person who is a "high risk serious offender" is actually necessary to ensure "adequate protection of the community and of victims of serious offences."[38] In this way, the court is impermissibly beholden to implement the policy of the legislature, with the consequence that its institutional integrity is impaired in the requisite sense.[39]

23. The absence of independent curial determination occurs where the court is satisfied of the factum in s 7(1), but the offender fails to discharge his onus under s 29(1) to show that he will substantially comply with the standard conditions of his order (which may include that the Court is not satisfied that the offender will not leave Western Australia for some reason). In such a case, the court *must* order the continuing detention of the offender without needing to be satisfied that such an order is necessary to protect the community. This result was adverted to by Allanson J in relation to an application under the Act to detain a 44-year-old Indigenous man who had already been incarcerated for 10 years:[40]

> Even where the court is not satisfied that it is necessary to detain [the offender] in custody to ensure the adequate protection of the community, in the absence of

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[36] *The State of Western Australia v Coffin [No 5]* [2021] WASC 360 at [33] (Archer J).

[37] *Totani* at 160 [436] (Crennan and Bell JJ).

[38] Section 8 of the Act.

[39] *Kuczborski v The State of Queensland* (2014) 254 CLR 51 at 98 [140] (Crennan, Kiefel, Gageler and Keane JJ).

[40] *The State of Western Australia v Mackay [No 2]* [2020] WASC 474 at [12] (Allanson J).

suitable accommodation into which he may be released and supervised within the community, detention may be the result.

24. This concern is particularly acute where the Act applies to an offender under custodial sentence who has been convicted of robbery. Although the Act refers to the offenders within its sweep as "high risk serious offenders", the court has no role in determining what is a "serious offence", but must rather act on the legislature's contestable selection of offences which are serious.[41] In the case of robbery, the legislature has defined it as a "serious offence" in all circumstances. That is despite commission of robbery under the law of Western Australia not requiring actual or threatened violence against a person at all (actual or threatened violence against property is sufficient) or any actual or threatened use of a weapon.[42] Further, the standard custodial sentence for an offence of armed robbery is "from 4 to 6 years without taking into account matters of mitigation",[43] and "in cases in which the offence is unattended by actual violence sentences tend to be lower."[44] Thus, where the Act mandates that a court order the continuing detention of an offender under custodial sentence for robbery because he has failed to discharge his onus, the order serves "to disguise an unstated premise"[45] – and often a false premise – that detention of the offender is necessary for the adequate protection of the community.

25. The absence of judicial determination in the central step of the proportionality enquiry which the Act presuppose – what orders are to be made to give effect to the legislative intent – is illustrated by the cases decided under the Act.

26. The *first* category of case is where the offender fails to discharge the onus because he does not have suitable accommodation. For example, in *Woodward*, the State conceded that "a supervision order was appropriate subject to the availability of suitable accommodations."[46] The difficulty was that there was no suitable accommodation, with one reason for that state of affairs being that the State's contract with an accommodation provider was limited to offenders below the age of the offender in question.[47]

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[41] See [15] of these submissions.

[42] See s 392 of the *Criminal Code Act Compilation Act 1913* (WA).

[43] *Mogridge v The State of Western Australia* [2016] WASCA 205 at [38] (Buss P and Mazza JA).

[44] *Schischka v The State of Western Australia* [2015] WASCA 15 at [33] (Martin CJ), citing *The State of Western Australia v Amoore* [2008] WASCA 65 at [50] (Pullin JA).

[45] *Totani* at 173 [480] (Kiefel J).

[46] *The State of Western Australia v Woodward* [2021] WASC 444 at [3] (Hall J).

[47] *ibid* at [79] (Hall J).

Nonetheless, on the strength of the court's finding that it "would be impossible for the respondent to substantially comply with the standard conditions of a supervision order in the absence of suitable accommodation", the court reluctantly ordered the continuing detention of a 78-year-old man who at the time of the decision had already been incarcerated for more than ten years.[48]

27. The *second* is what Quinlan CJ dubbed the "Catch-22" under the predecessor to the Act[49] and which has continued to the subject of judicial comment under the current Act.[50] This refers to certain cases in which, due to departmental policy, an offender in custody is not eligible for treatment to address his criminogenic needs unless he becomes subject to a continuing detention order, which of course has the effect that he does become subject to a continuing detention order at least in part because his criminogenic needs are unaddressed.[51] As Quinlan CJ said, "this Catch-22 is neither in the interests of [the offender] nor, as is the paramount consideration under the Act, the interests of the community."[52] Most recently, Fiannaca J said that:[53]

> It is a matter of concern (and one that has been raised in previous cases) that offenders in respect of an application has been made under [the Act], where outstanding treatment needs have been identified, are not provided with suitable treatment before proceedings are determined.

