

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, GORDON, EDELMAN AND STEWARD JJ

MINISTER FOR HOME AFFAIRS

APPLICANT

AND

ABDUL NACER BENBRIKA

RESPONDENT

Minister for Home Affairs v Benbrika
[2021] HCA 4
Date of Hearing: 10 December 2020
Date of Judgment: 10 February 2021
M112/2020

ORDER

1. *The question reserved for the consideration of the Court of Appeal of the Supreme Court of Victoria and removed into this Court pursuant to s 40 of the Judiciary Act 1903 (Cth) is answered as follows:*

Q. Is all or any part of Division 105A of the Criminal Code (Cth) and, if so, which part, invalid because the power to make a continuing detention order under section 105A.7 of the Code is not within the judicial power of the Commonwealth and has been conferred, inter alia, on the Supreme Court of Victoria contrary to Chapter III of the Commonwealth Constitution?

A. No.

2. *The respondent is to pay the applicant's costs.*

Representation

A P Berger QC for the applicant (instructed by Australian Government Solicitor)

R Merkel QC and C J Tran with E S Jones for the respondent (instructed by Doogue + George Lawyers)

S P Donaghue QC, Solicitor-General of the Commonwealth, with M A Hosking for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Minister for Home Affairs v Benbrika

Constitutional law (Cth) – Judicial power of Commonwealth – Jurisdiction vested in State courts – Where Div 105A of *Criminal Code* (Cth) empowered Supreme Court of State or Territory, on application of Minister for Home Affairs, to order that person convicted of terrorist offence be detained in prison for further period after expiration of sentence of imprisonment pursuant to continuing detention order ("CDO") – Whether all or any part of Div 105A of *Criminal Code* invalid because power to make CDO not within judicial power of Commonwealth having been conferred, inter alia, on Supreme Court of Victoria contrary to Ch III of *Constitution* – Whether scheme for preventative detention of terrorist offender capable of falling within exception to principle articulated in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 that involuntary detention of citizen in custody by the State is penal or punitive in character and exists only as incident of exclusively judicial function of adjudging and punishing criminal guilt – Whether Div 105A of *Criminal Code* directed to ensuring safety and protection of community from risk of harm posed by threat of terrorism.

Words and phrases – "analogy", "apprehended conduct", "Ch III court", "continuing detention order", "exception to the *Lim* principle", "involuntary detention", "judicial function of adjudging and punishing criminal guilt", "judicial power of the Commonwealth", "less restrictive measure", "non-punitive purpose", "orthodox judicial process", "preventative detention", "protection of the community from harm", "protective punishment", "protective purpose", "punitive purpose", "restriction on liberty", "separation of powers", "serious Part 5.3 offence", "Supreme Court of a State or Territory", "terrorism", "terrorist act", "terrorist offence", "terrorist organisation", "unacceptable risk".

Constitution, Ch III.

Criminal Code (Cth), Div 105A.

1 KIEFEL CJ, BELL, KEANE AND STEWARD JJ. Division 105A of the *Criminal Code* (Cth) ("the Code") empowers the Supreme Court of a State or Territory, on the application of the Minister for Home Affairs ("the Minister"), to order that a person who has been convicted of a terrorist offence be detained in prison for a further period after the expiration of his or her sentence of imprisonment. The scheme is comparable to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ("the Qld Act"), which empowers the Supreme Court of Queensland to order the continuing detention of persons convicted of serious sexual offences.

2 The validity of the Qld Act survived challenge on *Kable*¹ grounds in *Fardon v Attorney-General (Qld)*². *Fardon* allows that, consistently with its position within the integrated Australian court system, the Supreme Court of a State or Territory may commit a person to prison in the exercise of State judicial power after determining, by orthodox judicial process, that the person is a serious danger to the community because there is an unacceptable risk that he or she would commit a serious sexual offence if released from custody. The question in this proceeding is whether the Supreme Court of a State or Territory may commit a person to prison in the exercise of federal judicial power after determining, by orthodox judicial process, that the person presents an unacceptable risk of committing a terrorist offence if released from custody. For the reasons to be given, the answer is that it may.

Procedural history

3 On 15 September 2008, the respondent, Mr Benbrika, was convicted by the Supreme Court of Victoria of two terrorist offences. The offences were alleged to have occurred between July 2004 and November 2005. The first offence involved the intentional membership of a terrorist organisation knowing that the organisation was a terrorist organisation³. The offence has a maximum penalty of imprisonment for ten years. The second offence involved intentionally directing the activities of a terrorist organisation knowing the organisation to be a terrorist

1 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

2 (2004) 223 CLR 575.

3 *Criminal Code* (Cth), s 102.3(1).

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organisation⁴. This offence has a maximum penalty of imprisonment for 25 years. Each offence is a "serious Part 5.3 offence"⁵.

4 The Crown case against Mr Benbrika at his trial was that he and others were members of a Melbourne-based terrorist organisation that was fostering or preparing the doing of a terrorist act in Australia or overseas with the intention of causing death or serious physical harm in order to advance the cause – taught by Mr Benbrika and accepted by the other members of the organisation who had taken an oath of allegiance to him – that they were under a religious duty to pursue violent jihad against non-believers⁶. The Crown case included evidence that, as part of the instruction in violent jihad that Mr Benbrika provided, he had taught other members of the organisation that death in pursuit of "Allah's cause" would result in martyrdom and thus entry into paradise⁷. Mr Benbrika was sentenced to an effective term of imprisonment of 15 years with a non-parole period of 12 years. Mr Benbrika was not granted parole. His sentence expired on 5 November 2020. On 4 September 2020, the Minister commenced proceedings in the Supreme Court of Victoria, seeking a continuing detention order in respect of Mr Benbrika to be in force from the date of its making until 5 November 2023 and an interim detention order to be in force from 5 November 2020. On 27 October 2020, Tinney J made an interim detention order⁸. On 24 December 2020, his Honour made an order that Mr Benbrika be subject to a continuing detention order to be in force for a period of three years⁹.

5 On 2 October 2020, Mr Benbrika applied for an order reserving the following question for the consideration of the Court of Appeal of the Supreme Court of Victoria¹⁰:

4 *Criminal Code*, s 102.2(1).

5 *Criminal Code*, s 105A.2.

6 *Benbrika v The Queen* (2010) 29 VR 593 at 601-602 [5]-[6].

7 *Benbrika v The Queen* (2010) 29 VR 593 at 604 [16].

8 *Criminal Code*, s 105A.9(2).

9 *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [478]-[480].

10 *Supreme Court Act 1986* (Vic), s 17B(2).

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"Is all or any part of Division 105A of the *Criminal Code* (Cth) and, if so, which part, invalid because the power to make a continuing detention order under section 105A.7 of the *Code* is not within the judicial power of the Commonwealth and has been conferred, inter alia, on the Supreme Court of Victoria contrary to Chapter III of the Commonwealth Constitution?"

6 On 8 October 2020, Tinney J reserved the question for the consideration of the Court of Appeal. On 30 October 2020, on the application of the Attorney-General of the Commonwealth, the question reserved was removed into this Court¹¹. The Attorney-General intervened in support of the Minister on the hearing of the question reserved. The Minister adopted the Attorney-General's submissions. In these reasons the Minister and the Attorney-General will be referred to collectively as "the Commonwealth".

The scheme of Div 105A of the Code

7 Division 105A was enacted by the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth) and has as its object¹²:

"to ensure the safety and protection of the community by providing for the continuing detention of terrorist offenders who pose an unacceptable risk of committing serious Part 5.3 offences if released into the community."

8 The Minister may apply to the Supreme Court of a State or Territory for a continuing detention order¹³. A continuing detention order may only be made with respect to a "terrorist offender". Relevantly, there are three attributes of being a "terrorist offender". The first attribute is that the person has been convicted of an offence referred to in s 105A.3(1)(a) (a "terrorist offence"). These comprise those terrorism related offences in Pt 5.3 of the Code that have a maximum penalty of seven years' imprisonment or more ("serious Pt 5.3 offences"), certain offences involving international terrorist activities using explosives or lethal devices and certain terrorism related offences involving foreign incursions and recruitment. The second attribute is that the person is in custody, having been continuously in custody since being convicted of the terrorist offence, or is under a continuing or

11 *Judiciary Act 1903* (Cth), s 40.

12 *Criminal Code*, s 105A.1.

13 *Criminal Code*, s 105A.5.

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interim detention order¹⁴. The third attribute is that the person will be at least 18 years old at the expiration of the sentence¹⁵.

9 The effect of a continuing detention order is to commit the terrorist offender to detention in a prison for the period that the order is in force¹⁶. An application for a continuing detention order may only be made within 12 months before the end of the offender's sentence or, if a continuing detention order is in force, the application may not be made more than 12 months before the end of the period for which the order is in force¹⁷. The Court may appoint one or more experts to assess the risk of the offender committing a serious Pt 5.3 offence if released into the community¹⁸.

10 Sections 105A.7 and 105A.8 should here be set out:

"105A.7 Making a continuing detention order

- (1) A Supreme Court of a State or Territory may make a written order under this subsection if:
 - (a) an application is made in accordance with section 105A.5 for a continuing detention order in relation to a terrorist offender; and
 - (b) after having regard to matters in accordance with section 105A.8, the Court is satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community; and

14 *Criminal Code*, s 105A.3(1)(b).

15 *Criminal Code*, s 105A.3(1)(c).

16 *Criminal Code*, s 105A.3(2).

17 *Criminal Code*, s 105A.5(2).

18 *Criminal Code*, s 105A.6(1), (3) and (4).

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- (c) the Court is satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.

- (2) Otherwise, the Court must dismiss the application.

Onus of satisfying Court

- (3) The AFP Minister bears the onus of satisfying the Court of the matters referred to in paragraphs (1)(b) and (c).

Period of order

- (4) The order must specify the period during which it is in force.
- (5) The period must be a period of no more than 3 years that the Court is satisfied is reasonably necessary to prevent the unacceptable risk.

Court may make successive continuing detention orders

- (6) To avoid doubt, subsection (5) does not prevent a Supreme Court of a State or Territory making a continuing detention order in relation to a terrorist offender that begins to be in force immediately after a previous continuing detention order in relation to the offender ceases to be in force.

105A.8 Matters a Court must have regard to in making a continuing detention order

- (1) In deciding whether the Court is satisfied as referred to in paragraph 105A.7(1)(b) in relation to a terrorist offender, a Supreme Court of a State or Territory must have regard to the following matters:
 - (a) the safety and protection of the community;
 - (b) any report received from a relevant expert under section 105A.6 in relation to the offender, and the level of the offender's participation in the assessment by the expert;
 - (c) the results of any other assessment conducted by a relevant expert of the risk of the offender committing

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a serious Part 5.3 offence, and the level of the offender's participation in any such assessment;

- (d) any report, relating to the extent to which the offender can reasonably and practicably be managed in the community, that has been prepared by:
 - (i) the relevant State or Territory corrective services; or
 - (ii) any other person or body who is competent to assess that extent;
 - (e) any treatment or rehabilitation programs in which the offender has had an opportunity to participate, and the level of the offender's participation in any such programs;
 - (f) the level of the offender's compliance with any obligations to which he or she is or has been subject while:
 - (i) on release on parole for any offence referred to in paragraph 105A.3(1)(a); or
 - (ii) subject to a continuing detention order or interim detention order;
 - (g) the offender's history of any prior convictions for, and findings of guilt made in relation to, any offence referred to in paragraph 105A.3(1)(a);
 - (h) the views of the sentencing court at the time any sentence for any offence referred to in paragraph 105A.3(1)(a) was imposed on the offender;
 - (i) any other information as to the risk of the offender committing a serious Part 5.3 offence.
- (2) Subsection (1) does not prevent the Court from having regard to any other matter the Court considers relevant.
 - (3) To avoid doubt, section 105A.13 (civil evidence and procedure rules in relation to continuing detention order

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proceedings) applies to the Court's consideration of the matters referred to in subsections (1) and (2) of this section."

11 The power conferred on the Supreme Court of a State or Territory to make a continuing detention order under Div 105A is subject to the ordinary incidents of the exercise of judicial power. A continuing detention order may only be made following an inter partes hearing in open court (subject to the power to close the court under general statutory powers) at which the rules of evidence and procedure apply¹⁹. The offender has the opportunity to examine and cross-examine witnesses and to make submissions²⁰. The onus is on the Minister to establish the conditions for the making of the order²¹. The criterion of "unacceptable risk of committing a serious Part 5.3 offence"²² is capable of judicial application²³. The Court has a discretion whether to make the order and as to the terms of the order²⁴. The Court must give reasons for its decision²⁵ and the making of the decision is subject to appeal by way of rehearing as of right²⁶.

12 The power to authorise the continuing detention of an offender in prison after the expiration of his or her sentence is subject to a number of statutory safeguards. The Minister is required to ensure that reasonable inquiries are made to ascertain any facts that would reasonably be regarded as supporting a finding

19 *Criminal Code*, s 105A.13.

20 *Criminal Code*, s 105A.14.

21 *Criminal Code*, s 105A.7(3).

22 *Criminal Code*, s 105A.7(1)(b).

23 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 593 [22] per Gleeson CJ, 597 [34] per McHugh J, 616-617 [97]-[98] per Gummow J, 657 [225] per Callinan and Heydon JJ; *Thomas v Mowbray* (2007) 233 CLR 307 at 327-329 [15]-[16], 334 [28] per Gleeson CJ; *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1251 [57], 1253-1254 [66]-[68], 1255 [73]-[75], 1258-1259 [84]-[89] per Bell, Keane, Nettle and Edelman JJ; 374 ALR 1 at 17, 20, 22, 26-28.

24 *Criminal Code*, s 105A.7(1).

25 *Criminal Code*, s 105A.16.

26 *Criminal Code*, s 105A.17.

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that the order should not be made²⁷. Subject to a qualification as to information which the Minister is likely to seek to prevent or control the disclosure of, whether under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) or otherwise²⁸, the application must include a statement of any such facts²⁹. In the event that circumstances beyond the offender's control prevent the offender from engaging a legal representative in relation to the proceeding, the Court may stay the proceeding or order the Commonwealth to pay the offender's reasonable costs and expenses³⁰. Continuing detention orders are subject to annual review³¹. On the hearing of a review, unless the Court is satisfied of the same conditions specified in s 105A.7(1)(b) and (c) it must revoke the order³². In the event that the Minister fails to apply for a review before the end of the period specified in s 105A.10(1B) – within 12 months after the order began to be in force or since the last review – the order ceases to be in force at the end of such period³³.

Two arguments as to judicial power

- 13 In addition to the principal ground of his challenge to the validity of Div 105A, in written submissions Mr Benbrika makes two submissions which challenge the Division on the ground that the power it purports to confer on the Court is not judicial power. Both submissions can be dealt with shortly. First, he contends that the provision for review of the continuing detention order, on the application of the Minister, deprives the order of the conclusiveness that is essential to the exercise of judicial power: whether the order remains binding depends upon administrative action or non-action. The fact that a continuing detention order ceases to have force in the event that the Minister fails to apply for its review does not deprive the order of binding force at the time of its making.

27 *Criminal Code*, s 105A.5(2A).

28 *Criminal Code*, s 105A.5(5).

29 *Criminal Code*, s 105A.5(3)(aa)(ii).

30 *Criminal Code*, s 105A.15A.

31 *Criminal Code*, s 105A.10.

32 *Criminal Code*, s 105A.12(4) and (5).

33 *Criminal Code*, s 105A.10(4).

The order is the authority for the continuing detention of the offender under a statutory scheme which provides for annual curial review.

14 Secondly, Mr Benbrika contends that the making of a continuing detention order does not engage judicial power because it does not determine a controversy as to existing rights and obligations based on past events but rather it determines new rights and obligations³⁴. McHugh J rejected the same argument in *Fardon*³⁵:

"[W]hen determining an application under [the Qld Act], the Supreme Court is exercising judicial power ... It is true that in form the Act does not require the Court to determine 'an actual or potential controversy as to existing rights or obligations'³⁶. But that does not mean that the Court is not exercising judicial power. The exercise of judicial power often involves the making of orders upon determining that a particular fact or status exists. It does so, for example, in the cases of matrimonial causes, bankruptcy, probate and the winding up of companies. The powers exercised and orders made by the Court under [the Qld Act] are of the same jurisprudential character as in those cases."

His Honour's statement was adopted by Gleeson CJ in *Thomas v Mowbray*³⁷ and by six Justices in *Attorney-General (NT) v Emmerson*³⁸. The argument is in any event foreclosed by the holding in *Thomas* that the power conferred on a court to make a control order under Div 104 of the Code is within the judicial power of the Commonwealth³⁹.

34 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189.

35 (2004) 223 CLR 575 at 596-597 [34].

36 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 375 per Kitto J.

37 (2007) 233 CLR 307 at 328 [15]-[16].

38 (2014) 253 CLR 393 at 430-431 [57] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ. See also their Honours' discussion at 430-433 [57]-[63].

39 (2007) 233 CLR 307 at 335 [31]-[32] per Gleeson CJ, 358 [126] per Gummow and Crennan JJ, 507-509 [595]-[600] per Callinan J, 526 [651] per Heydon J.

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Mr Benbrika's principal argument

15 Mr Benbrika does not invite the Court to re-open *Fardon* or *Thomas*. He notes that *Thomas* was not concerned with the power of a Ch III court to authorise detention in prison based upon apprehended conduct and that the judicial power in *Fardon* was conferred by a State Act. Apart from its source, the judicial power of the Commonwealth is distinguished from the judicial power of a State by the separation of powers for which the *Constitution* provides⁴⁰ and the requirement that its exercise be with respect to a "matter"⁴¹. Mr Benbrika takes no point that an application for the making of a continuing detention order is not capable of constituting a "matter"⁴². It is the separation of powers that is said to explain why an order for continuing detention may be made in the exercise of State judicial power but not in the exercise of federal judicial power. Mr Benbrika points to judicial statements that have acknowledged that the separation of powers in the Australian constitutional setting ensures that Ch III courts serve as a bulwark of liberty⁴³. They do so, he submits, because, as the principle was explained in the joint reasons of Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration*, exceptional cases aside, the involuntary detention of a citizen in custody by the State is penal or punitive in character and exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt (the "*Lim* principle")⁴⁴.

16 Mr Benbrika's challenge depends upon acceptance that a scheme for preventative detention of the kind considered in *Fardon* is not an exception to the *Lim* principle and for that reason may not be conferred as federal judicial power. The argument adopts Gummow J's reasons in *Fardon*.

40 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 269-270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

41 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-266 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ.

42 See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 596-597 [34] per McHugh J.

43 See *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11 per Jacobs J; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11-12 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.

44 (1992) 176 CLR 1 at 27.

17 The Commonwealth contests that *Lim* is authority for the proposition that power to order the detention of a person in the custody of the State can only be within the judicial power of the Commonwealth if it is an incident of adjudging and punishing criminal guilt. In the Commonwealth's submission, correctly understood *Lim* is authority for the principle that the power to detain for a punitive purpose is exclusively judicial. Detention for any non-punitive purpose, in the Commonwealth's submission, may be conferred on the executive or on a Ch III court.

Lim

18 The issue in *Lim* was whether the administrative detention of non-citizens under the *Migration Act 1958* (Cth) involved the impermissible conferral of the judicial power of the Commonwealth on the executive. The joint reasons explained that some functions are exclusively judicial in character, of which the most important is the adjudgment and punishment of criminal guilt under a law of the Commonwealth. In this connection, their Honours observed that it would be beyond the power of the Parliament to invest the executive with an arbitrary power of detention even if the power was stated in terms divorced from punishment and criminal guilt. The *Lim* principle was stated as a reason for that preclusion in these terms⁴⁵:

"[P]utting 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."

The exceptional cases to which their Honours referred are arrest and detention pending trial and the detention of persons suffering from mental illness or infectious disease. In these cases, their Honours observed, the power to detain can legitimately be seen as non-punitive and as not necessarily involving the exercise of judicial power. Their Honours also referred to exceptions to the requirement that punitive detention follows the judicial function of adjudging and punishing criminal guilt, namely the traditional powers of the Parliament to punish for

45 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.

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contempt and of military tribunals to punish for breach of military discipline⁴⁶. All were exceptions to the general proposition ("the *Lim* general proposition") that⁴⁷:

"[T]he power to order that a citizen be involuntarily confined in custody is, under the doctrine of the separation of judicial from executive and legislative powers enshrined in our Constitution, part of the judicial power of the Commonwealth entrusted exclusively to Ch III courts."

19 The *Lim* general proposition and the *Lim* principle have a long pedigree under our inherited common law tradition. Their Honours referenced Blackstone and Coke in support of the *Lim* general proposition⁴⁸ and Dicey's celebrated statement that every citizen is "ruled by the law, and by the law alone" and "may with us be punished for a breach of law, but he can be punished for nothing else" in support of the allied *Lim* principle⁴⁹.

An unexplained aspect of acceptance of the challenge

20 Before turning to the Qld Act considered in *Fardon* and Gummow J's analysis of federal judicial power on which Mr Benbrika's argument depends, one unexplained aspect of acceptance of his argument may be noted. Chapter III courts serve as the bulwark of liberty by virtue of the qualities of independence and impartiality that are secured by the separation of the judicial function from the other functions of government⁵⁰. The absence of separation of powers under the Constitutions of the States allows that non-judicial functions may be conferred on the Supreme Courts provided the conferral does not substantially impair the institutional integrity of the Court as one in which federal jurisdiction is invested.

46 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28.

47 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28.

48 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28, citing Blackstone, *Commentaries*, 17th ed (1830), bk 1, paras 136-137 and Coke, *Institutes of the Laws of England* (1809), pt 2 at 589.

49 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27-28, citing Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 202.

50 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11-13 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.

On the authority of *Kable v Director of Public Prosecutions (NSW)*⁵¹, the conferral of a non-judicial function that undermines the appearance of the independence and impartiality of the Court will be beyond legislative power. Informing the *Kable* doctrine is the recognition that the *Constitution* does not permit different grades or qualities of justice⁵². What remains unexplained is why the judicial power to order preventative detention conferred on the Supreme Court by the Qld Act, which does not trench on the Court's independence and impartiality, is not capable of being conferred on the Supreme Court under Commonwealth law.

Fardon

21 The Qld Act considered in *Fardon* makes provision for the Attorney-General of the State of Queensland to apply to the Supreme Court of Queensland for an order that a prisoner serving a sentence of imprisonment for a "serious sexual offence" be detained in custody for an indefinite term if, on the hearing of the application, the Court is satisfied that the prisoner is "a serious danger to the community"⁵³. A prisoner is considered to be a serious danger to the community if, inter alia, there is "an unacceptable risk that the prisoner [would] commit a serious sexual offence" if the prisoner were released from custody⁵⁴. Any application is required to be made within the last six months of the sentence imposed for the serious sexual offence⁵⁵. The Court is only to be "satisfied" if

51 (1996) 189 CLR 51.

52 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103 per Gaudron J; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617 [101] per Gummow J; *Wainohu v New South Wales* (2011) 243 CLR 181 at 209 [45] per French CJ and Kiefel J, 228-229 [105] per Gummow, Hayne, Crennan and Bell JJ; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 89 [123] per Hayne, Crennan, Kiefel and Bell JJ; *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1270 [147] per Gageler J; 374 ALR 1 at 41-42.

53 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), ss 5 and 13.

54 *Dangerous Prisoners (Sexual Offenders) Act*, s 13(2).

55 *Dangerous Prisoners (Sexual Offenders) Act*, s 5(2)(c).

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persuaded "by acceptable, cogent evidence" and "to a high degree of probability" that the evidence is sufficient to justify the decision⁵⁶.

22 It was argued in *Fardon* that the power to commit a person to prison because he or she poses a risk of re-offending, and not as punishment for past criminal conduct, is repugnant to judicial process such that its conferral on the Supreme Court of Queensland is incompatible with that Court's role as a repository of federal judicial power⁵⁷. The argument was rejected by six Justices, including Gummow J⁵⁸.

