



HIGH COURT OF AUSTRALIA

7 September 2022

GARLETT v THE STATE OF WESTERN AUSTRALIA & ANOR
[2022] HCA 30

Today, the High Court dismissed the part of an appeal pending in the Court of Appeal of the Supreme Court of Western Australia which was removed to the High Court pursuant to s 40 of the *Judiciary Act 1903* (Cth). The appeal concerned a challenge to the validity of item 34 of Subdiv 3 of Div 1 of Sch 1 to the *High Risk Serious Offenders Act 2020* (WA) ("the HRSO Act") on the basis that it was contrary to Ch III of the *Constitution* by reason of the principle in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

The HRSO Act provides that the State of Western Australia may apply to the Supreme Court of Western Australia for a restriction order in relation to a "serious offender" under custodial sentence for a serious offence, who is not under a restriction order. The Court "must" make a restriction order if satisfied that it is necessary to ensure adequate protection of the community against an unacceptable risk that the offender will commit a serious offence. Item 34 of Subdiv 3 of Div 1 of Sch 1 to the HRSO Act specifies that robbery is a "serious offence" for the purposes of the HRSO Act. A restriction order may be either a supervision order (which subjects the offender, when not in custody, to stated conditions) or a continuing detention order (which detains the offender in custody "for an indefinite term for control, care or treatment").

Mr Garlett was sentenced to three years and six months' imprisonment for offences including robbery. The State applied for a restriction order in relation to Mr Garlett shortly before his release date. The primary judge relevantly declared that none of the provisions of the HRSO Act contravened Ch III of the *Constitution*, insofar as they apply to a serious offender under a custodial sentence who has been convicted of the offence of robbery.

The High Court, by majority, held that item 34 of Subdiv 3 of Div 1 of Sch 1 to the HRSO Act does not contravene Ch III of the *Constitution*. The HRSO Act establishes a non-punitive scheme that has as its object the protection of the community from harm, and the determination of the risk of future harm posed by an offender is judicial in nature. The circumstance that the Supreme Court is not invested with a residual discretion to decline to make a restriction order does not establish that it is acting upon the dictation of the executive government as to the manner of deciding the case or its outcome. Rather, the Court is required to act upon its own evaluative judgment, by processes characteristic of the exercise of judicial power and with reference to prescribed criteria, to determine whether a restriction order is necessary for the purpose of protecting the community from harm. The inclusion of an offence, such as robbery, as a "serious offence" for the purposes of the HRSO Act reflects a legislative judgment as to the kinds of offences which may be such as to cause harm of a kind from which the community needs protection different from that provided by the criminal law. It is not inimical to the institutional integrity of the Court to act upon a legislative judgment of this kind. The function of the Supreme Court under the HRSO Act is therefore not incompatible with the role of the Court as a repository of the judicial power of the Commonwealth.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.