Nonetheless, the result in at least some cases is that the unmet treatment become important factor supporting the continuing detention order against a person, even where the offender is willing to undergo the treatment.[54]

28. Cases such as these provide examples of the ""practical operation"[55] of the provisions of the Act. They serve to emphasise that the court is beholden to "give the neutral colour

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[48] See *ibid* at [3], [28] and [93] (Hall J).

[49] *State Director of Public Prosecution v Rao* [2019] WASC 93 at [14] (Quinlan CJ).

[50] See, eg, *The State of Western Australia v Ward [No 2]* [2020] WASC 480 at [137] (Archer J); *The State of Western Australia v Mackay [No 2]* [2020] WASC 474 at [122] (Allanson J); *The State of Western Australia v ACJ* [2021] WASC 219 at [268] (Fiannaca J).

[51] See *State Director of Public Prosecution v Rao* [2019] WASC 93 at [14] (Quinlan CJ).

[52] *ibid*.

[53] *The State of Western Australia v ACJ* [2021] WASC 219 at [268] (Fiannaca J).

[54] See, eg, *The State of Western Australia v Mackay [No 2]* [2020] WASC 474 at [121], [129] (Allanson J).

[55] *Totani* at 50 [74] (French CJ), 63 [134] (Gummow J) and 84 [213] (Hayne J).

of a judicial decision"[56] to what is in truth the legislature's desired policy of incarceration for certain classes of offenders under the Act.

Supervision orders

29. The enlistment of the court in the implementation of the policy of the legislature is also brought into effect by the seven "standard conditions" that a court is required to include in a supervision order by 30(2) and s 48(1) if a continuing detention order is not made on satisfaction of the factum in s 7(1) As explained earlier,[57] these conditions include being subject to electronic monitoring, not leaving Western Australia and complying with directions of a community corrections officer (who can impose curfew requirements). It is not difficult to see that these conditions are restrictive and enter "areas going to personal liberty"[58] that have traditionally been the province of the court. Notwithstanding that, the Act gives the court no discretion as to which of these conditions are to be imposed. The court is required to make a supervision order with these standard conditions if it is satisfied of the necessity to make a restriction order for the reason stated in the factum in s 7(1), which may be because the court is satisfied of the necessity of certain conditions of a supervision order but not of other conditions.

30. To take the example of electronic monitoring, the court must impose this condition irrespective of the nature of the risk posed by an offender (for example, whether it is a risk of sexual offending, arson or robbery), irrespective of the capacity of electronic monitoring to actually restrict this conduct and irrespective of the necessity of the measure in conjunction with other restrictions (such as the curfew that a community corrections officer can impose). As a result, the court is not given the task – here or in relation to the six other conditions of a supervision order – "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".[59] Instead, the court must authorise

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[56] *Totani* at 52 [82] (French CJ).

[57] See [19] to [20] of these submissions.

[58] *Totani* at 52 [82] (French CJ).

[59] *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 232 [15] (Kiefel CJ). See also 244–245 [52]–[53] (Bell, Keane, Nettle and Edelman JJ).

curtailment of personal liberty without determination of whether such a measure is necessary in terms of the objects of the Act. This requirement to implement legislative policy is repugnant to the court's institutional integrity.

31. Mr Ryan submits that the Court should make the orders sought by the appellant.

PART V: ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

32. If the Court would be assisted by it, Mr Ryan's estimates that oral submissions would be confined to 30 minutes.

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BETWEEN: **PETER ROBERT GARLETT**
Appellant
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THE STATE OF WESTERN AUSTRALIA
First Respondent
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THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA
Second Respondent

ANNEXURE TO THE PROPOSED SUBMISSIONS OF DEREK RYAN

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, Mr Ryan sets out below a list of particular constitutional provisions and statutes referred to in its submissions.

Commonwealth	Provision(s)	Version
Commonwealth Constitution	Ch III, s 71	Current

State	Provision(s)	Version
High Risk Serious Offenders Act 2020 (WA)	ss 3, 5, 7, 8, 29, 30, 32, 48, 80 sch 1	In force version
Criminal Code Act Compilation Act 1913 (WA).	s 392	In force version