23 The Attorney-General of the Commonwealth, intervening in support of his Queensland counterpart, submitted that the function conferred on the Supreme Court could not contravene the *Kable* principle because the same function could validly be conferred on the Supreme Court under Commonwealth law⁵⁹. Gummow J, with whose reasons in this respect Kirby J agreed⁶⁰, was the only member of the Court to express a concluded view on the Attorney-General of the Commonwealth's submission. His Honour rejected it, holding, on the authority of *Lim*, that detention for apprehended conduct is inconsistent with "the central constitutional conception of detention as a consequence of judicial determination of engagement in past conduct"⁶¹.

24 Gummow J favoured reformulating the *Lim* principle by removing reference to whether the detention is "penal or punitive in character", in order to

56 *Dangerous Prisoners (Sexual Offenders) Act*, s 13(3).

57 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

58 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592 [19] per Gleeson CJ, 594 [25], 598 [35] per McHugh J, 621 [117] per Gummow J (Hayne J agreeing at 647 [196]), 658 [234] per Callinan and Heydon JJ.

59 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 580.

60 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 631 [145].

61 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 613 [84].

emphasise that the constitutional concern is with the deprivation of liberty without adjudication of guilt. His Honour's statement of the principle was in these terms⁶²:

"[E]xceptional 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."

In his Honour's judgment, the fact that a statutory scheme of preventative detention employs a judicial process of "some refinement" would not save it from invalidity because the vice for a Ch III court in such a scheme inheres in the outcome and not the means by which the outcome is obtained⁶³.

The Commonwealth's submission

25 The Commonwealth is critical of Gummow J's formulation, characterising it as a radical reworking that converts a principle which articulates why the executive may not detain a person for a punitive purpose into a principle that precludes any detention for non-punitive purposes under Commonwealth law whether by the executive or by a Ch III court. In the result, the Commonwealth submits, the separation of powers operates to deny to each arm of government the ability to detain a person in the custody of the State for a non-punitive purpose. The Commonwealth invokes Gaudron J's analysis in *Kruger v The Commonwealth* in support of the contention that the exceptions to the *Lim* general proposition are so numerous as to belie the claim that the power to authorise detention in the custody of the State is exclusively judicial⁶⁴.

26 The Commonwealth is also critical of Gummow J's rejection of the utility of the distinction between detention for punitive and non-punitive purposes – a distinction, the Commonwealth submits, that has been endorsed in a line of decisions since *Lim*⁶⁵. In the Commonwealth's submission, the principle to be

62 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 612 [80].

63 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 614 [85].

64 (1997) 190 CLR 1 at 109-110. See also *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 498-499 [20] per Gleeson CJ; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 648-649 [257]-[258] per Hayne J (Heydon J agreeing at 662-663 [303]).

65 The submission references *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 [44]-[45], 586 [49] per McHugh J, 648 [255]-[256], 649-650 [263] per Hayne J

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distilled from this line of authority is that whether power to order detention in the custody of the State is exclusively entrusted to Ch III courts depends upon whether the detention is imposed as punishment for a breach of the law.

27 The decisions to which the Commonwealth refers involve administrative detention of a kind that is acknowledged to be among the exceptions that qualify the *Lim* general proposition. The contention that the Parliament may empower the executive or Ch III courts to detain a person in the custody of the State for any purpose other than as punishment for breach of the law may be thought to be a radical reworking of the *Lim* general proposition⁶⁶.

The exceptions to *Lim*

28 The answer to the question reserved does not require consideration of the scope of exceptions to the *Lim* general proposition that the power to order that a person be involuntarily detained in the custody of the State is entrusted exclusively to Ch III courts. Division 105A confers power on a Ch III court. The question reserved is concerned with the allied *Lim* principle that involuntary detention in the custody of the State under our system of government exists only as an incident of the adjudgment and punishment of criminal guilt.

29 As the joint reasons in *Lim* acknowledged, there are exceptions to the characterisation of detention by the State as penal or punitive in character. It is

(Heydon J agreeing at 662-663 [303]), 657 [287] per Callinan J; *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 499 [21] per Gleeson CJ, 559 [218] per Callinan J; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12 [17], 13 [19] per Gleeson CJ, 23-27 [53]-[62] per McHugh J, 75 [222], 77 [227] per Hayne J, 85 [261] per Callinan J; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 592-593 [36]-[37] per French CJ, Kiefel and Bell JJ, 610-612 [94]-[103] per Gageler J; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 69 [40] per French CJ, Kiefel and Nettle JJ, 86 [98], 87 [100] per Bell J, 111-112 [183]-[185] per Gageler J, 124-125 [238]-[241] per Keane J; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 341 [17], 343 [27], 343-344 [29], 344 [33] per Kiefel CJ, Bell, Keane and Edelman JJ, 360 [96] per Nettle J.

66 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28 per Brennan, Deane and Dawson JJ.

Mr Benbrika's case that the exceptions identified in *Lim* – committal to custody awaiting trial and detention of the mentally ill or those suffering from infectious disease – all pre-date federation and are to be taken to have been intended to fall within the judicial power of the Commonwealth. The absence of pre-federation precedent for court-ordered committal to prison for apprehended conduct, divorced from any finding of criminal guilt or mental impairment, is submitted to be against finding that the power conferred by Div 105A can fall within an exception to the *Lim* principle.

30 Acceptance of Mr Benbrika's primary argument would produce the consequence that no arm of the federal government may authorise the detention of a person in custody for the purpose of protecting the community against the unacceptable risk of harm posed by a terrorist offender. Mr Benbrika's alternative, distinctly unattractive⁶⁷, argument is that the executive may authorise detention in such a case but a Ch III court may not.

31 In *Fardon*, Gummow J drew a distinction between the Qld Act and earlier schemes for preventative detention⁶⁸ by pointing out that those schemes were "attached" to, and derived their authority from, the sentencing of the offender for past conduct⁶⁹. By contrast, the legislative scheme his Honour was considering took as the factum for engagement of the power the status of the person as a prisoner serving a sentence, but the sentencing itself was complete and the making of a continuing detention order could not be said to form part of it.

32 It may be observed that the exceptions to the *Lim* principle involving the involuntary detention of those suffering from mental illness or infectious disease share a purpose of protection of the community from harm⁷⁰. His Honour did not explain why an appropriately tailored scheme for the protection of the community

67 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 586 [2] per Gleeson CJ. See also *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1260 [90] per Bell, Keane, Nettle and Edelman JJ (quoting *Thomas v Mowbray* (2007) 233 CLR 307 at 329 [17] per Gleeson CJ), 1272 [158] per Gageler J; 374 ALR 1 at 28, 44.

68 See *Habitual Criminals Act 1905* (NSW) and *Prevention of Crime Act 1908* (UK), Pt II.

69 (2004) 223 CLR 575 at 613 [83].

70 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 110 per Gaudron J.

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from the harm that particular forms of criminal activity may pose is incapable of coming within an analogous exception. His Honour noted that⁷¹:

"It may be accepted that the list of exceptions to which reference was made in *Lim* is not closed. But it is not suggested that regimes imposing upon the courts functions detached from the sentencing process form a new exceptional class, nor that the detention of the mentally ill for treatment is of the same character as the incarceration of those 'likely to' commit certain classes of offence." (footnote omitted)

33 His Honour's evident concern was with detention for apprehended conduct. Yet, as his Honour acknowledged⁷², schemes for preventative detention have a long history in common law countries⁷³. The scheme considered in *McGarry v The Queen*⁷⁴ empowers a superior court when sentencing a person for an indictable offence, in addition to imposing the appropriate term of imprisonment for the offence ("the nominal sentence"), to order that the offender be imprisoned indefinitely. The making of such an order is conditioned on the court's satisfaction on the balance of probabilities that when the offender would otherwise be released he or she would be a danger to society, or a part of it, because of factors including the risk of the commission of further offences⁷⁵.

34 The order for indefinite detention under that scheme is to be made at the time of sentencing but the detention for which it provides is not founded on the offender's past criminal conduct: the nominal sentence is imposed for that conduct

71 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 613 [83].

72 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 613 [83].

73 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 590 [13] per Gleeson CJ, citing Dershowitz, "The Origins of Preventive Confinement in Anglo-American Law – Part I: The English Experience" (1974) 43 *University of Cincinnati Law Review* 1. See also Professor Norval Morris' introduction to a number of the *McGill Law Journal* devoted to issues concerning habitual criminals and preventative detention, (1967) 13(4) *McGill Law Journal* 534 at 551 and Radzinowicz and Hood, "Incapacitating the Habitual Criminal: The English Experience" (1980) 78 *Michigan Law Review* 1305.

74 (2001) 207 CLR 121.

75 *Sentencing Act 1995* (WA), s 98.

and reflects the various purposes of punishment including protection of the community and general deterrence. The order for indefinite detention is founded on the court's assessment, in the exercise of State judicial power, of the danger to society that the offender would present at the completion of the nominal sentence. As Gleeson CJ observed in *Fardon*, if the lawful exercise of judicial power admits of the judge assessing the danger an offender poses to the community at the time of sentencing it is curious that it does not admit of the judge making such an assessment at or near the time of imminent release when that danger might be assessed more accurately⁷⁶.

35 The question reserved does not raise consideration of the *Kable* limitation, if any, on legislative power to confer on the Supreme Court of a State or Territory the function of ordering the detention in custody of a person in circumstances that do not fall within an exception to the *Lim* principle. For present purposes the conclusion in *Fardon* that the power conferred by the Qld Act to order the continuing detention of a prisoner who is found to be a danger to society is a judicial power that does not compromise the Supreme Court's institutional integrity as a court that may be invested with federal jurisdiction points powerfully against acceptance of Mr Benbrika's challenge.

36 Terrorism poses a singular threat to civil society⁷⁷. The contention that the exceptions to the *Lim* principle are confined by history and are insusceptible of analogical development cannot be accepted. 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.

76 (2004) 223 CLR 575 at 586 [2].

77 *Thomas v Mowbray* (2007) 233 CLR 307 at 490 [544] per Callinan J; *Lodhi v The Queen* (2007) 179 A Crim R 470 at 490 [86]-[87] per Spigelman CJ, quoting *Sakr* (1987) 31 A Crim R 444 at 451 per Crockett J.

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Characterisation of Div 105A as punitive or non-punitive

37 Mr Benbrika submits that the detention authorised by Div 105A is not correctly characterised as non-penal or non-punitive. The fact of detention in custody, in his submission, is *prima facie* punitive whatever the reason may be for its imposition. He argues that if the overriding object of the scheme were the protection of the community and not any purpose of punishment it is to be expected that the Parliament would provide that any person found to pose an unacceptable risk of committing a serious Pt 5.3 offence, including persons not presently in detention, might be detained under it. Given that the condition for the engagement of the power is that the person is a "terrorist offender", he submits that a purpose of punishment cannot be quarantined from any purpose of protection. He points out that the prevention of future harm is itself an aspect of punishment. Other features of the scheme which he submits do not displace its *prima facie* characterisation as punitive are that the detention for which it provides is in a prison and no provision is made for the treatment and rehabilitation of detainees.

38 To observe that the protection of the community is a factor that is relevant in sentencing an offender for an offence against Commonwealth law⁷⁸ says nothing as to the characterisation of the power to make a continuing detention order. A court sentencing an offender for a terrorist offence is required to impose a sentence that is of a severity that is appropriate in all the circumstances of the offence⁷⁹. The power conferred by s 105A.7 of the Code is an extraordinary power to detain a terrorist offender in prison notwithstanding that the purposes of punishment have been vindicated and the sentence served. The power is conditioned on the status of the offender as a prisoner serving a sentence for a terrorist offence (or having been in custody continuously since having been convicted of such an offence) but its making is divorced from sentencing the offender for the terrorist offence. The requirement that the sentencing court warn the offender that an application for a continuing detention order may be made in the future does not alter that fact⁸⁰.

39 The object of Div 105A, set out earlier in these reasons, is plainly directed to the protection of the community from harm. The fact that the Parliament has chosen not to pursue this object by a more extreme measure that is not conditioned

78 *Bui v Director of Public Prosecutions (Cth)* (2012) 244 CLR 638 at 650-651 [18]; *Director of Public Prosecutions (Cth) v Said Khodor el Karhani* (1990) 21 NSWLR 370 at 377, quoting *R v Radich* [1954] NZLR 86 at 87.

79 *Crimes Act 1914* (Cth), s 16A(1).

80 *Criminal Code*, s 105A.23(1).

on the subject being a "terrorist offender" does not gainsay that the object of the continuing detention order is community protection and not punishment. Nor does the fact that the detention for which Div 105A provides is in a prison detract from the conclusion that its purpose is protective and not punitive. That protection is its purpose is reinforced by the requirement that a person detained under a continuing detention order, as far as reasonably possible, is to be treated in a way that is appropriate to his or her status as a person who is not serving a sentence of imprisonment. Such a detainee is not to be accommodated in the same area of the prison as prisoners serving sentences of imprisonment unless that is necessary, or unless the person elects to be so accommodated⁸¹. A detainee under a continuing detention order is not denied access to such treatment and rehabilitation programs as may be available in the prison. The absence of special provision for treatment and rehabilitation of detainees under Div 105A does not deprive the scheme of its character as protective.

40 The power is only enlivened in the last 12 months of the offender's sentence. In determining whether the conditions for the making of a continuing detention order are met the Court is, relevantly, to have regard to expert opinion about the risk of the offender committing a serious Pt 5.3 offence if released into the community⁸²; any report relating to the extent to which the offender can be managed in the community⁸³; and any treatment or rehabilitation programs in which the offender has had the opportunity to participate⁸⁴. The evident focus is on the assessment of the risk the offender poses of future harm to the community upon release and not on punishing the offender for the offence for which he or she was sentenced. Similarly, the provision for annual reviews⁸⁵, and the requirement that the Court revoke the continuing detention order unless satisfied: (1) to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Pt 5.3 offence if released into the community; and (2) that there is no other, less restrictive measure that would be

81 *Criminal Code*, s 105A.4(2).

82 *Criminal Code*, ss 105A.6(4) and 105A.8(1)(b) and (c).

83 *Criminal Code*, s 105A.8(1)(d).

84 *Criminal Code*, s 105A.8(1)(e).

85 *Criminal Code*, s 105A.10.

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effective in preventing that unacceptable risk⁸⁶, bespeak that the regime has as its object the protection of the community rather than punishment. Detention in prison is prima facie penal or punitive; however, that characterisation may be displaced by an evident non-punitive purpose⁸⁷. Division 105A has an evident non-punitive, protective purpose.

41 This Court has consistently held, and most recently in *Fardon*, that detention that has as its purpose the protection of the community is not punishment⁸⁸. As Gummow J explained, the making of a continuing detention order under the Qld Act did not punish Fardon twice, nor did it increase his punishment for the offences of which he had been convicted⁸⁹. Plainly enough, any suggestion that detention under a scheme such as that considered in *Fardon* is to supplement punishment for a crime would raise a large question as to double-punishment. It is precisely because a just sentence must be proportionate to the offending being punished that adequate protection for the safety of the community from demonstrable threats cannot be assured under the ordinary criminal law (and sentences imposed thereunder). As Gleeson CJ noted in *Fardon*⁹⁰, the statement of Deane J in *Veen v The Queen [No 2]*⁹¹ is necessarily predicated upon a positive view of the legitimacy of preventative detention independently of punishment of crime.

42 Mr Benbrika submits that if it is accepted that Div 105A does not have a punitive purpose, nonetheless it should not come within an exception to the *Lim* principle because the non-punitive object that it pursues is the prevention of crime

86 *Criminal Code*, s 105A.12(4) and (5).

87 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 342 [24] per Kiefel CJ, Bell, Keane and Edelman JJ; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 611-612 [98] per Gageler J.

88 (2004) 223 CLR 575 at 592 [20] per Gleeson CJ, 597 [34] per McHugh J, 654 [217] per Callinan and Heydon JJ. See also *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1257-1258 [83] per Bell, Keane, Nettle and Edelman JJ; 374 ALR 1 at 25-26.

89 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 610 [74] (Hayne J agreeing at 647 [196]).

90 (2004) 223 CLR 575 at 588 [9].

91 (1988) 164 CLR 465 at 495.

as distinct from the protection of the community from harm. The unacceptable risk of which the Court must be satisfied is the commission of any serious Pt 5.3 offence. Mr Benbrika points out that serious Pt 5.3 offences cover a wide range of conduct including preparatory conduct that would not in other contexts amount to criminal conduct.

43 The submission raises an issue touched on in *McGarry*. It will be recalled that the regime in that case conditions the making of an indefinite detention order on a court's satisfaction that the offender is a danger to society, or some part of it, by reason of factors that include the risk that the offender would commit further indictable offences if released. As the joint reasons observed, the association between being a "danger to society" and recidivism is not without difficulty given that a fundamental premise of the criminal law is that conduct is regarded as criminal for the very reason that its commission harms society, or some part of it. On that view, the court's satisfaction of the risk of re-offending would suffice to establish that the offender is a danger to society and support the making of an indefinite detention order. However, it was held that correctly understood the power to make the order is only enlivened upon finding that the offender would engage in conduct the consequences of which would be grave or serious for society as a whole, or some part of it; a bare conclusion that it was probable the offender would commit some indictable offence in the future would not suffice⁹².

44 Part 5.3 enacts offences involving "terrorist acts" and offences involving "terrorist organisations"⁹³. Terrorist acts are actions, or threats to take actions, that cause serious physical harm to a person or serious damage to property or which endanger human life (other than the life of the person taking the action) or which create a serious risk to the health or safety of the public, or a section of the public, or which seriously interfere with, disrupt or destroy various forms of infrastructure. The action or threat of action must be carried out, or threatened, with the intention of advancing a political, religious or ideological cause and coercing or influencing by intimidation a government or intimidating the public or a section of the public⁹⁴.

92 *McGarry v The Queen* (2001) 207 CLR 121 at 129-130 [20]-[23] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

93 See Australia, House of Representatives, *Security Legislation Amendment (Terrorism) Bill 2002*, Explanatory Memorandum at 9-10, noting Security Council of the United Nations, Resolution 1373 (2001), para 2(e).

94 *Criminal Code*, s 100.1(1), definition of "terrorist act".

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Serious Pt 5.3 offences involving terrorist acts include engaging in a terrorist act⁹⁵; providing or receiving training connected with terrorist acts⁹⁶; possessing things connected with terrorist acts⁹⁷; collecting or making documents connected with preparation for, the engagement of a person in, or assistance in a terrorist act⁹⁸; doing an act in preparation for, or planning, a terrorist act⁹⁹; providing or collecting funds reckless as to whether the funds will be used to facilitate or engage in a terrorist act¹⁰⁰; and making funds available to another person or collecting funds for, or on behalf of, another person and being reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act¹⁰¹.

45 A "terrorist organisation" is an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act or certain organisations that are specified as terrorist organisations in the regulations¹⁰². Serious Pt 5.3 offences involving terrorist organisations are directing the activities of a terrorist organisation¹⁰³; being a member of a terrorist

95 *Criminal Code*, s 101.1(1).

96 *Criminal Code*, s 101.2(1) and (2).

97 *Criminal Code*, s 101.4(1) and (2).

98 *Criminal Code*, s 101.5(1) and (2).

99 *Criminal Code*, s 101.6(1).

100 *Criminal Code*, s 103.1(1). Note that this offence was enacted to implement Australia's international obligations to criminalise the collection and provision of funds for terrorist acts: see Australia, House of Representatives, *Suppression of the Financing of Terrorism Bill 2002*, Explanatory Memorandum at 5, referring to the International Convention for the Suppression of the Financing of Terrorism (2000) and Security Council of the United Nations, Resolution 1373 (2001), para 1(b). See also Australia, House of Representatives, *Security Legislation Amendment (Terrorism) Bill 2002*, Explanatory Memorandum at 9-10.

101 *Criminal Code*, s 103.2(1).

102 *Criminal Code*, s 102.1(1), definition of "terrorist organisation".

103 *Criminal Code*, s 102.2.

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organisation¹⁰⁴; recruiting a person to join, or participate in the activities of, a terrorist organisation¹⁰⁵; providing or receiving training to or from a terrorist organisation¹⁰⁶; receiving funds from, or making funds available to, or collecting funds for, or on behalf of, a terrorist organisation¹⁰⁷; and providing support or resources to a terrorist organisation¹⁰⁸.

46

As Spigelman CJ has observed of the Pt 5.3 regime¹⁰⁹:

"Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, eg well before an agreement has been reached for a conspiracy charge."

It is difficult to envisage any circumstances in which a continuing detention order would be made to prevent the risk of the commission of a serious Pt 5.3 offence where that offence is of a kind that could not be seen to pose a real threat of harm to the community. Even where the apprehended serious Pt 5.3 offence does not involve as an element the inflicting, or having as an immediate purpose the actual inflicting, of personal injury on a person or persons, the advancement of terrorist ideology can readily be seen to create a milieu which fosters the prospect that personal injury will be suffered by innocent members of the community. A law directed against the implementation of such an ideology (even by preparatory acts) does not lack the character of a law for the protection of the community from harm simply because the law does not include the immediate likelihood or purpose of inflicting personal injury as an element of the offence. It is important that the

104 *Criminal Code*, s 102.3(1).

105 *Criminal Code*, s 102.4.

106 *Criminal Code*, s 102.5(1) and (2).

107 *Criminal Code*, s 102.6(1) and (2).

108 *Criminal Code*, s 102.7.

109 *Lodhi v The Queen* (2006) 199 FLR 303 at 318 [66].

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restriction upon individual liberty involved in the making of a continuing detention order is dependent upon the risk of an offence being "unacceptable" to the judge in light of the facts as they appear at the time he or she is asked to make the order. Further, the power to address the risk of harm posed to the community in any particular case by the making of an order less intrusive on personal liberty than a continuing detention order serves to ensure that continuing detention orders are made to secure the protection of the community from unacceptable risks of actual harm.

47 In this respect, it is to be noted that the Court is given wide powers to make control orders under Div 104 imposing restrictions, obligations and prohibitions that fall short of detention in custody¹¹⁰ and that the power to make a continuing detention order is conditioned not only on the risk of the commission of a serious Pt 5.3 offence but on satisfaction that no other, less restrictive measure would be effective in preventing the unacceptable risk¹¹¹. Correctly understood, a continuing detention order could not properly be made by a Court in the exercise of the discretion conferred by s 105A.7(1) 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. Contrary to Mr Benbrika's alternative submission, Div 105A is rightly characterised as directed to ensuring the safety and protection of the community from the risk of harm posed by the threat of terrorism.

48 Division 105A validly confers the judicial power of the Commonwealth on the Supreme Court of a State or Territory. This conclusion makes it unnecessary to consider the Commonwealth's submission that *New South Wales v Kable*¹¹² is determinative of the capacity of the Parliament to validly empower a court exercising federal judicial power to order the detention of a person after the expiry of his or her sentence based upon an assessment of the risk of future offending by that person.

110 *Criminal Code*, ss 104.4 and 104.5(3).

111 *Criminal Code*, s 105A.7(1)(c).

112 (2013) 252 CLR 118.

Costs

49 Mr Benbrika seeks an order for his costs whatever the event. The order is sought under s 105A.15A of the Code. The Commonwealth submits that there is no reason why costs should not follow the event.

50 Section 105A.15A applies if a continuing detention order proceeding relating to a terrorist offender is before a Supreme Court of a State or Territory and the offender, due to circumstances beyond the offender's control, is unable to engage legal representation in relation to the proceeding¹¹³. In such an event the Court is empowered to stay the proceeding and/or to order the Commonwealth to bear all or part of the reasonable costs and expenses of the offender's legal representation for the proceeding¹¹⁴.

51 On 17 September 2020, Tinney J made orders pursuant to s 105A.15A(2)(b) requiring the Commonwealth to bear Mr Benbrika's reasonable costs and expenses of the proceeding for: a period of three weeks; until Legal Aid funding is granted to him; or until further order, whichever occurs first. It is submitted that in circumstances where the primary judge considered it appropriate to make orders covering Mr Benbrika's costs of defending the Minister's application this Court should make an order that he have his costs of the determination of a question of law that arose in that same proceeding.

52 The proceeding in relation to which Tinney J's order was made is the Minister's application under Div 105A that a continuing detention order be made with respect to Mr Benbrika. The making of the order does not provide a good reason for requiring the Commonwealth to pay Mr Benbrika's costs of his unsuccessful challenge to the validity of Div 105A.

Conclusion and orders

53 For these reasons there should be the following orders:

1. The question reserved for the consideration of the Court of Appeal of the Supreme Court of Victoria and removed into this Court pursuant to s 40 of the *Judiciary Act 1903* (Cth) is answered as follows:

113 *Criminal Code*, s 105A.15A(1).

114 *Criminal Code*, s 105A.15A(2).

<i>Kiefel</i>	<i>CJ</i>
<i>Bell</i>	<i>J</i>
<i>Keane</i>	<i>J</i>
<i>Steward</i>	<i>J</i>

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Q. Is all or any part of Division 105A of the *Criminal Code* (Cth) and, if so, which part, invalid because the power to make a continuing detention order under section 105A.7 of the *Code* is not within the judicial power of the Commonwealth and has been conferred, inter alia, on the Supreme Court of Victoria contrary to Chapter III of the Commonwealth Constitution?

A. No.

2. The respondent is to pay the applicant's costs.

54 GAGELER J. Central to the operation of Pt 5.3 of the *Criminal Code* (Cth) is the notion of a "terrorist act". Engaging in a "terrorist act" involves taking or threatening specified action intending to advance a political, religious or ideological cause and intending either to coerce or intimidate a government or to intimidate the public or a section of the public. The specified action is action that causes death or serious physical harm to another person, that endangers another person's life, that creates a serious risk to the health or safety of the public or a section of the public, that causes serious damage to property, or that seriously interferes with or seriously disrupts or destroys an electronic system such as a telecommunications system or a financial system¹¹⁵.

55 Provisions within Pt 5.3 create offences having some connection to actual or potential terrorist acts. The degree of connection varies from offence to offence. At one end of the spectrum is the offence of engaging in a terrorist act, which carries a maximum penalty of imprisonment for life¹¹⁶. At the other end of the spectrum is the offence of associating with a person who is a member of a "terrorist organisation", which carries a maximum penalty of imprisonment for three years¹¹⁷. The definition of "terrorist organisation" is met by an organisation that is "directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act"¹¹⁸.

56 Most offences within the spectrum are "prophylactic offences" in the sense that "the risk of harm", relevantly from the commission of a terrorist act, "does not arise straightforwardly from the prohibited act" but "only after, or in conjunction with, further human interventions – either by the original actor or by others"¹¹⁹. An example is the offence of taking steps to become a member of a terrorist organisation, which carries a maximum penalty of imprisonment for ten years¹²⁰.

115 Section 100.1(1) of the *Criminal Code* (definition of "terrorist act") read with s 100.1(2) and (3).

116 Section 101.1 of the *Criminal Code*.

117 Section 102.8 of the *Criminal Code* read with s 102.1(1) (definition of "member").

118 Section 102.1(1) of the *Criminal Code* (definition of "terrorist organisation").

119 Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (2011) at 79. See also *Lodhi v The Queen* (2006) 199 FLR 303 at 318 [66].

120 Section 102.3 of the *Criminal Code* read with s 102.1(1) (definition of "member").

In *R v Abdirahman-Khalif*¹²¹ the offence was committed by a young Australian woman who attempted to travel from Australia to Turkey in order to "engage" with Islamic State with the intention of becoming a nurse or a bride.

57 Division 104 of Pt 5.3 provides for the making of "control orders", imposing obligations, prohibitions and restrictions stopping short of detention in custody. The Division confers on the Federal Court and the Federal Circuit Court power¹²², and jurisdiction¹²³, to make a control order on application of the Commissioner or another senior member of the Australian Federal Police. The Federal Court or the Federal Circuit Court can make a control order if, amongst other things, "the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed ... by the order is reasonably necessary, and reasonably appropriate and adapted", for the purpose of "protecting the public from a terrorist act" or "preventing the provision of support for or the facilitation of a terrorist act"¹²⁴.

58 Division 105A of Pt 5.3 provides for the making of "continuing detention orders", requiring persons convicted of terrorist offences to continue to be detained in custody beyond completion of their sentences. Division 105A confers on the Supreme Court of a State or Territory power¹²⁵, and jurisdiction¹²⁶, to make a continuing detention order in relation to a "terrorist offender" on application by the Minister administering the *Australian Federal Police Act 1979* (Cth)¹²⁷. The Supreme Court can make a continuing detention order if "satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community"¹²⁸ and if "satisfied that there is no other less

121 (2020) 94 ALJR 981; 384 ALR 1.

122 Section 104.4 of the *Criminal Code*.

123 Section 15C of the *Acts Interpretation Act 1901* (Cth).

124 Section 104.4(1)(d)(i) and (ii) of the *Criminal Code*.

125 Section 105A.7 of the *Criminal Code*.

126 Section 15C of the *Acts Interpretation Act*.

127 Section 105A.5 of the *Criminal Code*.

128 Section 105A.7(1)(b) of the *Criminal Code*.

restrictive measure that would be effective in preventing the unacceptable risk"¹²⁹. The expression "serious Part 5.3 offence" is defined to mean an offence against Pt 5.3 the maximum penalty for which is seven or more years of imprisonment¹³⁰.

59 Division 104's insertion in 2005¹³¹ marked a development in Commonwealth legislative practice in that it was the first time that a Commonwealth law made provision for the making by judicial order of "preventative restraints on liberty"¹³². The Division as inserted was held to be compatible with Ch III of the *Constitution* in *Thomas v Mowbray*¹³³.

60 Division 105A's insertion in 2017¹³⁴ marked a further development in Commonwealth legislative practice in that it was the first time that a Commonwealth law made provision for a person convicted of an offence to continue to be detained in custody by judicial order after the completion of his or her sentence. The Division was modelled on the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), compatibility of which with Ch III had been upheld in *Fardon v Attorney-General (Qld)*¹³⁵.

61 The question of Div 105A's compatibility with Ch III arose on an application by the Minister for Home Affairs to the Supreme Court of Victoria for a continuing detention order in relation to Mr Benbrika. The question was formally reserved in the Trial Division of the Supreme Court for the consideration of the Court of Appeal and was removed into this Court by order under s 40 of the *Judiciary Act 1903* (Cth).

62 The majority in *Thomas v Mowbray* held that the power to make a control order was judicial power within the meaning of s 71 of the *Constitution*. That holding was indispensable to the majority's conclusion that Div 104 was compatible with Ch III because the Commonwealth Parliament cannot confer

129 Section 105A.7(1)(c) of the *Criminal Code*.

130 Section 105A.2 of the *Criminal Code*.

131 *Anti-Terrorism Act (No 2) 2005* (Cth).

132 *Thomas v Mowbray* (2007) 233 CLR 307 at 330 [18].

133 (2007) 233 CLR 307.

134 Item 1 of Sch 1 to the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth), which relevantly commenced in 2017.

135 (2004) 223 CLR 575.

anything but judicial power, or a power incidental to judicial power, in defining the jurisdiction of a federal court under s 77(i) of the *Constitution*¹³⁶.

63 Division 105A correspondingly can be compatible with Ch III only if, and to the extent that, the power to make a continuing detention order is judicial power within the meaning of s 71 of the *Constitution*. That is because of a corresponding incapacity of the Commonwealth Parliament to confer anything but judicial power, or a power incidental to judicial power, on a State court through the investiture of federal jurisdiction under s 77(iii)¹³⁷ or on a Territory court through the investiture of federal jurisdiction under s 122 of the *Constitution*¹³⁸.

64 My conclusion is that the power to make a continuing detention order answers the description of judicial power within the meaning of s 71 of the *Constitution* only to the extent that the "serious Part 5.3 offence" to be prevented by the making of the order involves doing or supporting or facilitating a terrorist act.

65 Explaining how I reach that conclusion, I begin by examining the context and content of the canonical observation in the joint reasons for judgment in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* that, "exceptional cases" aside, "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"¹³⁹. I then set out my understanding of the narrow basis on which the power to order continuing detention conferred by the legislation in issue in *Fardon* fell within the category of an "exceptional case" and contrast that power with the width of the power to order continuing detention conferred by Div 105A.

***Lim* in context**

66 Nothing that has a history can be defined. Especially that is so of the concept of judicial power, which has been shown to "defy, perhaps it were better to say

136 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, affirmed in *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529; [1957] AC 288.

137 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151-152; *R v Murphy* (1985) 158 CLR 596 at 614-615.

138 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [28]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 615 [111].

139 (1992) 176 CLR 1 at 27.

transcend, purely abstract conceptual analysis", to "inevitably attract[] consideration of predominant characteristics" and to "invite[] comparison with the historic functions and processes of courts of law"¹⁴⁰.

67 Chapter III's separation of the judicial power of the Commonwealth from the legislative and executive powers of the Commonwealth compels us to recognise "that we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive"¹⁴¹. The historically observed incidents of those separated powers also compel us to recognise that when the *Constitution* "prescribes as a safeguard of individual liberty a distribution of the functions of government amongst separate bodies, and does so by requiring a distinction to be maintained between powers described as legislative, executive and judicial, it is using terms which refer, not to fundamental functional differences between powers, but to distinctions generally accepted at the time when the Constitution was framed between classes of powers requiring different 'skills and professional habits' in the authorities entrusted with their exercise"¹⁴². The point is not that the judicial power of the Commonwealth is frozen in time. The point is that contemporary exposition of that judicial power is necessarily informed by traditional practices within historical institutional structures¹⁴³.

68 Our inherited system of law and government has not drawn a rigid distinction between judicial power exercised in a civil proceeding and judicial power exercised in a criminal proceeding¹⁴⁴. Traditionally, however, an important distinction has been drawn between other exercises of judicial power and the exercise of judicial power that occurs in a proceeding in respect of a matter in

140 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394.

141 *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11.

142 *R v Davison* (1954) 90 CLR 353 at 381-382.

143 cf *Palmer v Ayres* (2017) 259 CLR 478 at 504 [69]; *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1268 [141]; 374 ALR 1 at 40.

144 *Witham v Holloway* (1995) 183 CLR 525 at 534, 549; *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 179 [56], 198-199 [114].

which the life or liberty of an individual is put in jeopardy¹⁴⁵. The importance of the distinction is given prominence within Ch III of the *Constitution* in the prescription of s 80 that "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury". Traditionally, a proceeding on indictment is a proceeding in a matter between the State, represented by the executive, and an individual who is a citizen or subject of the State. The proceeding on indictment is "solemnly determined according to a procedure considered appropriate to the highest crimes by which the State may be affected and the gravest liabilities to which a subject may be exposed"¹⁴⁶.

69 Trial of an individual for an offence at the instigation of the executive, whether by jury or by judge alone, exhibits features recognised in numerous standard descriptions of judicial power to epitomise judicial power and to define its distinctiveness. The judiciary is called on in the trial to hear and authoritatively determine a controversy about an existing liability of the individual which is claimed by the executive to arise solely from the operation of some positive law on some past event or conduct¹⁴⁷. Judicial determination of the controversy, whether by conviction or acquittal, creates a "new charter" by reference to which the controversy as to the existence or non-existence of the claimed liability of the individual is thereafter taken to be resolved between the State and the individual¹⁴⁸. Deprivation of the liberty of the individual occurs only if the determination of the controversy is by conviction. Then it occurs only through the judicial pronouncement of a sentence which reflects the penal consequence prescribed by law for the liability determined by the conviction to have arisen from the operation of the positive law on the past event or conduct.

145 *The Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at 516-518 [90]-[93].

146 *Munday v Gill* (1930) 44 CLR 38 at 86.

147 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374, 396; *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140 at 148-149; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188; *Ha v New South Wales* (1997) 189 CLR 465 at 503-504; *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1270-1271 [152]; 374 ALR 1 at 43.

148 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374. See *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 106; *New South Wales v Kable* (2013) 252 CLR 118 at 139 [53].

70 Those standard incidents of the exercise of judicial power in the trial of an individual for an offence are "founded on deeply rooted notions of the relationship of the individual to the state going to the character of the national polity created and sustained by the *Constitution*"¹⁴⁹. They render "beyond dispute that the power to determine whether a person has engaged in conduct which is forbidden by law and, if so, to make a binding and enforceable declaration as to the consequences which the law imposes by reason of that conduct lies at the heart of exclusive judicial power"¹⁵⁰.

71 The observation in *Lim* can only be understood in light of those standard incidents of the exclusively judicial function of adjudging and punishing criminal guilt. Although expressed in relation to the position of a "citizen", the observation applies equally to the position of an alien, except perhaps an enemy alien¹⁵¹. The opening part of the observation, that detention in custody is to be characterised as "penal or punitive" other than in "exceptional cases", is inextricably linked to the concluding part of the observation concerning the limited means by which involuntary detention of that character is constitutionally permitted to occur. That the detention is in consequence of an exercise of judicial power is not enough. Necessary, other than in "exceptional cases", is that the detention is in consequence of an exercise of judicial power that amounts to performance of "the exclusively judicial function of adjudging and punishing criminal guilt". The observation is not simply as to a division of power, but as to a limitation on power inherent in that division that is protective of liberty.

72 Constitutional assignment of the function of imposing penal or punitive detention exclusively to the judicial power protects liberty by preventing detention in custody at the initiative of the executive other than through the agency of an independent and impartial tribunal according to a procedure that is fair and transparent. Constitutional assignment of that function exclusively to an exercise of judicial power involving adjudgment and punishment of criminal guilt further protects liberty by preventing detention in custody other than as the penal

149 *Magaming v The Queen* (2013) 252 CLR 381 at 400 [63].

150 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497. See *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444; *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258, 269; *Duncan v New South Wales* (2015) 255 CLR 388 at 407 [41].

151 *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582-583; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 197-199 [125]-[130].

consequence prescribed by law for an existing liability determined to have arisen from the operation of positive law on past events or conduct.

73 Default characterisation of detention in custody as penal or punitive, and therefore as capable of imposition only through judicial pronouncement of a sentence that gives effect to the prescribed penal consequence for a liability determined to have arisen from the operation of positive law on past events or conduct¹⁵², underpins the protection of liberty by demanding constitutional justification for any detention in custody to be constitutionally permitted outside that paradigm. Description of cases in which detention in custody outside that paradigm is constitutionally permissible as "exceptional"¹⁵³ emphasises the stringency of the justification required.

74 The requirement for detention in custody to be justified as exceptional to escape characterisation as penal or punitive operates as a check on legislative and executive power against tendencies long recognised that have been borne out by experience. John Stuart Mill noted that "one of the undisputed functions of government" is "to take precautions against crime before it has been committed, as well as to detect and punish it afterwards". Mill also noted¹⁵⁴:

"The preventive function of government, however, is far more liable to be abused, to the prejudice of liberty, than the punitive function; for there is hardly any part of the legitimate freedom of action of a human being which would not admit of being represented, and fairly too, as increasing the facilities for some form or other of delinquency."

To the same effect, Brandeis J, in a "famous dissent"¹⁵⁵, said¹⁵⁶:

"Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The

152 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 611-612 [98].

153 cf *Chester v The Queen* (1988) 165 CLR 611 at 618.

154 Mill, *On Liberty* (1859), quoted in Ashworth and Zedner, *Preventive Justice* (2014) at 42, 253.

155 *Carpenter v United States* (2018) 138 S Ct 2206 at 2223.

156 *Olmstead v United States* (1928) 277 US 438 at 479.

greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

75 Categories of exceptional cases of non-punitive detention in custody mentioned in *Lim* included cases of mental illness and infectious disease¹⁵⁷. The outcome in *Lim*, recognising as consistent with Ch III conferral of a statutory power to detain an alien unlawfully in Australia pending either expulsion from Australia or grant of permission to remain in Australia, demonstrates that the categories of exceptional cases are not closed¹⁵⁸.

76 Detention might in some exceptional cases be authorised consistently with Ch III by Commonwealth legislation conferring on an executive officer a statutory power to detain¹⁵⁹, exercise of which is subject to judicial review for jurisdictional error by this Court under s 75(v) of the *Constitution*. Detention might in other exceptional cases be authorised consistently with Ch III by Commonwealth legislation conferring on a court the "double function"¹⁶⁰ of creating a liability to be detained through an act of adjudication "to be exercised according to legal principle or by reference to an objective standard or test prescribed by the legislature and not by reference to [unspecified] policy considerations"¹⁶¹, exercise of which is subject to appeal to this Court under s 73 of the *Constitution*.

77 Whether conferral on a court of a function of creating a liability to be detained in custody through an act of adjudication in a novel category of case falls within *Lim*'s reference to "exceptional cases" turns on the constitutional acceptability of the justification for that conferral. Evaluation of a proffered justification must proceed upon an acceptance that the *Constitution* was framed as "an instrument of government meant to endure and conferring powers expressed

157 (1992) 176 CLR 1 at 28.

158 See also *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at 630-631 [37], 648-650 [108]-[116], 676 [222].

159 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 611-612 [98]-[99]; *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 593 [21].

160 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 165.

161 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 360, quoting *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 191. See also *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1272-1275 [158]-[172]; 374 ALR 1 at 44-48.

in general propositions wide enough to be capable of flexible application to changing circumstances"¹⁶² and must be sensitive to the reality that "the exercise of powers, independently, impartially and judicially, especially when such powers affect the liberty of the individual, would ordinarily be regarded as a good thing, not something to be avoided"¹⁶³.

78 Essential to acceptance of any proffered justification for any detention in custody otherwise than as a result of adjudgment and punishment of criminal guilt, however, must be that the detention authorised is "reasonably capable of being seen as necessary for a legitimate non-punitive objective"¹⁶⁴. Here, as elsewhere in constitutional law, the legislative objective is what the impugned law is designed to achieve in fact¹⁶⁵. Here, as elsewhere in constitutional law, the legitimacy of the legislative objective falls to be determined by reference to the compatibility of what the impugned law is designed to achieve in fact with values protected by the constitutional principle to be applied¹⁶⁶. And here, as elsewhere in constitutional law, the "concern is with substance and not mere form"¹⁶⁷.

79 Prevention of harm is a legitimate non-punitive objective, at least where the harm is grave and specific. Mere prevention of commission of a criminal offence is not. Both of those propositions are illustrated by the reasoning in *Fardon*, to which I now turn.

162 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81.

163 *Thomas v Mowbray* (2007) 233 CLR 307 at 329 [17]. See also *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1272 [158]; 374 ALR 1 at 44.

164 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 162, citing *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33, 46, 56, 65, 71. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 653-654 [215]; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 343 [27].

165 *McCloy v New South Wales* (2015) 257 CLR 178 at 232 [132]; *Brown v Tasmania* (2017) 261 CLR 328 at 392 [209]; *Spence v Queensland* (2019) 93 ALJR 643 at 665 [60]; 367 ALR 587 at 605.

166 cf *McCloy v New South Wales* (2015) 257 CLR 178 at 231 [130].

167 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

Fardon

80 Ultimately in issue in *Fardon* was compatibility with Ch III of conferral on the Supreme Court of Queensland by the Parliament of Queensland of power to order continuing detention of a prisoner who the Supreme Court was satisfied was a "serious danger to the community" by reason of there being "an unacceptable risk" that the prisoner would commit "an offence of a sexual nature ... involving violence [or] against children" if released from custody¹⁶⁸. Compatibility with Ch III fell to be determined by reference to the principle in *Kable v Director of Public Prosecutions (NSW)*¹⁶⁹.

81 Stated at its highest level of generality, the *Kable* principle is that Ch III implies that a "court" of a State or Territory must be and be seen to be an independent and impartial tribunal in order to be an available repository of the judicial power of the Commonwealth¹⁷⁰. No part of the principle is to deny the validity of conferral on a State or Territory court by State or Territory legislation of a function merely because performance of that function would involve the court in an exercise of non-judicial power¹⁷¹.

82 The *Kable* principle is infringed by purported conferral on a State or Territory court or judicial officer by State or Territory legislation of any function – whether judicial¹⁷² or non-judicial¹⁷³ – which "substantially impairs" the "institutional integrity" of the court¹⁷⁴. Because the limitation placed by the principle on State and Territory legislative power is less – not greater – than that

168 Section 13 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) read with the definition of "serious sexual offence" in the Schedule to that Act.

169 (1996) 189 CLR 51.

170 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29]; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 81 [78]; *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1268 [138]–[139]; 374 ALR 1 at 39.

171 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 544 [153].

172 eg s 5 of the *Community Protection Act 1994* (NSW), considered in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

173 eg s 9 of the *Crimes (Criminal Organisations Control) Act 2009* (NSW), considered in *Wainohu v New South Wales* (2011) 243 CLR 181.

174 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 424 [40].

placed on Commonwealth legislative power, the principle cannot be infringed by a State or Territory law unless a hypothetical Commonwealth law conferring the same function would also be invalid as incompatible with Ch III¹⁷⁵.

83 That was the context in which the Attorney-General of the Commonwealth, intervening in *Fardon*, advanced the argument that the power to order continuing detention of a prisoner conferred by the State law in issue could have been conferred by a hypothetical Commonwealth law enacted under s 77(iii)¹⁷⁶. The argument was squarely addressed only by Gummow J, with whom Kirby J in dissent agreed¹⁷⁷. Although Gummow J was part of the majority which held that the conferral of power under the State law in issue did not infringe the *Kable* principle, his Honour rejected the argument that the power could have been conferred by a hypothetical Commonwealth law. Taking the view that "detention by reason of apprehended conduct, even by judicial determination on a quia timet basis ... is at odds with the central constitutional conception of detention as a consequence of judicial determination of engagement in past conduct"¹⁷⁸, his Honour concluded that "[t]he vice for a Ch III court and for the federal laws postulated ... would be in the nature of the outcome, not the means by which it was obtained"¹⁷⁹.

84 Gummow J expressed scepticism about the utility of persisting in labelling an unjustified deprivation of liberty without adjudication of criminal guilt as "penal or punitive"¹⁸⁰. Because I believe that traditional labels can convey underlying values¹⁸¹, and because I believe that limiting the permissible means of inflicting State-sanctioned punishment underlies the traditional assignment of detention in custody to the exclusive exercise of judicial power involving adjudication and

175 *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 561-562 [14]; *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at 186 [9]-[11], 194 [39]; *Baker v The Queen* (2004) 223 CLR 513 at 526-527 [22]-[24].

176 (2004) 223 CLR 575 at 580.

177 (2004) 223 CLR 575 at 608-614 [68]-[89], 631 [145].

178 (2004) 223 CLR 575 at 613 [84].

179 (2004) 223 CLR 575 at 614 [85].

180 (2004) 223 CLR 575 at 612-613 [81]. See also *Al-Kateb v Godwin* (2004) 219 CLR 562 at 612-613 [137]-[138].

181 cf *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 32-33 [24]; *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 130-131 [18], 132 [22].

punishment of criminal guilt, that is not a scepticism I share. Nothing turns on that difference in perspective.

85 Though I consider Gummow J ultimately to have been wrong to reject the argument of the Attorney-General of the Commonwealth, I consider his Honour to have been correct to reject the argument to the extent of the reasons he gave. To admit of the potential for judicial power to be used to detain an individual in custody merely because that individual poses an unacceptable risk of committing a criminal offence in the future would be directly at odds with Ch III's limitation of detention in custody to the penal consequence prescribed by law for an existing liability determined to have arisen from the operation of positive law on past events or conduct. If liberty is protected by a constitutional structure which limits detention in custody to the penal consequence of an offence determined by a court to have been committed in the past, then liberty would be subverted by an exception to the operation of that limitation cast in terms which would authorise detention in custody to prevent commission of an offence determined by a court to be at risk of being committed in the future. For that reason, the objective merely of preventing commission of a criminal offence cannot be legitimate.

86 The basis on which I consider his Honour to have been wrong to reject the argument of the Attorney-General of the Commonwealth is that evaluation of the substantive operation of the hypothesised Commonwealth law necessitated that attention be given to the harm inherent in the criminal conduct which the Supreme Court needed to be satisfied that a prisoner posed an unacceptable risk of committing before subjecting the prisoner to a continuing detention order.

87 Despite the conferral of power to make a continuing detention order being couched in terms of preventing the future commission of an offence, the substance of what a continuing detention order was designed to achieve in fact – and the substance of what a continuing detention order was reasonably capable of being seen as necessary to achieve in fact – was to protect "public safety"¹⁸². More specifically, in language adopted by Gleeson CJ, a continuing detention order under the *Fardon* regime fell within the description of a "preventive restraint to deal with the case of a person who has been convicted of violent crime and who, while not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality if he were to be released as a matter of course at the end of what represents a proper punitive sentence"¹⁸³.

88 On that limited basis, I consider that the power to make a continuing detention order under the *Fardon* regime could have been conferred as part of the

182 (2004) 223 CLR 575 at 654 [217].

183 (2004) 223 CLR 575 at 588-589 [9], quoting *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 495. See also (2004) 223 CLR 575 at 592 [20].

judicial power of the Commonwealth by a hypothetical law in the same terms enacted by the Commonwealth Parliament.

89 My conclusion that the power to order continuing detention conferred by the legislation in issue in *Fardon* could have been conferred as part of the judicial power of the Commonwealth is not assisted by anything in the reasoning in *New South Wales v Kable*¹⁸⁴, despite the attention devoted to that case in the argument of the parties. The result in that case did not turn on the proposition that the power to order the continuing detention of Mr Kable was compatible with Ch III; precisely the opposite had been determined in *Kable v Director of Public Prosecutions (NSW)*¹⁸⁵. The result turned on the order for the continuing detention of Mr Kable being a purported judicial order of the Supreme Court of New South Wales which derived legal force and effect from the time it was made until the time that it was set aside as unconstitutional, not from the unconstitutional legislation pursuant to which the Supreme Court purported to make it but from the constitutional status of the Supreme Court as a superior court of record¹⁸⁶.

Division 105A

90 The power to make a control order was characterised by members of the majority in *Thomas v Mowbray* as a form of "preventive justice" permissibly conferred as judicial power¹⁸⁷. Consistently with the power to order continuing detention conferred by the legislation in issue in *Fardon*, what was sought to be prevented by an exercise of the power was not occurrence of an offence but occurrence of an act which of its nature would cause serious harm.

91 As originally inserted and as considered in *Thomas v Mowbray*, Div 104 identified as its sole object "to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act"¹⁸⁸. Essential to the making of a control order was that the issuing court be "satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order

184 (2013) 252 CLR 118.

185 (1996) 189 CLR 51.

186 (2013) 252 CLR 118 at 134 [36], 139-140 [53]-[55].

187 (2007) 233 CLR 307 at 328-330 [16]-[18], 356-357 [114]-[121], 507 [595], 526 [651].

188 Section 104.1 of the *Criminal Code*, as discussed in *Thomas v Mowbray* (2007) 233 CLR 307 at 337 [43].

is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act"¹⁸⁹. The object of the Division¹⁹⁰, and correspondingly what an issuing court must be satisfied that each obligation, prohibition and restriction to be imposed by a control order is reasonably necessary and reasonably appropriate and adapted to achieve¹⁹¹, has since 2015¹⁹² been expressed to include in relevant alternative "preventing the provision of support for or the facilitation of a terrorist act". The legislative identification of what is sought to be prevented by the making of a control order has nevertheless remained prevention of a terrorist act.

92 Division 105A is designedly different. The expressed object of the Division is "to ensure the safety and protection of the community", not by providing for the continuing detention of terrorist offenders who pose an unacceptable risk of engaging in a terrorist act or of providing support for or facilitating a terrorist act, but "by providing for the continuing detention of terrorist offenders who pose an unacceptable risk of committing serious Part 5.3 offences"¹⁹³. Correspondingly, what a Supreme Court is required to be satisfied of before making a continuing detention order is identified not in terms of an unacceptable risk of a terrorist act but in terms of an unacceptable risk of commission of a serious Pt 5.3 offence¹⁹⁴.

93 The difference would be of no constitutional moment if each serious Pt 5.3 offence within the purview of Div 105A, like each serious sexual offence within the purview of the legislation considered in *Fardon*, involved conduct which of its nature gave rise to the serious harm which the offence was created to avoid. The risk of commission of a serious Pt 5.3 offence could then be treated as a proxy for the risk of a terrorist act just as the risk of commission of a serious sexual offence as defined in the legislation in issue in *Fardon* was able to be treated as a proxy for the risk of sexual conduct involving violence or against children. Some serious Pt 5.3 offences involve conduct of that nature. Others do not. The prophylactic approach taken to the imposition of criminal liability has the effect already noted

189 Section 104.4(1)(d) of the *Criminal Code*, as discussed in *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [64].

190 Section 104.1(a) and (b) of the *Criminal Code*.

191 Section 104.4(1)(d)(i) and (ii) of the *Criminal Code*.

192 *Counter-Terrorism Legislation Amendment Act (No 1) 2014* (Cth), which relevantly commenced in 2015.

193 Section 105A.1 of the *Criminal Code*.

194 Section 105A.7(1)(b) and (c) of the *Criminal Code*.

that a serious Pt 5.3 offence can involve conduct many steps removed from doing or supporting or facilitating any terrorist act.

94 The parliamentary record contains in a revised explanatory memorandum a description of the nature of the regime intended to be established by Div 105A. The terms of the description pointed to a constitutionally legitimate non-punitive objective which aligns with the statutorily expressed object of Div 104. Division 105A was described in the revised explanatory memorandum as a "means to protect the community from the risk of terrorist acts"¹⁹⁵.

95 The difficulty in determining whether Div 105A is reasonably capable of being seen as necessary for a legitimate non-punitive objective lies in the lack of close correspondence between the ultimate non-punitive objective of protecting against terrorist acts and the immediate statutory object of preventing serious Pt 5.3 offences. Instead of directly addressing the risk of terrorist acts to be averted in the targeted manner of Div 104, Div 105A overlays a new regime of civil preventive detention onto an existing regime of prophylactic crimes.

96 The scheme of Div 105A was refined in the parliamentary process which resulted in its insertion. One refinement was to remove offences unrelated to terrorism from the range of offences unacceptable risk of occurrence of which might found a continuing detention order¹⁹⁶. How the offences that remained came to include all offences carrying a maximum penalty of seven or more years of imprisonment does not emerge from the parliamentary record and is remarkable given that none of the offences created by those provisions is expressed to carry a maximum penalty of seven years. The explanation appears to be that the definition of "serious Part 5.3 offence" was drafted to mirror the definition of "serious sex offence" in some State legislation based on the *Fardon* model¹⁹⁷ without discrimination as to the nature of the conduct involved in each offence.

97 By adapting the model of the legislation considered in *Fardon*, the Commonwealth Parliament has extrapolated from continuing detention to protect

195 Australia, House of Representatives, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, Revised Explanatory Memorandum at 3.

196 Australia, Senate, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, Supplementary Explanatory Memorandum at 3, 13.

197 See eg s 5(1)(a)(i) of the *Crimes (High Risk Offenders) Act 2006* (NSW) (as to the provenance of which see Tulich, "Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales" (2015) 38 *University of New South Wales Law Journal* 823 at 829-832) and the definition of "serious sexual offence" in s 106A of the *Evidence Act 1906* (WA) adopted in s 3(1) of the *Dangerous Sexual Offenders Act 2006* (WA).

against a narrow category of inherently harmful criminal conduct to continuing detention to prevent criminal conduct remote from the terrorist acts against which protection is sought to be provided. The exceptional case of detention in custody otherwise than as punishment for a past offence has in the result become unexceptional in relation to offences having some (even very remote) connection to a potential terrorist act.

98 Because the burden of restrictions on liberty imposed in pursuit of national security are likely to fall on a few for the benefit of many, political constraints on the exercise of legislative power cannot be presumed to limit the design of legislation enacted in the interests of national security in a manner that is protective of individual liberty to the extent entailed by the constitutional commitment of separated judicial power to institutions immunised from the political processes. Through the legislative establishment of the Office of the Independent National Security Legislation Monitor, provision has been made for independent review and reporting on the effectiveness and implications of Div 105A, including by reference to its impact on "the rights of individuals"¹⁹⁸. The Parliamentary Joint Committee on Intelligence and Security is also required to review Div 105A¹⁹⁹. Neither the Independent National Security Legislation Monitor nor the Parliamentary Joint Committee on Intelligence and Security has yet reported on Div 105A.

99 Whether Div 105A complies with the constitutional principle identified by the observation in *Lim*, however, is a question irrevocably committed to judicial determination. Neither the "respect which the judicial organ must accord to opinions of the legislative and executive organs"²⁰⁰ nor the potential for the outcome to turn on a contestable judgment of degree alleviates the judicial responsibility to undertake the close scrutiny of legislation necessary to provide an answer.

Conclusion

100 No part of my reasoning is to suggest that the power to make a continuing detention order is incapable of reasonably being seen to be necessary for the constitutionally legitimate non-punitive objective of protecting against terrorist acts in all its applications. And no part of my reasoning is to suggest that a bright line can be drawn around those Pt 5.3 offences unacceptable risk of commission of which can be taken to indicate an unacceptable risk of the occurrence of a

198 *Independent National Security Legislation Monitor Act 2010* (Cth), s 6(1)(a)(ia) and (b)(i).

199 *Intelligence Services Act 2001* (Cth), s 29(1)(cb).

200 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 263.

terrorist act or support for or facilitation of a terrorist act. Compliance with the principle identified by the observation in *Lim* nevertheless requires that a line be drawn.

101 Without undermining the scheme of Div 105A, the reference in the definition of "serious Part 5.3 offence" to "an offence against" Pt 5.3 can be given a distributive construction to include those offences which fall on one side of the line and exclude those offences which fall on the other side of the line. Because the reference can be so construed, s 15A of the *Acts Interpretation Act 1901* (Cth) requires that it be so construed²⁰¹. However, nothing would be served by embarking on that subsidiary and contingent exercise of construction in dissenting reasons for judgment unassisted by argument and absent material having the potential to reveal relevant statutory and constitutional facts.

102 Enough by way of conclusion is that I indicate that I would answer the question removed to the effect that Div 105A is not wholly compatible with Ch III of the *Constitution*. I would order the Minister to pay Mr Benbrika's costs.

201 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 93; *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502-503.

103 GORDON J. This case raises issues of "vital constitutional importance"²⁰² being faced by many democratic states in the modern age. Immediately, the issues concern the legislative responses to "terrorism". More fundamentally, they are issues about adherence to the rule of law. In Australia, that includes the maintenance of the system of law and government prescribed by the *Constitution* of the Commonwealth; with a judiciary, as the "bulwark of freedom", which traditionally and historically adjudges the most basic of rights upon the determination of criminal guilt²⁰³.

104 On 15 September 2008, the respondent, Mr Benbrika, was convicted after a trial of having committed two offences between July 2004 and November 2005, namely, intentionally being a member of a terrorist organisation and intentionally directing the activities of a terrorist organisation, in both cases knowing that it was a terrorist organisation, contrary to ss 102.3(1) and 102.2(1) of the *Criminal Code* (Cth). Each offence is a "serious Part 5.3 offence"²⁰⁴ within the meaning of s 105A.2 of the *Criminal Code*. The respondent was sentenced to a total effective sentence of 15 years' imprisonment with a non-parole period of 12 years. Parole was never granted. The respondent's sentence was due to expire on 5 November 2020.

105 On 4 September 2020, the Minister for Home Affairs ("the Minister") applied to the Supreme Court of Victoria under s 105A.5 of the *Criminal Code*, for orders in respect of the respondent that a continuing detention order ("CDO") be made pursuant to s 105A.7(1), and that an interim detention order be made pursuant to s 105A.9(2). On 8 October 2020, Tinney J reserved a question in the proceeding for the consideration of the Court of Appeal pursuant to s 17B(2) of the *Supreme Court Act 1986* (Vic), concerning the validity of Div 105A of the *Criminal Code*.

106 On 27 October 2020, Tinney J made an interim detention order pursuant to s 105A.9 of the *Criminal Code*. That interim order was in force from 5 November 2020 to 2 December 2020 but was extended by a further interim order to 30 December 2020. On 24 December 2020, after the hearing before this Court,

202 *The Commonwealth v Cigamatic Pty Ltd (In liq)* (1962) 108 CLR 372 at 389; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 630.

203 *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11. See also *R v Davison* (1954) 90 CLR 353 at 381-382.

204 Defined to mean "an offence against [Pt 5.3], the maximum penalty for which is 7 or more years of imprisonment": *Criminal Code*, s 105A.2 definition of "serious Part 5.3 offence".

Tinney J made a CDO pursuant to s 105A.7(1) of the *Criminal Code*²⁰⁵. Subject to the outcome of any appeal from that order, the CDO will be in force for a period of three years and the effect of the CDO is to commit the respondent to detention in a prison²⁰⁶. On 1 December 2020, in a separate proceeding brought by the Assistant Commissioner of the Australian Federal Police in the Federal Court of Australia, Besanko J made an interim control order pursuant to s 104.4 of the *Criminal Code*²⁰⁷.

107 On 30 October 2020, Nettle J ordered that, pursuant to s 40 of the *Judiciary Act 1903* (Cth), the question reserved for the consideration of the Court of Appeal be removed into this Court. The question reserved is as follows:

"Is all or any part of Division 105A of the *Criminal Code* (Cth) and, if so, which part, invalid because the power to make a continuing detention order under section 105A.7 of the *Code* is not within the judicial power of the Commonwealth and has been conferred, inter alia, on the Supreme Court of Victoria contrary to Chapter III of the Commonwealth Constitution?"

108 The respondent submitted that Div 105A is invalid in its entirety. The Attorney-General of the Commonwealth, intervening in support of the Minister, submitted that the question reserved should be answered "No". The Minister adopted the Commonwealth's submissions.

109 For the reasons that follow, I would answer the question reserved as follows:

"Division 105A of the *Criminal Code* (Cth) is wholly invalid because the power to make a continuing detention order under s 105A.7 is not within the judicial power of the Commonwealth and is contrary to Ch III of the Commonwealth *Constitution*."

Security of the Commonwealth and terrorism

110 Chapter 5 of the *Criminal Code*, headed "The security of the Commonwealth", comprises six parts: "Treason and related offences"²⁰⁸;

205 *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [478].

206 *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [479]-[480].

207 *Lee v Benbrika* [2020] FCA 1723.

208 *Criminal Code*, Ch 5, Pt 5.1.

"Espionage and related offences"²⁰⁹; "Terrorism"²¹⁰; "Harming Australians"²¹¹; "Foreign incursions and recruitment"²¹²; and "Secrecy of information"²¹³. This case is concerned with Pt 5.3, headed "Terrorism"²¹⁴. The constitutional basis for the operation of Pt 5.3 is addressed in ss 100.3 and 100.8 in Pt 5.3: it includes a referral of powers by the States and Territories to the extent that they are not otherwise included in the legislative powers of the Commonwealth Parliament and, relatedly, that no amendment to Pt 5.3 can be made unless it is approved by a majority of the States and Territories (which majority must include at least four States)²¹⁵.

209 *Criminal Code*, Ch 5, Pt 5.2.

210 *Criminal Code*, Ch 5, Pt 5.3.

211 *Criminal Code*, Ch 5, Pt 5.4.

212 *Criminal Code*, Ch 5, Pt 5.5.

213 *Criminal Code*, Ch 5, Pt 5.6.

214 In 2002, as part of a national scheme of anti-terrorism legislation, each State enacted legislation referring certain matters relating to terrorist acts to the Parliament of the Commonwealth for the purposes of s 51(xxxvii) of the *Constitution: Terrorism (Commonwealth Powers) Act 2002* (NSW), s 1(2); *Terrorism (Commonwealth Powers) Act 2003* (Vic), s 1; *Terrorism (Commonwealth Powers) Act 2002* (SA), s 1(2); *Terrorism (Commonwealth Powers) Act 2002* (Qld), s 1(2); *Terrorism (Commonwealth Powers) Act 2002* (WA), s 1(2); *Terrorism (Commonwealth Powers) Act 2002* (Tas), s 3. See also The Commonwealth of Australia, The State of New South Wales, The State of Victoria, The State of Queensland, The State of Western Australia, The State of South Australia, The State of Tasmania, The Australian Capital Territory and The Northern Territory of Australia, *Agreement on Counter-terrorism Laws*, 25 June 2004. The nature and effect of these referrals were not addressed in argument.

215 See, eg, *Terrorism (Commonwealth Powers) Act 2003* (Vic), s 3 definitions of "express amendment" and "terrorism legislation".

Divisions 104 and 105 – Control orders, preventative detention orders and "terrorist acts"

111 When Pt 5.3 was inserted into the *Criminal Code* in 2003²¹⁶, it did not contain Div 104, 105²¹⁷ or 105A, which were later inserted²¹⁸. Division 104 provides for the making of control orders, which impose obligations, prohibitions and restrictions on a person's liberty short of detention in prison, for the purpose, among others, of "protecting the public from a terrorist act" or "preventing the provision of support for or the facilitation of a terrorist act"²¹⁹. Division 105 provides for the making of preventative detention orders, which allow a person to be taken into custody and detained in a prison for a short period of time in order to "prevent a terrorist act that is capable of being carried out, and could occur, within the next 14 days from occurring" or to "preserve evidence of, or relating to, a recent terrorist act"²²⁰. Both Divs 104 and 105 are expressed to be directed at protecting the public from certain kinds of acts – terrorist acts, or, in the case of Div 104, terrorist acts or providing support for or facilitation of a terrorist act. As will later appear, the division in issue in this case, Div 105A, is expressed to be directed at preventing the commission of identified offences.

112 For the purpose of Pt 5.3, a "terrorist act" is defined in s 100.1(1) to mean:

"an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within subsection (3); and
- (b) the action is done or the threat is made with the intention of *advancing a political, religious or ideological cause*; and

216 *Criminal Code Amendment (Terrorism) Act 2003* (Cth), Sch 1.

217 Divisions 104 and 105 were inserted into Pt 5.3 by the *Anti-Terrorism Act (No 2) 2005* (Cth), Sch 4, item 24. See also Council of Australian Governments, *Council of Australian Governments' Communiqué: Special Meeting on Counter-Terrorism*, Canberra, 27 September 2005.

218 Division 105A was inserted into Pt 5.3 by the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth), Sch 1, item 1. See also Australia, Senate, *Parliamentary Debates* (Hansard), 15 September 2016 at 1035-1036.

219 *Criminal Code*, s 104.1. See also *Thomas v Mowbray* (2007) 233 CLR 307 at 325 [8], 337 [43], 370 [170], 468-469 [475]-[476], 502-503 [580], 511 [610].

220 *Criminal Code*, s 105.1.

51.

- (c) the action is done or the threat is made with the *intention of*:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; *or*
 - (ii) *intimidating the public or a section of the public.*" (emphasis added)

113 Sub-section (2) of s 100.1 provides that an "action" can be a terrorist act if it:

- "(a) causes serious harm that is physical harm to a person; or
- (b) causes serious damage to property; or
- (c) causes a person's death; or
- (d) endangers a person's life, other than the life of the person taking the action; or
- (e) creates a serious risk to the health or safety of the public or a section of the public; or
- (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (i) an information system; or
 - (ii) a telecommunications system; or
 - (iii) a financial system; or
 - (iv) a system used for the delivery of essential government services; or
 - (v) a system used for, or by, an essential public utility; or
 - (vi) a system used for, or by, a transport system."

114 Section 100.1(3) provides further that an "action" that is "advocacy, protest, dissent or industrial action" falls outside the definition of "terrorist act" in sub-s (1) if the advocacy, protest, dissent or industrial action is *not* intended to: cause serious harm that is physical harm to a person; cause a person's death; endanger the life of a person, other than the person taking the action; or create a serious risk to the health or safety of the public or a section of the public.

115 As is apparent, a wide range of conduct falls within a "terrorist act". It includes an *action done* or a *threat made* with the intention of *advancing a political, religious or ideological cause* where the action is done, or the threat is made, with an intention, among other things, of coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country, *or* intimidating the public or a section of the public. A "terrorist act" also includes "all actions or threats of action that constitute terrorist acts (no matter where the action occurs, the threat is made or the action, if carried out, would occur)"²²¹.

116 More generally, Pt 5.3 applies to "preliminary acts", relevantly defined as "all actions ... that relate to terrorist acts but [which] do not themselves constitute terrorist acts (no matter where the preliminary acts occur and no matter where the terrorist acts to which they relate occur or would occur)"²²².

Division 105A – CDOs and "serious Part 5.3 offences"

117 Division 105A, with which this case is concerned, was inserted into the *Criminal Code* in 2017²²³. It establishes a scheme, the object of which is "to ensure the safety and protection of the community by providing for the continuing detention of terrorist offenders who pose an unacceptable risk of committing serious Part 5.3 offences if released into the community"²²⁴. It provides for the making of a CDO, which commits a terrorist offender to detention in prison²²⁵ while the order is in force²²⁶. A "terrorist offender" includes certain persons convicted of a "serious Part 5.3 offence"²²⁷. A "serious Part 5.3 offence" is an

221 *Criminal Code*, s 100.4(1)(a); see also s 101.1(2).

222 *Criminal Code*, s 100.4(1)(b).

223 *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth), Sch 1, item 1.

224 *Criminal Code*, s 105A.1.

225 Defined to include "any gaol, lock-up or other place of detention": *Criminal Code*, s 105A.2 definition of "prison".

226 *Criminal Code*, s 105A.3(2).

227 *Criminal Code*, ss 105A.3(1)(a)(iii), 105A.3(1)(b), 105A.3(1)(c).

offence against Pt 5.3 where the maximum penalty is seven or more years of imprisonment²²⁸.

118 The scheme established under Div 105A has the following features.

Power to make a CDO

119 Section 105A.3(1) provides that a person may be subject to a CDO only if: they have been convicted of one of a number of specific offences which are generally terrorism-related offences committed in Australia or elsewhere²²⁹; the person is detained in custody and serving a sentence for that offence, has been continuously in custody since being convicted for that offence or is subject to a CDO or interim detention order that is still in force²³⁰; and if in custody serving a sentence, will be at least 18 years old upon the expiry of the sentence²³¹.

120 Only the Minister, or a legal representative of the Minister, may apply to a Supreme Court of a State or Territory for a CDO in relation to a terrorist offender²³². The application may not be made more than 12 months before the end of a sentence of imprisonment that the offender is serving, at the end of which the offender would be required to be released into the community²³³.

121 Under s 105A.7(1), a Supreme Court of a State or Territory may make a CDO. It is necessary to set out its text to understand the structure that has been created. The sub-section provides:

"A Supreme Court of a State or Territory may make a written order under this subsection if:

- (a) an application is made in accordance with section 105A.5 for a [CDO] in relation to a *terrorist offender*; and
- (b) after having regard to matters in accordance with section 105A.8, the Court is satisfied to a high degree of probability, on the basis of

228 *Criminal Code*, s 105A.2 definition of "serious Part 5.3 offence".

229 *Criminal Code*, s 105A.3(1)(a).

230 *Criminal Code*, s 105A.3(1)(b).

231 *Criminal Code*, s 105A.3(1)(c)-(d).

232 *Criminal Code*, s 105A.5(1).

233 *Criminal Code*, s 105A.5(2). Section 105A.5 contains other requirements that must be met. They are presently not in issue.

admissible evidence, that the *offender poses an unacceptable risk of committing a serious Part 5.3 offence* if the offender is released into the community; and

- (c) the Court is satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.

Note 1: An example of a less restrictive measure is a control order.

Note 2: The rules of evidence and procedure for civil matters apply when the Court has regard to matters in accordance with section 105A.8, as referred to in paragraph (1)(b) of this section (see subsection 105A.8(3) and section 105A.13)." (emphasis added)

The Minister bears the onus of satisfying the Court of the matters in s 105A.7(1)(b) and (c)²³⁴.

122 In deciding whether the Court is satisfied that there is an "unacceptable risk" pursuant to s 105A.7(1)(b), the Supreme Court *must* have regard to the matters set out in s 105A.8(1), which are as follows:

- "(a) the safety and protection of the community;
- (b) any report received from a relevant expert under section 105A.6 in relation to the offender, and the level of the offender's participation in the assessment by the expert;
- (c) the results of any other assessment conducted by a relevant expert of the risk of the offender committing a serious Part 5.3 offence, and the level of the offender's participation in any such assessment;
- (d) any report, relating to the extent to which the offender can reasonably and practicably be managed in the community, that has been prepared by:
 - (i) the relevant State or Territory corrective services; or
 - (ii) any other person or body who is competent to assess that extent;
- (e) any treatment or rehabilitation programs in which the offender has had an opportunity to participate, and the level of the offender's participation in any such programs;

234 *Criminal Code*, s 105A.7(3).

- (f) the level of the offender's compliance with any obligations to which he or she is or has been subject while:
 - (i) on release on parole for any offence referred to in paragraph 105A.3(1)(a); or
 - (ii) subject to a [CDO] or interim detention order;
- (g) the offender's history of any prior convictions for, and findings of guilt made in relation to, any offence referred to in paragraph 105A.3(1)(a);
- (h) the views of the sentencing court at the time any sentence for any offence referred to in paragraph 105A.3(1)(a) was imposed on the offender;
- (i) any other information as to the risk of the offender committing a serious Part 5.3 offence."

The Court, however, is not prevented from having regard to any other matter that the Court considers relevant²³⁵.

123 By way of summary, a CDO may be made, relevantly, in relation to a person who has been convicted of one of a number of specific offences which are generally terrorism-related offences committed in Australia or elsewhere, who is detained in custody and serving a sentence of imprisonment or in respect of whom a CDO or interim detention order is in force²³⁶. Where an application for a CDO is made in accordance with Div 105A, a Supreme Court of a State or Territory is conferred with a power to make such an order if, having regard to matters set out in s 105A.8, the Court is "satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community" and the Court is "satisfied that there is no other less restrictive measure that would be effective in *preventing* the unacceptable risk"²³⁷ (emphasis added).

²³⁵ *Criminal Code*, s 105A.8(2).

²³⁶ *Criminal Code*, s 105A.3(1).

²³⁷ *Criminal Code*, s 105A.7(1).

Conduct of CDO proceedings

- 124 The conduct of CDO proceedings is specifically addressed in Subdiv E of Div 105A. The Subdivision provides for notice of the proceedings to be given to the terrorist offender and addresses their legal representation²³⁸. The rules of evidence and procedure for civil matters apply²³⁹. And a party to a CDO proceeding may adduce evidence and make submissions to the Court²⁴⁰.

Duration of a CDO and periodic review

- 125 A CDO commits the offender to detention in prison while the order is in force²⁴¹. Although s 105A.7(5) provides that the maximum duration of the CDO is no more than three years, s 105A.7(6) provides that a Court may make successive CDOs. Sections 105A.10 and 105A.11 provide for periodic review of CDOs every 12 months, and otherwise on application by an offender if the Court is satisfied either that there are new facts or circumstances justifying a review or that it is in the interests of justice to review the CDO.

Reasons and right of appeal

- 126 A Court that makes a CDO must state the reasons for its decision²⁴². An appeal by way of rehearing of a decision to make a CDO lies as of right to the court of appeal of a State or Territory if the court of appeal has jurisdiction to hear appeals from the Supreme Court in relation to civil matters²⁴³.

Other features

- 127 Division 105A provides that a Court that is sentencing a person who is convicted, relevantly, of a serious Part 5.3 offence *must* warn the person that an application may be made under the Division for a CDO requiring the person to be

238 *Criminal Code*, ss 105A.15 and 105A.15A; see also s 105A.5(4).

239 *Criminal Code*, s 105A.13(1).

240 *Criminal Code*, s 105A.14.

241 *Criminal Code*, s 105A.3(2).

242 *Criminal Code*, s 105A.16.

243 *Criminal Code*, s 105A.17.

detained in a prison after the end of the person's sentence²⁴⁴. However, a failure by the Court to give such a warning does not affect the validity of the sentence for the offence or prevent an application for a CDO being made under the Division²⁴⁵.

128 It is, of course, also necessary to notice that Div 105A (except for the warning provision to which reference has just been made) applies retrospectively and thus applies to the respondent because he was a person who, when the Division commenced, was detained in custody and serving a sentence of imprisonment for a serious Part 5.3 offence²⁴⁶.

129 Consideration of the respondent's contention that Div 105A is inconsistent with Ch III of the *Constitution* requires examination of the legal and practical operation of the structure that has been created²⁴⁷. But it is first necessary to understand why that examination is required.

Liberty, punishment and Ch III of the *Constitution*

130 In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*²⁴⁸, Brennan, Deane and Dawson JJ held that, subject to certain exceptions, "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".

131 The Commonwealth submitted that if a power to detain a person is conferred on a Ch III court for a purpose other than to punish for a breach of the criminal law, the power "will not intersect with the 'general proposition' from *Lim*" – that is, *Lim* is simply not engaged. By contrast, the respondent contended that, notwithstanding judicial recognition that the executive may permissibly detain a person where detention is directed to a protective or non-punitive purpose,

244 *Criminal Code*, s 105A.23(1).

245 *Criminal Code*, s 105A.23(2).

246 *Criminal Code*, s 106.8(7) and (8).

247 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27; *Ha v New South Wales* (1997) 189 CLR 465 at 498; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 610 [74].

248 (1992) 176 CLR 1 at 27.

the *Lim* principle applies strictly in relation to Ch III courts exercising the judicial power of the Commonwealth.

132 This Court has never considered whether Commonwealth legislation may empower a Ch III court exercising the judicial power of the Commonwealth to order the imprisonment of a person otherwise than as a consequence or incident of a finding of criminal guilt. The Court has only considered such powers of detention conferred on State Supreme Courts by State legislation²⁴⁹ and Commonwealth legislation authorising Ch III courts exercising the judicial power of the Commonwealth to impose restraints on liberty less than imprisonment²⁵⁰.

133 This observation directs attention to two interrelated issues: what is the principle in *Lim* and what underpins it; and what is the ambit and content of the "judicial power of the Commonwealth"²⁵¹.

134 The principle in *Lim* – that adjudging and punishing criminal guilt is an exclusively judicial function – has been restated by this Court many times in cases dealing with administrative or executive detention²⁵². But for present purposes, the central principle derived from *Lim*, as reflected in subsequent decisions of this Court, is that involuntary detention in custody by the State is inherently penal or punitive in character, and thus cannot be imposed other than as an incident of adjudging and punishing criminal guilt unless one of the recognised exceptions applies; "[it] exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt"²⁵³. As *Lim* recognised, there are some

249 See, eg, *Fardon* (2004) 223 CLR 575.

250 See, eg, *Thomas* (2007) 233 CLR 307.

251 *Constitution*, s 71.

252 *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 498-499 [20], 527-528 [121]; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 11 [14], 12 [16]-[17], 65-66 [182]; *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at 630-631 [37], 642-643 [84], 669 [189]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 592-593 [37], 610 [94], 651-652 [236] ("NAAJA"); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 69-70 [40]; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 340-341 [16].

253 See, eg, *Behrooz* (2004) 219 CLR 486 at 528 [121]; *Re Woolley* (2004) 225 CLR 1 at 12 [16]; *Vasiljkovic* (2006) 227 CLR 614 at 642 [84], 667 [180]; *NAAJA* (2015) 256 CLR 569 at 592-593 [37]; *Plaintiff M68* (2016) 257 CLR 42 at 69-70 [40];

exceptional cases where detention other than as punishment for a breach of the law will be authorised, such as detention in cases of mental illness or infectious disease or to secure attendance at trial for an offence²⁵⁴.

135 In *Fardon v Attorney-General (Qld)*, Gummow J preferred "a formulation of the principle derived from Ch III in terms that, 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"²⁵⁵ (emphasis added). The formulation reflects both the strict separation of Commonwealth judicial power from executive and legislative power inherent in the text and structure of the *Constitution* and the values protected by that separation²⁵⁶.

136 Two key rationales for Ch III's strict separation of federal judicial power are directly raised here: first, the historical judicial protection of liberty against incursions by the legislature or the executive²⁵⁷; and secondly, the protection of the independence and impartiality of the judiciary so as to ensure the judiciary can operate effectively as a check on legislative and executive power²⁵⁸. These rationales – or "constitutional values"²⁵⁹ – underpin the separation of Commonwealth judicial power and the *Lim* principle.

137 It is also necessary to observe that the strict separation of powers effected by the *Constitution* does not apply directly to the States. The limitation on State legislative power identified in *Kable v Director of Public Prosecutions (NSW)* ("*Kable [No 1]*") prevents the conferral of jurisdiction on State courts which is incompatible with their capacity to exercise federal jurisdiction invested in them

Falzon (2018) 262 CLR 333 at 341 [16]; *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1270-1271 [152]; 374 ALR 1 at 43.

254 *Lim* (1992) 176 CLR 1 at 28-29.

255 (2004) 223 CLR 575 at 612 [80].

256 See Stellios, *The Federal Judicature: Chapter III of the Constitution*, 2nd ed (2020) at 259-264. See also *NAAJA* (2015) 256 CLR 569 at 610-611 [94]-[97].

257 *Vella* (2019) 93 ALJR 1236 at 1268-1269 [141]-[142]; 374 ALR 1 at 40.

258 See *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 684-685; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11.

259 Stellios, "Liberty as a Constitutional Value", in Dixon (ed), *Australian Constitutional Values* (2018) at 177.

under Ch III²⁶⁰. That limitation is "more closely confined" than the strict separation of powers²⁶¹. It is because of Ch III that it is said that the "judicial power of the Commonwealth" involves a "narrowing" of the notion of judicial power²⁶².

The judiciary as protector of liberty

138 The first rationale underpinning the separation of Commonwealth judicial power under Ch III is the role of the judiciary as the protector of liberty. As has been repeatedly restated by this Court²⁶³, the Blackstonian common law conception of liberty²⁶⁴ lies at the heart of our inherited constitutional tradition. It is the judiciary, the "bulwark of freedom", which traditionally and historically adjudges the most basic of rights upon the determination of criminal guilt²⁶⁵. Sitting at the core of that conception is the notion that the separation of judicial power protects against the unjustified exercise of the power of the State against an individual's liberty. A "safeguard of individual liberty [is] a distribution of the functions of government"²⁶⁶.

260 (1996) 189 CLR 51 at 93-94, 103-104, 109, 137. See also, for example, *Fardon* (2004) 223 CLR 575 at 591 [15], [18], 598-599 [37], 614 [86], 617-618 [101]-[102], 626-627 [136]-[137], 648 [198], 652-653 [212]-[213]; *Baker v The Queen* (2004) 223 CLR 513 at 534-535 [51]; *Wainohu v New South Wales* (2011) 243 CLR 181 at 208-209 [43]-[44], 228-229 [105].

261 *Kable [No 1]* (1996) 189 CLR 51 at 104. See also *Baker* (2004) 223 CLR 513 at 534-535 [51]; *Fardon* (2004) 223 CLR 575 at 630 [144(5)], 655-656 [219].

262 *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at 372 [73].

263 See, eg, *Trobridge v Hardy* (1955) 94 CLR 147 at 152; *Williams v The Queen* (1986) 161 CLR 278 at 292; *Magaming v The Queen* (2013) 252 CLR 381 at 400-401 [63]-[67]; *NAAJA* (2015) 256 CLR 569 at 610-611 [94]-[97]; *Vella* (2019) 93 ALJR 1236 at 1268-1269 [141]-[142]; 374 ALR 1 at 40.

264 Blackstone, *Commentaries on the Laws of England* (1765), bk I, ch 1 at 130-133.

265 *Quinn* (1977) 138 CLR 1 at 11. See also *Davison* (1954) 90 CLR 353 at 381-382.

266 *Davison* (1954) 90 CLR 353 at 381.

As Gageler J said in *Vella v Commissioner of Police (NSW)*²⁶⁷:

"Chapter III's separation of the judicial power of the Commonwealth to be exercisable only by courts 'was not a product of abstract reasoning alone, and was not based upon precise definitions of the terms employed'. Rather, it was 'based upon observation of the experience of democratic states':

'It may accordingly be said that when the Constitution of the Commonwealth prescribes as a safeguard of individual liberty a distribution of the functions of government amongst separate bodies, and does so by requiring a distinction to be maintained between powers described as legislative, executive and judicial, it is using terms which refer, not to fundamental functional differences between powers, but to distinctions generally accepted at the time when the Constitution was framed between classes of powers requiring different "skills and professional habits" in the authorities entrusted with their exercise.'

The point is not that the characteristics of judicial power and of institutions qualified to exercise it are frozen in time. They are not. The point is that those characteristics are deeply rooted in a tradition within which judicial protection of individual liberty against legislative or executive incursion has been a core value.

Continued reference to an independent judiciary as 'a safeguard of individual liberty', or in language traceable to Blackstone as a 'bulwark of freedom', can too easily be dismissed in contemporary Australia as antiquated hyperbole. That is so if regard is not had to the contemporary experience of once-democratic states, also inheritors of the common law tradition, where judicial independence has fallen into neglect and where the characteristics of institutions entrusted with the exercise of judicial power have been permitted to become less distinctive."

It is that value, that fundamental idea, which underlies the principle in *Lim*, and which sees the involuntary detention of a person by the State as *prima facie* punitive, and permissible *only* as an incident of the adjudgment and punishment of criminal guilt (apart from the recognised exceptions)²⁶⁸. But it also must be

267 (2019) 93 ALJR 1236 at 1268-1269 [141]-[142]; 374 ALR 1 at 40, quoting *Davison* (1954) 90 CLR 353 at 381-382 (footnotes omitted).

268 See Stellios, *The Federal Judicature: Chapter III of the Constitution*, 2nd ed (2020) at 249-250. See also *Witham v Holloway* (1995) 183 CLR 525 at 534 ("Punishment

acknowledged that the exceptions are "neither clear nor within precise and confined categories"²⁶⁹.

Independence and impartiality of the judiciary

141 The second and interrelated rationale underpinning the separation of Commonwealth judicial power under Ch III is the independence and impartiality of the judiciary. In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*, Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ explained²⁷⁰:

"The separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges. In *R v Davison*, Kitto J identified the conceptual basis of the Constitution's division of the functions of government:

'It is well to remember that the framers of the Constitution, in distributing the functions of government amongst separate organs, were giving effect to a doctrine which was not a product of abstract reasoning alone, and was not based upon precise definitions of the terms employed. As an assertion of the two propositions that government is in its nature divisible into law-making, executive action and judicial decision, and that it is necessary for the protection of the individual liberty of the citizen that these three functions should be to some extent dispersed rather than concentrated in one set of hands, the doctrine of the separation of powers as developed in political philosophy was based upon observation of the experience of democratic states, and particularly upon observation of the development and working of the system of government which had grown up in England.'

is punishment, whether it is imposed in vindication or for remedial or coercive purposes. And there can be no doubt that imprisonment and the imposition of fines ... constitute punishment"); *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 16 [54]; Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed (2008) at 4-5; Ashworth and Zedner, *Preventive Justice* (2014) at 14, 20, 166-167, 180.

269 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 110. See also *Behrooz* (2004) 219 CLR 486 at 499 [20]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 604-605 [110], 646-647 [251]; *Vasiljkovic* (2006) 227 CLR 614 at 631 [37]; *South Australia v Totani* (2010) 242 CLR 1 at 147 [383].

270 (1996) 189 CLR 1 at 11-12 (footnotes omitted).

In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*, Windeyer J traced back the doctrine of separation of powers to Montesquieu's proposition that 'there is no liberty if the judiciary power be not separated from the legislative and executive power'. Blackstone adapted Montesquieu's proposition to the realities of the British Constitution, especially the law-making function of the [j]udiciary. Blackstone, as Brennan J has noted elsewhere, commended as a protection of liberty 'the separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown'."

142 The consequence of the *Lim* principle is that the power to make a CDO, which is not an incident of adjudging and punishing criminal guilt, cannot be validly conferred on a Ch III court unless an exception to that principle applies. If the power to make a CDO cannot be seen as an exception to the *Lim* principle, that conferral of power is contrary to Ch III of the *Constitution*, and Div 105A is invalid.

Nature and content of judicial power of the Commonwealth

143 Identification of the rationales underpinning the strict separation of Commonwealth judicial power also directs attention to the nature and content of that power. It leads one to ask, what is within the judicial power of the Commonwealth? Or to put it in negative terms, what is not within the judicial power of the Commonwealth?

144 Two principles should be stated at the outset. First, the judicial power of the Commonwealth can only be exercised by a court referred to in s 71 of the *Constitution*²⁷¹ and, second, a court exercising the judicial power of the Commonwealth can only exercise non-judicial power incidental to the exercise of that judicial power²⁷². It is not in issue that the judicial power of the Commonwealth under Ch III requires that there be a "matter" before there can be an exercise of federal judicial power²⁷³; and that purely advisory or hypothetical

271 *New South Wales v The Commonwealth* (1915) 20 CLR 54 at 62, 93, 109; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 441, 450, 465; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258, 267.

272 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 269-270.

273 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264-267. See also *Gould v Brown* (1998) 193 CLR 346 at 420-421 [118]; *Re Wakim; Ex parte McNally* (1999)

decision-making by Ch III courts pursuant to federal legislation, participation by Ch III courts in the investigation of crime, and provision of non-binding advice to the executive, are all excluded from the ambit of the "judicial power of the Commonwealth"²⁷⁴.

145 The question is whether the power conferred on the Supreme Court by s 105A.7 of the *Criminal Code* is within the "judicial power of the Commonwealth". If the power to make a CDO is not within the judicial power of the Commonwealth, and is not incidental to the exercise of the judicial power of the Commonwealth, the conferral of that power on the Supreme Court is contrary to Ch III of the *Constitution*, and Div 105A is invalid.

146 Although judicial power is not susceptible to an exhaustive or exclusive definition²⁷⁵, it has been referred to as "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision ... is called upon to take action"²⁷⁶. This statement recognises that the core characteristic of judicial power is the determination of controversies about existing rights²⁷⁷. Thus, as Hayne J stated in *South Australia v Totani*, "[i]t is ... both right and important to observe that the

198 CLR 511 at 574-575 [111]; *Momcilovic v The Queen* (2011) 245 CLR 1 at 61-62 [82]-[83]; *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 349-351 [24]-[26].

274 *South Australia v Victoria* (1911) 12 CLR 667 at 674-675; *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 267; *Hilton v Wells* (1985) 157 CLR 57 at 72-73; *Wilson* (1996) 189 CLR 1 at 16, 25; *Albarran* (2007) 231 CLR 350 at 372 [73].

275 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189. See also *Davison* (1954) 90 CLR 353 at 366; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 373; *Brandy* (1995) 183 CLR 245 at 267-268; *Re Woolley* (2004) 225 CLR 1 at 22 [51]; *Thomas* (2007) 233 CLR 307 at 414 [306]; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 592 [151].

276 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 ("*Huddart Parker*").

277 This has been consistently recognised since *Huddart Parker* (1909) 8 CLR 330; *Waterside Workers'* (1918) 25 CLR 434 at 442-443; *Brandy* (1995) 183 CLR 245 at 267-268; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355-359 [45]-[56]; *Alinta* (2008) 233 CLR 542 at 577 [94], 592-593 [153]-[155].

determination of rights and liabilities lies at the heart of the judicial function, and that the creation of rights and liabilities lies at the heart of the legislative function"²⁷⁸.

147 But, as has been observed, this description of judicial power is not exhaustive. In the past, this Court has on occasion drawn historical analogies to bring certain powers within judicial power despite the absence of a determination of existing rights²⁷⁹. So, for example, it was on the basis of historical analogy that Gummow and Crennan JJ accepted in *Thomas v Mowbray* that the power to make control orders (a power which their Honours specifically distinguished from the power to detain in custody) was a power that could be conferred on a court and exercised judicially²⁸⁰:

"Detention in the custody of the State differs significantly in degree and quality from what may be entailed by observance of an interim control order. Moreover ... some analogy is provided by examples in the English legal tradition of the imposition by curial order of preventative restraints. One such was the power of justices of the peace, on the application of the person threatened to bind over to keep the peace those whose activities threatened to break it, and on the justices' own motion to bind over generally to be of good behaviour. This species of 'preventative justice' to maintain order and preserve the public peace was part of the legal inheritance of the Australian colonies and is discussed with much learning by Bray CJ and by Zelling J in *R v Wright; Ex parte Klar*."

At the same time, however, this Court has warned that "[h]istory alone does not provide a sufficient basis for defining the exercise of a power as judicial power"²⁸¹.

148 In other cases, in determining whether certain functions may be regarded as judicial, the character of the repository of the grant of power has aided in the

278 (2010) 242 CLR 1 at 86 [220].

279 See, eg, *Davison* (1954) 90 CLR 353 at 382; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 574 [105]. See also Stellios, "Reconceiving the Separation of Judicial Power" (2011) 22 *Public Law Review* 113 at 121; Stellios, "The Masking of Judicial Power Values: Historical Analogies and Double Function Provisions" (2017) 28 *Public Law Review* 138.

280 (2007) 233 CLR 307 at 356 [116] (footnote omitted).

281 *Palmer v Ayres* (2017) 259 CLR 478 at 494 [37], citing *Davison* (1954) 90 CLR 353 at 366-369, 382 and *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 595 [48].

ascertainment of the nature of the power – but even then, this has not been determinative²⁸². And, of course, where a function is entrusted to a court, this may permit an inference to be drawn that the power is to be exercised judicially²⁸³.

149 In other decisions of this Court about the nature of judicial power, the Court has recognised that a criterion to assist in the characterisation of a power as judicial is the extent to which the power conferred involves the application of established and ascertainable legal standards²⁸⁴. A decision-making power that depends on the application of policy considerations or involves a substantial discretionary element is less likely to be characterised as judicial than a decision-making power that involves the application of established legal standards²⁸⁵.

150 But the characterisation of the power is not undertaken in a vacuum; it is a process of characterisation where the core values which underpin the separation of powers – the protection of liberty and the independence of the judiciary – underpin the essential characteristic, or what has been described as the general rule²⁸⁶, of judicial power, namely the determination of controversies about existing rights²⁸⁷. That is what is reflected in *Lim*.

151 Where, as here, there has been a conferral of a power on a court by Commonwealth legislation and, in particular, a conferral of a "power to restrict or

282 *Quinn* (1977) 138 CLR 1 at 6, 9-10, 18; *R v Hegarty*; *Ex parte City of Salisbury* (1981) 147 CLR 617 at 628, 631-632; *Pasini v United Mexican States* (2002) 209 CLR 246 at 253-254 [12]-[13], 265 [51]-[52].

283 See, eg, *R v Spicer*; *Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305; *Hegarty* (1981) 147 CLR 617 at 628; *Precision Data* (1991) 173 CLR 167 at 190-191.

284 See, eg, *R v Spicer*; *Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 291; *R v Spicer*; *Ex parte Waterside Workers' Federation of Australia* (1957) 100 CLR 312 at 317; *Tasmanian Breweries* (1970) 123 CLR 361 at 376-377; *Thomas* (2007) 233 CLR 307 at 416-419 [312]-[322], 465-466 [468]; cf *Cominos v Cominos* (1972) 127 CLR 588; *R v Joske*; *Ex parte Shop Distributive and Allied Employees' Association* (1976) 135 CLR 194.

285 See, eg, *Thomas* (2007) 233 CLR 307 at 350-351 [88]-[93].

286 *Vella* (2019) 93 ALJR 1236 at 1270 [151]; 374 ALR 1 at 42-43.

287 See, eg, *Waterside Workers'* (1918) 25 CLR 434 at 442-443; *Brandy* (1995) 183 CLR 245 at 267-268; *Bass* (1999) 198 CLR 334 at 355-359 [45]-[56]; *Alinta* (2008) 233 CLR 542 at 577 [94], 592-593 [153]-[155].

interfere with a person's liberty on the basis of what that person might do in the future"²⁸⁸, there is no dispute that the power can be conferred only if the power is, or is incidental to, a power properly characterised as judicial. The question is, what indicia determine whether it is properly characterised as judicial power? Or, put in different terms, as Gageler J said in *Vella*²⁸⁹:

"Where an exercise of a power conferred on a court settles no question as to the existence of any antecedent right or obligation yet results in an order imposing a new and enduring restriction on liberty, *some special and compelling feature ought to be found to exist for its inclusion in the category of judicial power to be justified*. Characterisation of the power as judicial ought to require at least that the *criteria to be applied by the court in making the order are legislatively tailored to the achievement of a legislatively specified protective outcome*. That was the case in *Thomas v Mowbray*." (emphasis added)

152 The reference to *Thomas v Mowbray* is important. Not only does it bring into sharp focus the terms of the legislation in issue²⁹⁰, but it recognises that the problem posed by terrorism is "not susceptible of sound solution by the domino method of constitutional adjudication ... wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation"²⁹¹. That is what the Commonwealth invited the Court to do. That is, the Commonwealth's submissions invited the Court to take what was said in one case²⁹² and extrapolate from it, failing to recognise first and foremost that doing so would sever the principle from its constitutional root, but also not recognising that what is said in one case is said in the context of that particular case. Put in different

288 *Vella* (2019) 93 ALJR 1236 at 1270 [150]; 374 ALR 1 at 42.

289 (2019) 93 ALJR 1236 at 1275 [171]; 374 ALR 1 at 48.

290 *Fardon* (2004) 223 CLR 575 at 648 [197]. See also *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 94 [137]-[138].

291 Friendly, "The Bill of Rights as a Code of Criminal Procedure" (1965) 53 *California Law Review* 929 at 950. See also *Pompano* (2013) 252 CLR 38 at 94 [137].

292 See *Veen v The Queen [No 2]* (1988) 164 CLR 465; *Chester v The Queen* (1988) 165 CLR 611; *Kable [No 1]* (1996) 189 CLR 51; *Fardon* (2004) 223 CLR 575; *Thomas* (2007) 233 CLR 307; *New South Wales v Kable ("Kable [No 2]")* (2013) 252 CLR 118; *Vella* (2019) 93 ALJR 1236; 374 ALR 1.

terms, the Court is not engaged in statutory construction of some of its reasons for judgment²⁹³.

153 Two other cases should be mentioned in this context. The first is *Chester v The Queen*²⁹⁴. That case concerned s 662(a) of the *Criminal Code* (WA), under which a direction could be given by a sentencing judge that the convicted person, on the expiration of a finite term of imprisonment to which they were sentenced, be detained during the Governor's pleasure. There, the direction formed part of the sentencing process. This Court held that the exercise of the power in that context should be reserved for very exceptional cases and where the sentencing judge was satisfied by acceptable evidence that the convicted person was "so likely to commit further crimes of violence (including sexual offences) that [the person] constitute[d] a constant danger to the community"²⁹⁵. As Gageler J explained in *Yates v The Queen*²⁹⁶, *Chester* reflected the view that the power given to the court could not be used "where there [was] only the probability of the offender re-offending as he must be seen as a constant danger to the community".

154 Second, the decision of this Court in *Fardon* is instructive. It concerned a State law permitting a State Supreme Court to impose preventative detention where the Court was satisfied to a high degree of probability that the person was a serious danger to the community²⁹⁷. A prisoner could be considered to be a serious danger to the community only if there was an unacceptable risk that the prisoner would commit a serious sexual offence if released from custody²⁹⁸. A "serious

293 See *Pompano* (2013) 252 CLR 38 at 88-90 [122]-[126], 111 [196]. See also *Vella* (2019) 93 ALJR 1236 at 1275 [174]; 374 ALR 1 at 49.

294 (1988) 165 CLR 611.

295 *Chester* (1988) 165 CLR 611 at 619. See also *M v Germany* (2010) 51 EHRR 41 at 989-990 [49]-[51], where the German Criminal Code provided for the imposition of preventative detention measures in circumstances where the option to make such an order had been preserved by the sentencing court at the initial sentencing stage.

296 (2013) 247 CLR 328 at 343 [43].

297 *Fardon* (2004) 223 CLR 575 at 616 [95]-[96].

298 *Fardon* (2004) 223 CLR 575 at 616 [96]-[97].

sexual offence" was defined as an offence of a sexual nature involving violence or against children²⁹⁹.

155 The Court did not decide in *Fardon* whether a law of that kind – permitting a court to make an order for continuing detention – would be valid if made by the Commonwealth Parliament³⁰⁰. The reasoning of the majority did not need to directly address judicial power³⁰¹. It does not follow from *Fardon* that a law of the kind considered in that case would be valid if enacted by the Commonwealth Parliament. As explained³⁰², the strict separation of powers effected at the level of the Commonwealth by the *Constitution* does not apply at the level of the States.

156 Further, in *Fardon* the "nature of the process for which the Act provide[d] assume[d] particular importance"³⁰³. The majority held that the exercise of the power by the State Supreme Court – pursuant to what might be described as a "carefully calculated legislative response"³⁰⁴ – did not impair the institutional integrity of the State Supreme Court in such a fashion as to be incompatible with the Court's constitutional position as a potential receptacle of federal judicial power³⁰⁵.

157 Two additional points should be made about *Fardon* and its relevance to this case. Division 105A of the *Criminal Code* is drafted in terms very like those used in the law considered in *Fardon*³⁰⁶. These textual similarities must not distract attention from important differences in the legal and practical operation of the two laws. Both the law considered in *Fardon* and Div 105A are expressed as directed

299 *Fardon* (2004) 223 CLR 575 at 604 [51], 616 [97].

300 cf (2004) 223 CLR 575 at 619 [106].

301 *Fardon* (2004) 223 CLR 575 at 591 [18], 596-597 [34], 613-614 [83]-[87], 647-648 [196]-[197], 655-656 [219].

302 See [137] above. See also *Fardon* (2004) 223 CLR 575 at 614 [86].

303 (2004) 223 CLR 575 at 614 [90]; see also 602 [44], 631-632 [147]-[148], 648 [198], 654 [216]-[217].

304 *Kable [No 1]* (1996) 189 CLR 51 at 62. See also *Fardon* (2004) 223 CLR 575 at 615 [91]; *Vella* (2019) 93 ALJR 1236 at 1275 [171]; 374 ALR 1 at 48.

305 *Fardon* (2004) 223 CLR 575 at 593 [24], 601-602 [43]-[44], 619 [106]-[107], 648 [197], 658 [234].

306 See *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), ss 5, 8, 13.

at preventing the commission of certain kinds of offences – a "serious sexual offence" and a "serious Part 5.3 offence", respectively. But because the kinds and range of conduct which may constitute the identified offences is so different, the legal and practical operation of the two laws is very different. In *Fardon*, the law was expressed as directed to preventing an offence of a sexual nature involving violence or against children. They are crimes of violence to the personal integrity of the victim – adult or child. As will be seen next, the legal and practical operation of Div 105A differs markedly.

158 The second point to make is fundamental. The decision in *Fardon* depended upon the principle first identified in *Kable [No 1]*³⁰⁷. That principle asks whether a task assigned to a State Supreme Court impairs the institutional integrity of that State Supreme Court in such a fashion as to be incompatible with the Court's constitutional position as a potential receptacle of federal judicial power³⁰⁸. That principle will not be engaged if the task assigned to the State court is one that could be given to the High Court or a federal court created by the Parliament under s 71 of the *Constitution*³⁰⁹.

159 But it is to invert the established doctrine of this Court to contend that a task which would not impair the integrity of a State court can for that reason be given to the High Court or a federal court created by the Parliament. It inverts doctrine because it does not recognise that the principle first identified in *Kable [No 1]*, and subsequently developed and applied, takes as its basic premise that the State courts can be given tasks that the High Court (and federal courts created by the Parliament) cannot.

160 As *R v Kirby; Ex parte Boilermakers' Society of Australia* shows³¹⁰, the federal judicature has and must retain a particular place in the constitutional framework. It is the federal judicature that has "the ultimate responsibility for the

307 (1996) 189 CLR 51.

308 See [137] above.

309 *Bachrach (HA) Pty Ltd v Queensland* (1998) 195 CLR 547 at 561-562 [14]; *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at 186 [10]; *Fardon* (2004) 223 CLR 575 at 630 [144(5)], 655-656 [219]; *Baker* (2004) 223 CLR 513 at 526 [22]; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 122 [194]; *Totani* (2010) 242 CLR 1 at 129 [339]; *Wainohu* (2011) 243 CLR 181 at 208 [43]; *Pompano* (2013) 252 CLR 38 at 90 [126]; *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at 95-96 [17]; *Vella* (2019) 93 ALJR 1236 at 1269-1270 [147]; 374 ALR 1 at 41-42.

310 (1956) 94 CLR 254.

maintenance and enforcement of the boundaries within which governmental power might be exercised"³¹¹. Neither the Commonwealth Parliament nor the executive could order the continued detention of any offender after the conclusion of their sentence. Like the adjudgment and punishment of criminal guilt, it is a task that may be reposed only in the judiciary. If a task of that kind is to be given to the federal judicature, the fact that the power to perform that task raises no question as to the existence of any antecedent right or obligation, yet imposes a restriction on liberty, has the consequence that in order for the power to be characterised as judicial, it would have to be legislatively tailored to the achievement of a sufficiently specified protective outcome³¹². Separation of judicial and legislative power recognises and reflects the absolute necessity for the federal judicature to be independent of the legislative branch of government. Observing that legislation which is said to infringe the separation of powers was enacted by the legislature to further what is seen as desirable public ends does not answer whether the task given by the legislature to the judiciary is within the judicial power of the Commonwealth. Further, observing that legislation required the judicial branch to inflict individual injustice for what the legislature has determined to be for the greater good of society does not demonstrate that the legislation is valid. Rather, it invites closer attention to whether the judiciary is being used to further a legislative or executive objective or issue of policing and detecting future crime by dressing the objective or issue in the garb of a judicial determination³¹³.

Legal and practical operation of Div 105A

161 First, although Div 105A is contained in the *Criminal Code*, it sets up a civil scheme for the continuing detention in prison of a terrorist offender at the conclusion of their sentence for a serious Part 5.3 offence and it operates by reference to the civil standard of proof³¹⁴, not the criminal standard.

162 Second, the power conferred on the Supreme Court settles no question as to the existence of any antecedent right or obligation or threatened breach of an antecedent obligation. Yet, it results in an order imposing a new and enduring

311 *Boilermakers'* (1956) 94 CLR 254 at 276.

312 *Vella* (2019) 93 ALJR 1236 at 1275 [171]; 374 ALR 1 at 48.

313 See *Thomas* (2007) 233 CLR 307 at 477-478 [512]; *Vella* (2019) 93 ALJR 1236 at 1269 [144]-[145]; 374 ALR 1 at 40-41; cf *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 205-206, 263.

314 *Criminal Code*, ss 105A.8(3) and 105A.13.

restriction on liberty³¹⁵. It operates by reference to the terrorist offender's status as a convicted offender³¹⁶. And, in relation to the respondent, it operates retrospectively³¹⁷. Those considerations are not determinative of validity.

163 It is what follows that is determinative – the CDO regime in Div 105A is not sufficiently tailored to its stated purpose of ensuring the safety and protection of the community³¹⁸. Unlike Divs 104 and 105³¹⁹, the relevant criteria in Div 105A are not limited to a "terrorist act" or providing support for or facilitating a terrorist act. Division 105A permits a Court to order the continuing detention of a terrorist offender who poses an unacceptable risk of committing a "serious Part 5.3 offence", an offence against Pt 5.3 where the maximum penalty is seven or more years of imprisonment³²⁰. A serious Part 5.3 offence includes engaging in a terrorist act (s 101.1) but it also includes each of the following offences:

- providing or receiving training connected with terrorist acts (s 101.2);
- possessing things connected with terrorist acts (s 101.4);
- collecting or making documents likely to facilitate terrorist acts (s 101.5);
- any acts done in preparation for, or planning, a terrorist act (s 101.6);
- directing the activities of a terrorist organisation (s 102.2);
- membership of a terrorist organisation (s 102.3);
- recruiting for a terrorist organisation (s 102.4);
- training involving a terrorist organisation (s 102.5);
- getting funds to, from or for a terrorist organisation (s 102.6);
- providing support to a terrorist organisation (s 102.7);
- financing terrorism (s 103.1); and
- financing a terrorist (s 103.2).

164 The only Pt 5.3 offence that is not a serious Part 5.3 offence is "[a]ssociating with terrorist organisations" in s 102.8. The maximum penalty for this offence is three years' imprisonment. Section 102.8 is contravened if: a person, on two or

315 *Criminal Code*, s 105A.3(2).

316 *Criminal Code*, s 105A.3(1).

317 *Criminal Code*, s 106.8(7).

318 *Criminal Code*, s 105A.1.

319 See *Criminal Code*, ss 104.4(1)(d) and 105.4(4)-(6).

320 *Criminal Code*, s 105A.2 definition of "serious Part 5.3 offence".

more occasions, intentionally *associates* with another person who is a member of, or a person who promotes or directs the activities of, an organisation³²¹; the person knows that the organisation is a terrorist organisation; the association provides support to the organisation; the person intends that the support assist the organisation to expand or to continue to exist; and the person knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation.

165 As is readily apparent, a serious Part 5.3 offence covers a broad range of offences with maximum terms of imprisonment ranging from imprisonment for ten years³²² to imprisonment for life³²³. Other offences created by the *Criminal Code* that carry a maximum term of ten years' imprisonment include the offence of theft of property from the Commonwealth³²⁴ and other like offences under Pt 7.2.

166 Not only do serious Part 5.3 offences cover a broad range of offences, they necessarily embrace a wide range of conduct. For example, one serious Part 5.3 offence is the offence committed by a person collecting or making a document in connection with the preparation for, the engagement of a person in, or assistance in a terrorist act³²⁵. That offence is committed even if:

- (1) the person is reckless as to the existence of the connection between the document and the terrorist act;
- (2) a terrorist act does not occur; or
- (3) the document is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act³²⁶.

And each of the other offences within the class of serious Part 5.3 offences will themselves be capable of embracing a range, often a very wide range, of conduct.

321 Specified by the regulations as a terrorist organisation: s 102.1(1) definition of "terrorist organisation".

322 See, eg, *Criminal Code*, ss 101.4(2), 101.5(2), 102.3(1).

323 *Criminal Code*, ss 101.1, 101.6, 103.1, 103.2.

324 *Criminal Code*, s 131.1.

325 *Criminal Code*, s 101.5(1).

326 *Criminal Code*, s 101.5(2)-(3).

Further still, the legal and practical operation of a number of offences can be altered from time to time by the executive passing regulations under the *Criminal Code*³²⁷. And as this Court has recently observed, the offence-creating provisions in Pt 5.3 of the *Criminal Code*, including those creating serious Part 5.3 offences, extend criminal liability to certain preparatory or anticipatory acts that would not usually fall within the range of conduct generally regarded as criminal³²⁸.

167 The premise which underpins making any conduct a crime is that its commission works some harm to society. But the nature and extent of the harm caused will vary widely. The legislature's assessment of possible harm is often reflected in the maximum punishment that is prescribed. By that measure, some serious Part 5.3 offences are treated as equivalent to, and in some cases less serious than, stealing property from the Commonwealth³²⁹.

168 The nature and extent of the harm that may be caused to persons or property by commission of a serious Part 5.3 offence will vary widely. Some offences, like the offence under s 101.1 of committing a terrorist act, may (but need not) cause widespread death, injury or destruction. By contrast, committing an offence of possessing documents may work no direct harm at all to any person or any property. Merely describing certain offences as "serious Part 5.3 offences" does not, without more detailed inquiry, identify the kind or extent of the harm to the community caused by the commission of those offences. Parliament cannot draft itself into power by using labels³³⁰.

169 Because the range of serious Part 5.3 offences is so broad, the offences and the conduct underlying these offences are not restricted to offences or conduct having an immediate harm to persons or property. If the premise for casting the net so widely is that commission of any of these offences carries with it a high degree of probability of serious harm to persons or property, then, as with Divs 104 and 105, that is the inquiry the Supreme Court should have been directed to

327 A Minister can specify a "terrorist organisation" under a regulation which alters the legal and practical operation of a range of Pt 5.3 offences: *Criminal Code Act 1995* (Cth), s 5(2); *Criminal Code*, ss 102.2-102.7 read with s 102.1(1) definition of "terrorist organisation". See, eg, *R v Abdirahman-Khalif* (2020) 94 ALJR 981 at 987 [24]; 384 ALR 1 at 8, citing *Criminal Code (Terrorist Organisation – Islamic State) Regulation 2014* (Cth), s 4, which relevantly designated Islamic State as a "terrorist organisation".

328 *Abdirahman-Khalif* (2020) 94 ALJR 981 at 993-994 [44]; 384 ALR 1 at 16.

329 See, eg, *Criminal Code*, ss 101.5(2) and 131.1.

330 cf *Australian Communist Party* (1951) 83 CLR 1 at 205-206, 263.

perform – that is, whether the commission of the offence carries with it a high degree of probability of serious harm to persons or property.

170 However, as Div 105A is drafted, in making a CDO the Court must be satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community³³¹. The *unacceptable risk* is not of harm to the community but of the offender committing a serious Part 5.3 offence, which, as has just been explained, concerns a wide range of offences. Although safety and protection of the community is a matter that the Court must consider³³², the question for the Court is whether it is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing an offence if the offender is released into the community. The unacceptable risk is that identified in s 105A.7(1)(b), namely, the risk of the offender committing one of the many offences which are caught by the phrase "serious Part 5.3 offence". The concern is not of harm, but of the offender committing an offence regardless of the consequence of that offending for the community.

171 It is in relation to the unacceptable risk that the Court must be satisfied that "there is no other less restrictive measure" that would be "effective in *preventing* the unacceptable risk"³³³ (emphasis added). There must be another measure that "prevents" the unacceptable risk, namely the risk of the offender committing a relevant offence.

172 And the fact that the Court must be satisfied that there is no other, less restrictive measure that would be effective in preventing the unacceptable risk is problematic. In the notes to s 105A.7(1), the *Criminal Code* identifies a control order under Div 104 as "[a]n example of a less restrictive measure". But, as has been seen, Div 104 provides for the making of control orders, which impose obligations, prohibitions and restrictions on a person's liberty short of detention in prison, for the purpose of protecting the public from a terrorist act³³⁴.

173 The problem that arises is that, under Div 105A, a Supreme Court is authorised to make a CDO without being satisfied that the person subject to the order poses an unacceptable risk of committing a terrorist act, or that the person will aid, abet, counsel or procure another person to commit a terrorist act.

331 *Criminal Code*, s 105A.7(1)(b).

332 *Criminal Code*, s 105A.8(1)(a).

333 *Criminal Code*, s 105A.7(1)(c).

334 *Criminal Code*, s 104.1. See *Thomas* (2007) 233 CLR 307 at 337-338 [43]-[46].

This aspect of a Supreme Court's power to make a CDO is not tailored to the stated purpose of Div 105A.

174 A related problem is that Div 105A does not identify the amount of risk of a terrorist offender committing a serious Part 5.3 offence that would be *acceptable*. Yet, that question must necessarily be answered before a Court can be satisfied to a high degree of probability that the offender poses an *unacceptable* risk of committing a serious Part 5.3 offence if released into the community. And whether a terrorist offender poses an unacceptable risk of committing a serious Part 5.3 offence is not directed to the risk of harm to the community.

175 Division 105A, and the criteria for making a CDO, are too broad. The Division refers to a wide range of offences. It permits a Supreme Court to make a CDO even though the conduct anticipated may be less harmful than the conduct necessary to found a control order under Div 104. It is not to the point that, in some cases, preparatory or anticipatory acts might in some way or other advance an ideology that increases the possibility that harm to persons or property will be caused at some time in the future. The relevant inquiry is not how a Supreme Court might reason when applying the criteria set out in s 105A.7(1) in a given case but the proper construction of Div 105A. Section 105A.7(1) states three criteria – one procedural (the making of an application³³⁵) and two substantive³³⁶. The substantive criteria both turn on an unacceptable risk of committing a serious Part 5.3 offence, *not* what consequences the commission of the offence might entail.

176 Division 105A is not saved by the so-called "safety valve", the possibility of a less restrictive measure provided for by s 105A.7(1)(c). That is not a valve but a padlock because, unlike the legislation in *Fardon*³³⁷, the focus in Div 105A is on the unacceptable risk of the commission of an offence. It is not focussed upon the unacceptable risk of harm, or potential harm, caused by the possible offending. Once the threshold of the possibility of a less restrictive measure is met, the padlock can be opened only if a less restrictive measure that "prevents" the risk – the commission of the offence – can be identified. It is anything but clear how anything less than exclusion from the community could *prevent* (as distinct from lessening the probability of, or deterring) the commission of future offences.

177 It follows that the power of a Supreme Court to make a CDO under s 105A.7 is not sufficiently tailored to the stated purpose of Div 105A to be an

³³⁵ *Criminal Code*, s 105A.7(1)(a).

³³⁶ *Criminal Code*, s 105A.7(1)(b) and (c).

³³⁷ See *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), ss 5, 8, 13.

exercise of Commonwealth judicial power. It is therefore not necessary to decide whether there is to be a new exception to the principle in *Lim* for judicially ordered preventative detention to protect the public from serious harm of the kind described in the definition of a "terrorist act". If there were to be such an exception, then Div 105A goes further than necessary to achieve that objective³³⁸. It follows from the construction given above that Div 105A, in its practical and legal operation, is not properly characterised or justified as protective. It is not for this Court to identify how legislation is to be drafted but, as presently enacted, Div 105A is not sufficiently tailored³³⁹, whether to the achievement of its stated objective or otherwise.

178 Any such new exception would need to reflect the reasons for the separation of Commonwealth judicial power and the *Lim* principle. Otherwise, the exception would deprive Ch III of its content.

Conclusion and orders

179 For those reasons, the reserved question should be answered as set out above. The respondent's costs should be paid by the Commonwealth.

338 See, in the context of executive detention, *Lim* (1992) 176 CLR 1 at 33, 65-66; *Al-Kateb* (2004) 219 CLR 562 at 609-611 [128]-[132].

339 See, by way of contrast, *Acts Interpretation Act 1901* (Cth), s 15A; *Pidoto v Victoria* (1943) 68 CLR 87 at 109-111; *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 518-519; *Victoria v The Commonwealth* (1996) 187 CLR 416 at 502-503; cf *Vella* (2019) 93 ALJR 1236 at 1250 [53]; 374 ALR 1 at 16.

EDELMAN J.

Introduction

180 Mr Benbrika is a terrorist offender. He has served a sentence of 15 years in prison after conviction in the Supreme Court of Victoria for intentional membership of a terrorist organisation and for intentionally directing the activities of a terrorist organisation. Division 105A³⁴⁰ of the *Criminal Code* (Cth) establishes a scheme which empowers the Supreme Court of a State or Territory to make an order for the continuing detention of a terrorist offender. One condition that must be satisfied before a continuing detention order can be made³⁴¹ is that the Minister must satisfy the court "to a high degree of probability, on the basis of admissible evidence", that the offender poses an "unacceptable risk" of committing one or more terrorism-related offences, examples of which include engaging in a terrorist act³⁴², providing or receiving training connected with terrorist acts³⁴³, and directing the activities of a terrorist organisation³⁴⁴.

181 The question reserved which has been removed into this Court is whether all or any part of Div 105A is invalid because the power to make a continuing detention order under s 105A.7 is not within the judicial power of the Commonwealth and has been conferred on courts, including the Supreme Court of Victoria, contrary to Ch III of the *Constitution*. A central focus of the parties' submissions was the reasoning in the joint judgment of Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*³⁴⁵. That reasoning concerned the separation of Commonwealth powers. The essential point made by their Honours was that subject to limited historical exceptions, such as the power of the Commonwealth Parliament to punish for contempt and the power of Commonwealth military tribunals to punish for military discipline, the involuntary detention of a person as an incident of adjudging and punishing criminal guilt is exclusively a judicial power that is subject to Ch III of the *Constitution*. The power to punish that is generally the exclusive province of the judiciary was expressed, and is to be understood, in a broad sense.

340 Ch 5, Pt 5.3.

341 *Criminal Code*, s 105A.7.

342 *Criminal Code*, s 101.1.

343 *Criminal Code*, s 101.2.

344 *Criminal Code*, s 102.2.

345 (1992) 176 CLR 1.

182 The answer to the question reserved is that no part of Div 105A is contrary to Ch III of the *Constitution*. In answering this question, transparency and constitutional fidelity require the true character of a continuing detention order made under Div 105A to be recognised. Properly characterised, and although not a form of traditional criminal punishment, which primarily looks backwards in responding to commission of past offences, the power to grant a continuing detention order within Div 105A involves notions sufficiently similar to traditional criminal punishment so as also to fall within the sphere of power that is exclusively judicial. Consistently with the broad use of the category of "punishment" by this Court and by many leading writers, the continuing detention order should be described as a form of "protective punishment". Whilst it could equally be given a different description to emphasise that it is not traditional punishment, the benefits of a description such as "protective punishment" are that it avoids drawing an unprincipled line between closely related orders in the application of principles of separation of Commonwealth powers and it avoids the error of treating punishment as always independent of prevention.

183 It is a category error to reason that Div 105A is not punitive because it aims to protect the community by preventing the commission of offences. These categories are not independent: prevention of the commission of offences is one of the goals of punishment – it was even thought by Oliver Wendell Holmes Jr to be the "chief and only universal purpose of punishment"³⁴⁶. As Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ said in *Rich v Australian Securities and Investments Commission*³⁴⁷ of a similar attempt to distinguish punishment from protection, "[a]t best, the distinction between 'punitive' and 'protective' is elusive".

184 It is equally erroneous to reason that a continuing detention order made under Div 105A cannot be punitive in a broad sense because it is thought to be inconsistent with an a priori conception of proportionality between criminal punishment and the crime committed. A prisoner who was scheduled for execution for the offence of robbery in the 19th century would be unlikely to be persuaded by the suggestion that the execution was not punishment because it was a

³⁴⁶ Holmes, *The Common Law* (1881) at 46, quoted in Dershowitz, "The Origins of Preventive Confinement in Anglo-American Law – Part I: The English Experience" (1974) 43 *University of Cincinnati Law Review* 1 at 1.

³⁴⁷ (2004) 220 CLR 129 at 145 [32]. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 613 [82]; *Minogue v Victoria* (2019) 93 ALJR 1031 at 1042 [47]; 372 ALR 623 at 636-637.

disproportionate order imposed to discourage others on the theory that punishment for a few will deter all³⁴⁸.

185 When a power, such as that in Div 105A, is punitive in the broad sense conveyed in *Lim* it is a power that can only be conferred upon the judiciary, an exclusively judicial power. It must be conferred upon the judiciary in the form of judicial power. And it must also be "accompanied by the necessary curial and judicial character"³⁴⁹; that is, as a matter of substance it must also be a power that is exercised judicially. An order that imprisons a person for something that they have not done, but might do, has been said to deprive the person "of the rights of a human being"³⁵⁰ and to treat them as "judged to have lost all of their essential humanity"³⁵¹. To the extent that a continuing detention order is only forward-looking it can be seen to involve individual injustice. But this alone does not make the exercise of such a punitive power unjudicial. Commonwealth judicial power operates also at a social or systemic level. It involves implementing justified legislative policies, even those that might cause individual injustice. Courts should be wary before invalidating, as unjustified, a power that can only be exercised as a last resort in order to implement legislative policy with a fundamental purpose of ensuring the safety and protection of the community. The power contained in Div 105A of the *Criminal Code* is, in form, a judicial power and in its manner of exercise it is justified and valid.

Mr Benbrika's circumstances

186 In 2008, Mr Benbrika was convicted under ss 102.2(1) and 102.3(1) in Pt 5.3 of the *Criminal Code* of the offences of intentionally directing the activities of a terrorist organisation and intentional membership of a terrorist organisation. His total effective sentence of 15 years' imprisonment was due to expire on 5 November 2020. On 4 September 2020, the Minister applied to the Supreme Court of Victoria under s 105A.5 of the *Criminal Code* for a continuing detention

348 See Coke, *Institutes of the Laws of England* (1644), Pt 3 at 6: "*ut poena ad paucos, metus ad omnes perveniat*"; cf Voltaire, *Candide* (1759) at 211-212: "Mais dans ce pays-ci il est bon de tuer de tems en tems un Amiral pour encourager les autres."

349 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 271.

350 Lewis, "The Humanitarian Theory of Punishment" (1953) 6 *Res Judicatae* 224 at 225.

351 Corrado, "Punishment and the Wild Beast of Prey: The Problem of Preventive Detention" (1996) 86 *Journal of Criminal Law and Criminology* 778 at 778, adapting Hampton, "The Moral Education Theory of Punishment" (1984) 13 *Philosophy and Public Affairs* 208 at 223.

order in relation to Mr Benbrika. The Minister asserted that Mr Benbrika poses an unacceptable risk of committing numerous terrorism-related offences³⁵². Following the conclusion of his sentence, Mr Benbrika was the subject of an interim detention order which was due to expire on 30 December 2020.

187 Subsequent to the hearing of the question reserved, this Court was informed by the parties that a continuing detention order was made against Mr Benbrika in the Supreme Court of Victoria on 24 December 2020. The term of that order was the statutory maximum period of three years³⁵³.

The operation and character of Div 105A of the *Criminal Code*

The operation of Div 105A

188 Any challenge to the validity of a legislative provision requires the provision to be interpreted so that its meaning and scope of application can be ascertained. If necessary to ensure validity the meaning can be read down, severed in part, or disapplied in its application³⁵⁴.

189 Part 5.3 of the *Criminal Code* is concerned with terrorism. The Pt 5.3 remedial regime includes Divs 104, 105 and 105A. Division 104 creates sweeping powers to restrict a person's liberty through interim control orders, in circumstances which do not require the commission of an offence. The validity of Subdiv B of Div 104 was upheld by this Court in *Thomas v Mowbray*³⁵⁵. Division 105 creates a power to make preventative detention orders in order to prevent a terrorist act that is capable of being carried out, and could occur, within the next 14 days, or to preserve evidence of, or relating to, a recent terrorist act³⁵⁶. Division 105A was enacted by the Commonwealth Parliament following, and relying in part upon, a reference of power from the Parliaments of the States under

352 Against *Criminal Code*, ss 101.1, 101.2, 101.4, 101.5, 101.6, 102.2, 102.3, 102.4, 102.5, 102.6, 102.7, 103.1, 103.2.

353 *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [477], [479].

354 *Acts Interpretation Act 1901* (Cth), s 15A.

355 (2007) 233 CLR 307.

356 *Criminal Code*, s 105.1.

s 51(xxxvii) of the *Constitution*³⁵⁷. The object of Div 105A is to "ensure the safety and protection of the community by providing for the continuing detention of terrorist offenders who pose an unacceptable risk of committing serious Part 5.3 offences if released into the community"³⁵⁸. It creates a judicial power to make continuing detention orders where a terrorist offender poses an unacceptable risk of committing a terrorism-related offence under Pt 5.3 if released into the community.

190 The range of terrorism-related offences in Pt 5.3 of the *Criminal Code* is wide. The offences include those that could cause significant and widespread harm to the community such as committing "terrorist acts" which intimidate the public for a political, religious or ideological cause with the intention of causing death to people³⁵⁹. The offences can also be less extreme, extending, for example, to "preliminary acts" which "do not themselves constitute terrorist acts"³⁶⁰ but which are preliminary to causing "serious damage" to property³⁶¹. But these less extreme actions must still be taken with the intention of: (i) "advancing a political, religious or ideological cause"; and (ii) "coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country" or "intimidating the public or a section of the public"³⁶². And, even acts with this intention will not constitute terrorist acts if they are for reasons of "advocacy, protest, dissent or industrial action" and are not intended to cause various types of serious harm to people³⁶³. There are also offences "connected" with terrorist acts. These include, in broad terms, where a person with the requisite intention or recklessness³⁶⁴ performs actions of

357 *Criminal Code*, s 100.3. See *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth), Sch 1, item 1. No issue was raised by the parties arising from a partial source of power being referred State legislative power.

358 *Criminal Code*, s 105A.1.

359 See *Criminal Code*, ss 100.1(1) (definition of "terrorist act"), 101.1.

360 *Criminal Code*, s 100.4(1)(b).

361 *Criminal Code*, s 100.1(2)(b).

362 *Criminal Code*, s 100.1(1) (definition of "terrorist act").

363 *Criminal Code*, s 100.1(3).

364 *Criminal Code*, s 5.6.

preparation for or planning of a terrorist act³⁶⁵, or, knowing of a variously described connection with a terrorist act, or reckless as to the connection, provides or receives training, possesses things, or collects or makes documents³⁶⁶.

191 The pre-conditions to a court making a continuing detention order under s 105A.7(1) include that it must be satisfied: (i) to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing an offence against Pt 5.3 for which the maximum imprisonment is seven years or more if the offender is released into the community (a "serious Part 5.3 offence")³⁶⁷; and (ii) that there is no other, less restrictive measure that would be effective in preventing the unacceptable risk. The Australian Federal Police Minister bears the onus of satisfying the court of those matters³⁶⁸.

192 The criterion of an "unacceptable risk" of committing a serious Pt 5.3 offence is an open-textured expression commonly used in bail legislation³⁶⁹. In relation to a consideration of whether to deprive a parent of access to a child, this Court said that "unacceptable risk" requires a balancing of factors³⁷⁰. The same is true of s 105A.7(1)(b). Whether the risk of commission of a Pt 5.3 offence is "unacceptable" is not limited to the likelihood of the commission of the offence. It extends also to the magnitude of harm to the community in light of the interest that the terrorist offender has in their liberty³⁷¹. Due to the separation of the "less restrictive measure" criterion, which expressly requires minimal intrusion into the liberty of the terrorist offender, the "unacceptable risk" criterion treats the liberty of the terrorist offender only as an "underlying assumption" when determining the likelihood and magnitude of harm that will be tolerable³⁷². The focus is upon the likelihood of the commission of the offence and the magnitude of harm to the community. A level of risk which is not high, concerning an offence that would

365 *Criminal Code*, s 101.6.

366 *Criminal Code*, ss 101.2, 101.4, 101.5.

367 *Criminal Code*, s 105A.2 (definition of "serious Part 5.3 offence").

368 *Criminal Code*, s 105A.7(3).

369 *Bail Act 2013* (NSW), s 19; *Bail Act 1977* (Vic), s 4E; *Bail Act 1980* (Qld), s 16.

370 *M v M* (1988) 166 CLR 69 at 78.

371 See also *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1249 [51]; 374 ALR 1 at 15.

372 See *Lynn v New South Wales* (2016) 91 NSWLR 636 at 660-661 [128]-[129].

not greatly threaten the safety and protection of the community (and hence might not imperil the object of Div 105A³⁷³), might not be unacceptable although the same level of risk for an offence that greatly threatens the safety and protection of the community might be unacceptable.

193 The need to consider both the likelihood of the commission of the offence and the magnitude of possible harm to the community when assessing whether a risk is "unacceptable" is reinforced by the mandatory considerations required when the court exercises the evaluative judgment of "acceptability" of the risk of a terrorist offender committing a serious Pt 5.3 offence. The mandatory considerations are prescribed in s 105A.8(1) in addition to other matters that the court considers relevant³⁷⁴. The first mandatory factor, concerning "the safety and protection of the community", requires the court to consider both the likelihood that a serious Pt 5.3 offence will be committed by the terrorist offender and the magnitude of harm to the community of such an offence. Naturally, the greater the potential harm to the community from commission of the offence and the more likely that harm is to occur, the more likely it is that the court will conclude that the risk is unacceptable.

194 Another open-textured criterion is that the court must be satisfied that there is "no other less restrictive measure" that would be effective in preventing the unacceptable risk³⁷⁵. This does not require the elimination of the risk. It will be sufficient if the less restrictive measures are able to reduce the risk to a level that is not unacceptable. One less restrictive measure is a control order³⁷⁶. The breadth of possible obligations, prohibitions and restrictions that may be imposed on a person by a control order is almost unlimited. For instance, had Mr Benbrika been released from custody and had the control order imposed on him by the Federal Court come into force then he would have been required to do, amongst other things, all of the following³⁷⁷: wear a tracking device at all times or, alternatively, report daily to a police officer; remain at a specified premises between 10 pm and 6 am; avoid entering any prohibited places including exclusion zones at airports or ports and the residences of a long list of persons with whom association is also forbidden; not form, join or affiliate with any group, club or organisation without written permission from an Australian Federal Police Superintendent; not form prayer groups in or out of a Mosque, lead prayers, instruct others on leading

373 *Criminal Code*, s 105A.1.

374 *Criminal Code*, s 105A.8(2).

375 *Criminal Code*, s 105A.7(1)(c).

376 *Criminal Code*, s 105A.7(1), note 1.

377 See *Lee v Benbrika* [2020] FCA 1723, Annexure A.

prayers, or influence any other person in relation to religion in any group; and not access, or allow access on his behalf to, any telephone (other than one provided by the Australian Federal Police subject to strict conditions), computer, tablet or device or email without permission from an Australian Federal Police Superintendent and with any use subject to strict conditions. Breach of any of those requirements would render Mr Benbrika liable to imprisonment for contempt.

195 With the extraordinary breadth of possible control order obligations, and assuming the availability of sufficient police resources, it should be possible to reduce to an acceptable level the risk of the commission of many serious Pt 5.3 offences. An exception may be where the risk concerns an offence where the magnitude of harm to the community is great and the person's determination to commit the offence is strong. The possibility of a great magnitude of harm might mean that the risk would remain unacceptable even if extreme control measures and substantial police resourcing meant that the risk had become extremely small. And even if the risk remained unacceptable, a reduction in the extent of the risk by alternative available orders such as a control order upon the conclusion of the continuing detention might lead a court to impose a period of continuing detention that is shorter than would otherwise be imposed³⁷⁸.

The punitive nature of an order under Div 105A

196 A vast literature has developed around preventive justice orders. Although doing so for various different reasons, many leading writers recognise that at least some preventive justice orders should be characterised as punitive³⁷⁹. Any denial of the punitive nature of preventive justice orders is usually carefully expressed by reference only to narrow definitions of criminal punishment in traditional terms confined to primarily backwards-looking orders of State retribution upon the adjudication of offences³⁸⁰. For the reasons below, to give "punishment" this narrow meaning in the context of assessing the principles of separation of powers

378 See *Criminal Code*, s 105A.7(5).

379 See, eg, Hart, *Punishment and Responsibility* (1968) at 166-167; Husak, "Lifting the Cloak: Preventive Detention as Punishment" (2011) 48 *San Diego Law Review* 1173; Ferzan, "Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible" (2011) 96 *Minnesota Law Review* 141; Ashworth and Zedner, *Preventive Justice* (2014) at 14-17; Zedner, "Penal subversions: When is a punishment not punishment, who decides and on what grounds?" (2016) 20 *Theoretical Criminology* 3; Nathan, "Punishment the Easy Way" (2020) *Criminal Law and Philosophy* (online, 2 October 2020).

380 See, eg, Robinson, "Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice" (2001) 114 *Harvard Law Review* 1429 at 1432.

would create incoherent distinctions based upon a category error that punishment and prevention are separate categories. Such a narrow meaning in this context could also have the potential to permit redefinition of "any measure which is claimed to be punishment as 'regulation,' and, magically, the Constitution no longer prohibits its imposition"³⁸¹. And such a narrow meaning would not be consistent with the broader approach to punishment taken in the joint judgment in *Lim* or in the unanimous decision of this Court in *Chester v The Queen*³⁸².

197 If the category of "punishment" is not strictly confined to its traditional sense, the relationship between preventive justice orders and punishment might best be understood by reference to a spectrum. At one end of the spectrum are orders that are distant from traditional notions of criminal punishment. There, the orders can be characterised as purely protective. An example is orders confining in detention those who, by reason of extreme mental illness, pose a danger to the public: "[i]t was the doctrine of our ancient law, that persons deprived of their reason might be confined till they recovered their senses"³⁸³. A more difficult example is orders made historically to "bind over" in order to keep the peace or to ensure good behaviour³⁸⁴. A person who was suspected of future misbehaviour would be required to give an undertaking and security as "full assurance to the public, that such offence as is apprehended shall not happen"³⁸⁵. The suspected behaviour need not have been criminal³⁸⁶. Some have argued that these orders are not equivalent to traditional criminal punishment³⁸⁷. But others have described

381 *United States v Salerno* (1987) 481 US 739 at 760.

382 (1988) 165 CLR 611.

383 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 2 at 25.

384 *R v Wright* (1971) 1 SASR 103 at 106-107.

385 *Chu Shao Hung v The Queen* (1953) 87 CLR 575 at 590, quoting Blackstone, *Commentaries on the Laws of England*, 15th ed (1809), bk 4, ch 18 at 251.

386 *R v County of London Quarter Sessions Appeals Committee; Ex parte Metropolitan Police Commissioner* [1948] 1 KB 670 at 675.

387 *R v Rogers* (1702) 7 Mod 28 at 29 [87 ER 1074 at 1075]; *Ex parte Davis* (1871) 35 JP 551 at 551-552. See the concession by counsel in *R v County of London Quarter Sessions Appeals Committee; Ex parte Metropolitan Police Commissioner* [1948] 1 KB 670 at 672. See also Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 18 at 248-249.

them as "quasi-penal"³⁸⁸. Denning LJ once remarked that the proceedings are analogous to a criminal proceeding since, in substance, they are based not merely on a fear of what the person might do but upon the person's words or conduct giving rise to the apprehension and the failure to provide security could result in imprisonment³⁸⁹.

198 At the other end of the spectrum are orders that are much closer to traditional notions of criminal punishment. These orders might be described as "protective punishment" to recognise both the contrasts and commonalities with traditional criminal punishment. The commonalities, discussed below, are the reason that at this end of the spectrum, as the European Court of Human Rights has observed, the same type of protective punishment order has been described in Italy as preventive and in France as penal³⁹⁰.

199 An example of a protective order that has been recognised by this Court as punitive is that in *Chester v The Queen*³⁹¹. There, this Court considered a power of a judge sentencing for an offence to order that a person be detained indefinitely at the Governor's pleasure at the conclusion of a sentence, with release to be in the discretion of the Parole Board. The Court treated this power as one to extend a sentence of imprisonment. In light of the common law principle that a sentence of imprisonment should not be extended beyond what is proportionate to the crime merely for the purpose of protection of society, the Court held that the exercise of the power should be reserved for "exceptional cases"³⁹². The Court concluded that this exceptional power was punitive³⁹³:

"The stark and extraordinary nature of punishment by way of indeterminate detention, the term of which is terminable by executive, not by judicial, decision, requires that the sentencing judge be clearly satisfied by cogent

388 Feldman, "The King's Peace, the Royal Prerogative and Public Order" (1988) 47 *Cambridge Law Journal* 101 at 102. See also Power, "'An Honour and Almost a Singular One': A Review of the Justices' Preventive Jurisdiction" (1981) 8 *Monash University Law Review* 69 at 111.

389 *Everett v Ribbands* [1952] 2 QB 198 at 206.

390 *M v Germany* (2010) 51 EHRR 41 at 995 [74].

391 (1988) 165 CLR 611.

392 (1988) 165 CLR 611 at 618.

393 (1988) 165 CLR 611 at 619.

evidence that the convicted person is a constant danger to the community in the sense already explained."

200 For three reasons, the power to make a continuing detention order, like the power considered in *Chester*, is sufficiently closely associated with concepts of traditional criminal punishment to attract the description of "protective punishment" when considering whether a continuing detention order under the *Criminal Code* is an exclusive exercise of the judicial power of the Commonwealth.

201 First, there is a close association between detention and punishment: as one of the strongest forms of hard treatment, detention fulfils a central aspect of punishment. It is generally the "deprivation of liberty involved" in detention of a citizen that is the mark of a punitive power³⁹⁴. Unless some other, independent purpose can be identified, the order is likely to be characterised as punitive³⁹⁵. Protection of the community from crime is not an independent purpose. Indeed, on a consequentialist view, the ultimate focus of punishment is always the end "of preventing future crimes"³⁹⁶. But even on the more widely held view of punishment, as centrally concerned with retribution or moral desert, the goal of prevention remains important. As the Supreme Court of the United States said in *United States v Brown*³⁹⁷, it would be:

"archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes: retributive, rehabilitative, deterrent – and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment."

202 The close relationship between detention and punishment becomes even closer where the purpose of the detention is prevention of future crime. Whilst traditional criminal punishment is centrally backwards-looking in shaping its response to an offence based on moral desert, the punishment is also usually

394 *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 499 [20]. See also *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 342 [24].

395 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 342 [24].

396 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 1 at 12. See also bk 4, ch 18 at 249.

397 (1965) 381 US 437 at 458.

shaped by forward-looking criteria such as specific and general deterrence of the commission of similar offences in the future. Protective punishment, by continuing detention orders such as those made under Div 105A, is centrally forward-looking but one essential criterion is backwards-looking: the commission of a past offence of the same nature. Traditional criminal punishment and protective punishment both involve backwards-looking and forward-looking criteria although giving different weight to each.

203 Secondly, a continuing detention order under Div 105A is not wholly independent of the sentencing process. Although, unlike the sentencing process in *Chester*, a continuing detention order in Div 105A can only be made for the first time within the final 12 months of imprisonment³⁹⁸, the separation of powers principles that are affected by a characterisation of an order as punishment are concerned "with substance and not mere form"³⁹⁹. It would elevate form over substance if the mere expedient of having the judge make the order at the conclusion of the sentence rather than at the commencement of the sentence were sufficient for the continuing detention order to be characterised as something wholly different from a punitive regime. Indeed, when sentencing for a terrorism-related offence the court must warn the offender that an application may be made under Div 105A for a continuing detention order⁴⁰⁰. And during the continuing detention order, the offender will be detained in the same area or unit of a prison as prisoners serving sentences of imprisonment if, for example, that is reasonably necessary for the purposes of rehabilitation, treatment, work, education, general socialisation, or other group activities⁴⁰¹.

204 Thirdly, a continuing detention order is, at least, closely analogous to orders that meet the elements of Hart's classic "standard case" of punishment⁴⁰². The only

398 *Criminal Code*, ss 105A.5(2)(a), 105A.7(1)(a).

399 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

400 *Criminal Code*, s 105A.23(1).

401 *Criminal Code*, s 105A.4(2).

402 Hart, *Punishment and Responsibility* (1968) at 4-5: (i) it must involve pain or other consequences normally considered unpleasant; (ii) it must be for an offence against legal rules; (iii) it must be of an actual or supposed offender for their offence; (iv) it must be intentionally administered by human beings other than the offender; and (v) it must be imposed and administered by an authority constituted by a legal system against which the offence is committed. See also *Al-Kateb v Godwin* (2004) 219 CLR 562 at 650 [265]; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575

submission in this case which could suggest that a continuing detention order was other than a standard case of punishment was the submission by the Attorney-General of the Commonwealth that the order is not made against an offender for a past offence against legal rules. In one sense this submission is correct because the past terrorism-related offence is not sufficient for the imposition of the continuing detention order. But nor was the commission of the offence in *Chester*. Like the regime in *Chester*, a necessary condition for a continuing detention order, with a likely motivation of specific deterrence in order to protect the community, is that the person has been convicted of an offence⁴⁰³. Other criteria for a continuing detention order also appear to be based upon notions of specific deterrence including that the offender is detained in custody⁴⁰⁴ and poses an unacceptable risk of committing a serious Pt 5.3 offence⁴⁰⁵. These other criteria are insufficient departures from the regime in *Chester* to warrant removing continuing detention under Div 105A from the category of punishment for the purposes of assessing the boundaries of exclusive judicial power.

The principle in *Lim*

205 It is a sign of difficulty in understanding the rationale for a legal rule when the legal rule is described by reference to the case in which it was recognised. The legal rule usually described by reference to the decision in *Lim* is one such example. It has been revised and restated. But rarely has its rationale been explained.

206 The issue in *Lim* concerned the validity of provisions of the *Migration Act 1958* (Cth) concerning detention in custody by the Executive of certain non-citizen arrivals in Australia until their removal or grant of an entry permit. The relevant part of the joint judgment comprising the "*Lim* principle" is contained within a section entitled "Chapter III of the Constitution". That section begins by emphasising the long-established constitutional implication of the principle of separation of Commonwealth powers⁴⁰⁶. That principle generally requires that the judicial power of the Commonwealth cannot be conferred upon, or exercised by,

at 641 [174]; *Minogue v Victoria* (2019) 93 ALJR 1031 at 1042 [47]; 372 ALR 623 at 636-637.

⁴⁰³ *Criminal Code*, s 105A.3(1)(a).

⁴⁰⁴ *Criminal Code*, s 105A.3(1)(b).

⁴⁰⁵ *Criminal Code*, s 105A.7(1)(b).

⁴⁰⁶ (1992) 176 CLR 1 at 26-27.

the Commonwealth Parliament or the Commonwealth Executive⁴⁰⁷. A closely related principle, as the joint judgment observed, requires that courts in whom the judicial power of the Commonwealth is vested cannot exercise that power in a manner inconsistent with the nature of judicial power⁴⁰⁸; the judicial power of the Commonwealth must be exercised judicially.

207 Following the enunciation of these principles, in the passage upon which both Mr Benbrika and the Attorney-General of the Commonwealth heavily relied, the joint judgment in *Lim* explained that one exclusively judicial power is the adjudgment and punishment of criminal guilt under a law of the Commonwealth. Their Honours continued⁴⁰⁹:

"[P]utting 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."

The exceptional cases were: the executive power of arrest and detention in custody of a person accused of a crime to ensure that the person is available to be dealt with by the courts; and the involuntary detention by the Executive in cases of mental illness or infectious disease⁴¹⁰. Other than to say that none of these instances were "punitive", the joint judgment rightly did not suggest that there was any commonality across these instances of executive detention. For instance, they are not united by a principle concerning protection of the community from harm. Rather than protection of the community, the core, and sometimes sole, function of detention of a person in custody pending trial was "for safe custody" to trial⁴¹¹. And when detention of non-citizens is added to the list of "exceptional" cases of detention, an alien might be detained despite posing no threat whatsoever to the community.

208 The central point made by the joint judgment in the discussion in *Lim* concerning involuntary detention by the State concerned the separation of powers.

407 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270.

408 (1992) 176 CLR 1 at 27, citing *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 607, 689, 703-704.

409 (1992) 176 CLR 1 at 27.

410 (1992) 176 CLR 1 at 28.

411 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 22 at 294.

That point, which was of longstanding authority⁴¹² and has been approved on many occasions subsequently⁴¹³, is that the exercise of a power to detain a citizen in custody as an incident of adjudging and punishing criminal guilt is exclusively judicial. Hence, focusing upon punishment of criminal guilt, the joint judgment in *Lim* concluded that the only Commonwealth authority to imprison is by "an order by a court in the exercise of the judicial power of the Commonwealth"⁴¹⁴.

209 The separation of powers principle embodied in the Commonwealth *Constitution* is not absolute. As the joint judgment in *Lim* recognised⁴¹⁵, despite the constitutional separation of powers, there are at least two possible exceptions to the principle that, at the level of Commonwealth power, punishment is the sole province of a Ch III court. These exceptions, based upon deep historical roots that were not displaced by Ch III of the *Constitution*, are the Commonwealth Parliament's power to imprison for contempt⁴¹⁶ and the power of military tribunals to punish for breach of military discipline⁴¹⁷. But, putting to one side examples of entrenched historical exceptions, a Commonwealth power to detain in custody for reasons incidental to the adjudging and punishing of criminal guilt is the sole province of the judiciary and subject to Ch III of the *Constitution*.

412 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444.

413 *Nicholas v The Queen* (1998) 193 CLR 173 at 186 [16]; *Magaming v The Queen* (2013) 252 CLR 381 at 399-400 [61]-[62]; *Duncan v New South Wales* (2015) 255 CLR 388 at 407 [41]; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 340 [14]-[15], 357 [88]; *Minogue v Victoria* (2019) 93 ALJR 1031 at 1042 [48]; 372 ALR 623 at 637; *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1270-1271 [152]; 374 ALR 1 at 43; *Private R v Cowen* (2020) 94 ALJR 849 at 888 [168]; 383 ALR 1 at 47.

414 (1992) 176 CLR 1 at 28-29.

415 (1992) 176 CLR 1 at 28-29.

416 *Constitution*, s 49, discussed in *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 167. See also *Burdett v Abbot* (1811) 14 East 1 at 159-160 [104 ER 501 at 561-562]; *Kielley v Carson* (1842) 4 Moo PC 63 at 89 [13 ER 225 at 235]; Gordon, "Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-Criminal Detention" (2012) 36 *Melbourne University Law Review* 41 at 85-86.

417 *Private R v Cowen* (2020) 94 ALJR 849 at 887-889 [163]-[170]; 383 ALR 1 at 45-48.

The scope of the *Lim* principle: the category of "punishment"

210 No narrow approach was intended in the statement of principle in the joint judgment in *Lim* that exercise of a power to detain a citizen in custody as an incident of adjudging and punishing criminal guilt is exclusively judicial. As four members of this Court said in *Falzon v Minister for Immigration and Border Protection*⁴¹⁸, it was not disputed in that case that adjudging and punishing a breach of the law are disjunctive. Moreover, the scope of the exclusively judicial category of "punishment" was intended to be broad. The joint judgment in *Lim* emphasised that involuntary detention in custody is generally penal or punitive. Indeed, the joint judgment held that a law would be punitive if it authorised detention of an alien for a period that was not "limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered"⁴¹⁹. In so reasoning, their Honours did not tie the exclusively judicial category of "punishment" to the traditional conception of criminal punishment involving hard treatment by the State in response to a past offence.

211 The joint judgment in *Lim* was correct not to take such a narrow approach to punishment in this context. For the reasons explained above, it would be incoherent in this context to treat the standard case of criminal punishment as falling within a different category from that of continuing detention orders. Two points of qualification must, however, be made to the conclusion that both traditional criminal punishment and protective punishment should be characterised as punitive and as generally exclusive to the judicial function.

212 First, although both can be described as punishment in a broad sense for the purpose of assessing the scope of exclusive judicial power, they involve different approaches to criminal justice with different emphases and can therefore be the subject of different regimes. They will not give rise to issues of double punishment in the traditional sense of criminal punishment where the antipathy of the common law to double punishment rests upon the inherent contradiction in treating traditional criminal punishment as based upon moral desert yet imposing it again. A recent example is *Vella v Commissioner of Police (NSW)*⁴²⁰. In that case, a majority of this Court upheld the validity of a serious crime prevention order which permitted a range of restraints upon a person's liberty including in circumstances

418 (2018) 262 CLR 333 at 340 [15]. See also *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444; *Re Tracey*; *Ex parte Ryan* (1989) 166 CLR 518 at 580.

419 (1992) 176 CLR 1 at 33.

420 (2019) 93 ALJR 1236; 374 ALR 1.

where the person had not been charged with, or convicted of, any offence. Bell, Keane, Nettle and Edelman JJ said that the regime was "separate and distinct from traditional criminal justice" and involved "different responses to a different subject matter"⁴²¹.

213 Secondly, as with traditional criminal punishment, there may be deeply entrenched historical exceptions which, despite the separation of powers at the Commonwealth level, permit powers that might be characterised as protective punishment to be exercised by bodies that are not judicial. For instance, even if some instances of the arrest and detention in custody of persons accused of a crime were to be characterised, albeit with some difficulty, as protective punishment⁴²² then this characterisation would not deprive the Executive of power, by executive warrant, within the scope of its historical exercise⁴²³.

214 The conclusion that at least some protective orders for continuing detention will be protective punishment is therefore mandated not merely by principle, by a need for coherence, and by the unanimous judgment in *Chester*. It also reflects the broad understanding of punishment taken in *Lim* and cases subsequently. In particular, it is consistent with the reasons of five members of this Court in *Fardon v Attorney-General (Qld)*⁴²⁴, none of whom separated punishment, in the broad sense expressed in *Lim*, from protection. In *Fardon*, Gleeson CJ said nothing to deny the punitive character of the legislation and, suggesting to the contrary, quoted from Chief Judge Haynsworth⁴²⁵ to the effect that the criminal law: existed "for the protection of society"; could eliminate punishment "for punishment's sake"; and could implement "wherever necessary, the ultimate isolation from society" of those who cannot conform their conduct "as active members of a free society to the requirements of the law"⁴²⁶. Gummow J, with whom Hayne J agreed

⁴²¹ (2019) 93 ALJR 1236 at 1256 [78]; 374 ALR 1 at 24. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 610 [74]. And compare, eg, *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 14 [42]-[43].

⁴²² Compare the majority and minority decisions in *United States v Salerno* (1987) 481 US 739.

⁴²³ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28.

⁴²⁴ (2004) 223 CLR 575; cf at 654 [217].

⁴²⁵ *United States v Chandler* (1968) 393 F 2d 920 at 929.

⁴²⁶ (2004) 223 CLR 575 at 589 [11].

on this point⁴²⁷, rejected the submission⁴²⁸ that the continuing detention order imposed double punishment⁴²⁹. But, and to the same effect as explained above⁴³⁰, his Honour was plainly speaking of punishment in the traditional sense rather than the extended sense used in *Lim*. He therefore did not contradict himself only seven paragraphs later when, considering the broad notion of punishment in the *Lim* principle, he eschewed characterisation of the deprivation of liberty as either punitive or non-punitive⁴³¹. Certainly, Gummow J did not make the error of rigidly separating punishment from protection of the community. He observed, in relation to a United States decision that turned upon whether a preventive detention order was punitive⁴³², that this Court has not treated the objectives of criminal punishment so narrowly that they could be contrasted with protection of the community from harm⁴³³. Kirby J considered that the continuing detention order was punitive and, despite the absence of a focus on moral desert that is present in traditional punishment, held that it amounted to double punishment⁴³⁴. McHugh J, choosing his words carefully, considered that the legislation was "not *designed* to punish the prisoner"⁴³⁵. His Honour did not reach any conclusion about whether it should nevertheless be ascribed that character and plainly did not separate punishment and protection. It is very doubtful that McHugh J would have taken any narrow view of punishment and contrasted it with protection of the community. In *Kable v Director of Public Prosecutions (NSW)*⁴³⁶, which was at the forefront of the submissions in *Fardon*, his Honour had described the continuing detention legislation in that case as providing for "punishment by way

427 (2004) 223 CLR 575 at 647 [196].

428 (2004) 223 CLR 575 at 578.

429 (2004) 223 CLR 575 at 610 [74].

430 See [212] above.

431 (2004) 223 CLR 575 at 611 [77], 612-613 [81]-[82].

432 *Kansas v Hendricks* (1997) 521 US 346.

433 (2004) 223 CLR 575 at 612-613 [81]-[82].

434 (2004) 223 CLR 575 at 631 [147], 644 [185].

435 (2004) 223 CLR 575 at 597 [34] (emphasis added). See Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 June 2003 at 2484.

436 (1996) 189 CLR 51 at 122.

of imprisonment for what the appellant is likely to do as opposed to what he has done".

A different principle limiting all governmental power to detain?

215 In *Fardon*⁴³⁷, Gummow J sought to reformulate the *Lim* principle as one based on individual liberty in which, subject to exceptions, "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". Mr Benbrika relied upon this formulation. There is, however, insufficient constitutional foundation to expand the *Lim* principle from one which is concerned with the separation of powers to one which is also founded upon the liberty of the individual and is a substantive constraint upon all legislative, executive, and judicial power.

216 For better or for worse, every day every branch of government exercises power which deprives people of their liberty of action. In some circumstances, the deprivation of a person's liberty might be slight. An example is laws that prevent a person driving through a red light at an intersection. In other circumstances, the deprivation might be more substantial. An example is the inability during a pandemic to leave one's premises to engage in many of the usual activities of life. The involuntary detention of a person in custody is one of the most extreme constraints upon liberty but, apart from considerations founded upon separation of powers or pertaining to the nature of judicial power, there has never been any independent constitutional principle of individual liberty that denies to the State the power to implement a policy choice that deprivation of liberty is required for an orderly society.

217 From a libertarian perspective, the creation of new constitutional restraints upon power to detain a person in order to ensure their liberty might be laudable. But constitutional implications to protect liberty must be based upon the text and structure of the *Constitution*. However desirable such implications might be thought to be, they cannot be superimposed without constitutional foundation⁴³⁸. Moreover, even as a matter of superimposed policy, it is hard to see why such an implication should be limited only to full-time detention in the custody of the State. Why should the same protection of liberty not extend also to a regime of "periodic detention" in the custody of the State? Why should it not extend also to periods of home detention or detention at places outside a custodial institution? And why should the implication be limited to detention when non-custodial measures, such

⁴³⁷ (2004) 223 CLR 575 at 612 [79]-[80].

⁴³⁸ *Gerner v Victoria* (2020) 95 ALJR 107 at 111 [14].

as sweeping control orders, could involve a greater overall restraint upon liberty than a short period of detention?

218 The creation of a new implication that constrains the power of all branches of government to restrict a person's liberty by detention would also be subject to so many exceptions, which are neither "clear nor within precise and confined categories"⁴³⁹, as to deny any coherence to the rule. The exceptions would include disparate circumstances such as the following⁴⁴⁰: detention to protect the community from threatened harm by persons with contagious diseases or chemical, biological and radiological emergencies; detention of persons with mental illnesses or in need of drug treatment even where those persons pose no threat of harm to anyone other than themselves; the detention of aliens pending deportation where no harm to the community would be involved at all because the detained aliens pose no threat of any harm to anyone; and the refusal of bail for a person who poses no threat of reoffending but who might abscond.

219 Even if the focus of the proposed new implication were confined to judicial power – an implication that, subject to exceptions, detention could only be ordered as a consequential step in the adjudication of criminal guilt of that citizen for past acts – such an implication would likely recognise so many varied and diverse historical exceptions that the implication would lack coherence. The exceptions on historical grounds could include: judicial orders committing a person to an institution to be detained on the ground of insanity or mental illness⁴⁴¹; judicial orders for arrest and detention pending extradition⁴⁴²; judicial orders detaining a

439 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 110. See also *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 499 [20].

440 See also the legislation referred to in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 654 [217].

441 See *Williamson v Brown* (1914) 18 CLR 433, considering s 6 of the *Lunacy Act 1898* (NSW). See also *Lunacy Act 1890* (Vic) (54 Vict No 1113), ss 4, 9; *The Lunatics Act 1865-6* (SA) (29 Vict No 19), ss 6, 7; *The Lunacy Act 1871* (WA) (34 Vict No 9), ss 11, 12, 38; *The Insane Persons' Hospitals Act 1858* (Tas) (22 Vict No 23), s 13.

442 See *Extradition Act 1988* (Cth), ss 12, 15. See, earlier, *The Extradition Act 1870* (Imp) (33 & 34 Vict c 52), ss 8, 10; *Extradition (Foreign States) Act 1966* (Cth), ss 16, 17.

person by refusal of bail pending trial⁴⁴³; judicial orders detaining particular debtors who were in default⁴⁴⁴; and judicial orders detaining inebriates⁴⁴⁵.

The boundaries of judicial power

The form of judicial power is not limited to adjudication of existing rights and obligations

220 Mr Benbrika submitted that the power to make a continuing detention order is not judicial as it involves the determination of new rights and obligations, as opposed to the determination of existing rights and obligations having regard to past events. The latter is certainly the most common feature of power that is judicial in form. The most famous expression of judicial power, by Griffith CJ, focuses upon a tribunal being called upon to give a decision concerning "controversies between its subjects, or between itself and its subjects"⁴⁴⁶, which, as Kitto J has explained, generally involve "a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons"⁴⁴⁷. But while such statements aim to describe "what lies at the very centre of judicial power"⁴⁴⁸, they are neither exclusive nor exhaustive statements of judicial power⁴⁴⁹.

221 It would be a flawed approach to constitutional interpretation to give the fluid concept of judicial power an essential meaning that is "cribbed, cabined and

443 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 22 at 293-294.

444 *Judgment Creditors' Remedies Act 1901* (NSW), ss 19-22; *The Debtors Act 1870* (Tas) (34 Vict No 33), s 4. See also *R v Wallace; Ex parte O'Keefe* [1918] VLR 285, considering the *Imprisonment of Fraudulent Debtors Act 1915* (Vic).

445 *Inebriates Act 1900* (NSW), s 1; *Inebriates Act 1890* (Vic) (54 Vict No 1101), ss 8, 9. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 590 [13].

446 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.

447 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374, quoted in *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636 at 655.

448 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 307.

449 *R v Davison* (1954) 90 CLR 353 at 366-367. See also *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189.

confined"⁴⁵⁰ at a low level of generality closely associated with resolving controversies about rights and obligations. One reason this would be flawed is that this definition would exclude exercises of power, contemporary in 1901, involving the creation of rights and obligations by reference to a status such as in cases of matrimonial causes, bankruptcy, probate, and the winding up of companies⁴⁵¹. Another reason is that it would exclude exercises of power, again contemporary in 1901, involving exposure of a party to a new liability such as an order to make discovery or to give an account⁴⁵². Even more fundamentally, the fluidity of the concept of judicial power requires any attempt at essential meaning to be at a high level of generality. As Sawyer wrote⁴⁵³:

"[T]he delimitation of the frontiers of judicial power for the purpose of applying Chapter 3 of the Constitution is never likely to be reduced to a deductive system of propositions. Like so many other questions of constitutional law, its solution requires judicial statesmanship in which questions of expediency and the adjustment of governmental methods to the changing needs of a complex society must play a large part."

Judicial power must be exercised judicially

222

It is not enough to satisfy the requirements of Ch III of the *Constitution* that a power conferred upon a court is judicial in form. Apart from matters incidental to the power, it must also only be exercisable judicially. Mr Benbrika submitted that the exercise of judicial power to punish a person by involuntary detention is impermissible where the detention is "divorced from the judgment of guilt because it is prospective". Although Mr Benbrika did not articulate precisely why punishment of a person for something they have not done, but might do, was contrary to the requirements for judicial power, the basis for the submission must lie in the individual injustice that arises from a continuing detention order made under s 105A.7 which, the submission assumed, would require the exercise of that power in an unjudicial manner. The use of a judicial power to impose further

450 Mason, "Foreword", in Lindell, *Cowen and Zines's Federal Jurisdiction in Australia*, 4th ed (2016) v at vi. See Shakespeare, *Macbeth*, act III, scene 4.

451 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 597 [34]; *Thomas v Mowbray* (2007) 233 CLR 307 at 328 [15]-[16]; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 430-431 [57].

452 *Bell Lawyers Pty Ltd v Pentelow* (2019) 93 ALJR 1007 at 1029 [95]; 372 ALR 555 at 579.

453 Sawyer, "The Judicial Power of the Commonwealth" (1948) 1 *University of Western Australia Annual Law Review* 29 at 29.

detention as protective punishment beyond that which Parliament has assessed as deserved for the offence is unjust from the perspective of the individual. The individual experiences the order as punishment that they do not deserve for something that they have not done. As Ashworth and Zedner have observed, the logic of protective punishment⁴⁵⁴ "applies without respect for whether the subject is a responsible agent or not"⁴⁵⁵.

223 Consistently with the imprecision in any essential meaning of judicial power, the boundary at which the exercise of judicial power becomes unjudicial is also imprecise and elastic. But "[e]lasticity has not meant that what is of the essence of the judicial function may be destroyed"⁴⁵⁶. In different contexts, such as where judicial power is conferred without a duty to give reasons for decision on important issues⁴⁵⁷ or arguably some instances where judicial power is to be exercised without key elements of procedural fairness⁴⁵⁸, the assessment of when judicial power is exercised unjudicially, or contrary to the essence of the judicial function, will involve different considerations.

224 The individual injustice of a continuing detention order is insufficient to make the manner of exercise of the relevant power unjudicial. The manner of exercise of judicial power does not cease to be judicial merely because that exercise would cause injustice from an individual perspective. Judicial power, and justice, also operate at a broader level of giving effect to the policy of Parliament as reflected in legislative purpose. But when considered from the perspective of both the individual and the legislative purpose then, almost by definition, power cannot be exercised judicially if its exercise would always cause injustice and if the power lacks justification.

454 Described by the authors as "punitive-preventive" measures: Ashworth and Zedner, *Preventive Justice* (2014) at 16.

455 Ashworth and Zedner, *Preventive Justice* (2014) at 19.

456 *In re Richardson* (1928) 160 NE 655 at 657. See *Hilton v Wells* (1985) 157 CLR 57 at 82; *Grollo v Palmer* (1995) 184 CLR 348 at 364; *Wainohu v New South Wales* (2011) 243 CLR 181 at 202 [30].

457 See *Wainohu v New South Wales* (2011) 243 CLR 181 at 213-215 [54]-[58], 228 [104].

458 See *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469-470; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 354-355 [54]-[56], 379-380 [141].

225 The approach taken in the joint judgment in *Lim* when considering whether detention of aliens by the Executive was "justified by valid statutory provision"⁴⁵⁹ was that detention would be punitive and invalid if it was not "limited to what is reasonably capable of being seen as necessary" for the purposes of deportation or processing of an entry permit⁴⁶⁰. And, as to the exercise of judicial power, as Gummow J observed in *Fardon*⁴⁶¹, the majority judgments in *Kable v Director of Public Prosecutions (NSW)*⁴⁶², to varying degrees, accepted the submission that the relevant Act, which was held to be invalid, was "not a carefully calculated legislative response to a general social problem".

226 As an issue separate from the characterisation of the type of power involved⁴⁶³, this "reasonable necessity" or "carefully calculated legislative response" approach to justification of the exercise of judicial power can be expressed with additional transparency by the more common explication of these concepts through a form of structured proportionality analysis. On that approach, protective punishment will be unable to be justified in two circumstances: (i) where the purpose of the protective punishment could easily be met to the same extent by reasonable alternatives, such as less restrictive control orders, which could achieve the statutory purpose without the extreme constraint upon liberty of detention; and (ii) where the purpose for the protective punishment, assessed primarily by reference to the importance placed upon that purpose by Parliament⁴⁶⁴, is so slight or trivial that it cannot justify detention of an individual. As with other instances where structured proportionality applies, and subject to reading down, severance, or disapplication⁴⁶⁵, it will only be in extreme cases that justification will fail on this latter basis: the very integrity and impartiality of the courts which the principle protects would be seriously impaired if the judiciary

459 (1992) 176 CLR 1 at 19.

460 (1992) 176 CLR 1 at 33.

461 (2004) 223 CLR 575 at 614-615 [91].

462 (1996) 189 CLR 51.

463 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 343-344 [27]-[32].

464 Compare *Clubb v Edwards* (2019) 267 CLR 171 at 343-344 [496].

465 *Acts Interpretation Act*, s 15A.

could generally refuse to implement statutory provisions on the grounds of an objection to legislative policy⁴⁶⁶.

227 An example of the first circumstance of lack of justification, in the different context of the fourteenth amendment due process limits to the exercise of judicial power in the United States, is the decision of Stevens J in *BMW of North America Inc v Gore*⁴⁶⁷. With the concurrence of four other members of the Supreme Court of the United States, Stevens J denied the power to make judicial awards that are "grossly excessive" in relation to the State's legitimate interests in punishing unlawful conduct and deterring its repetition⁴⁶⁸. As to the second circumstance where justification will not be established, an extreme example, which has been described as "difficult to defend" in the United States and which might equally face difficulty in Australia, may be life preventive detention, without further review, after a sentence is served for a third minor fraud offence⁴⁶⁹.

228 Mr Benbrika approached the question of justification by reference to different criteria. In the context of a submission concerning whether s 105A.7 could be justified if it did not have a punitive character, Mr Benbrika submitted that justification required a purpose to prevent harm rather than to prevent crime. This approach to justification should not be accepted. It would depart from longstanding and fundamental premises of our criminal system: "conduct is regarded as criminal for the very reason that its commission harms society, or some part of it"⁴⁷⁰ and it is rarely the role of a court to second-guess Parliament's decision about the seriousness of the harm that various crimes will have to the community.

229 An example can illustrate the difficulty of Mr Benbrika's approach, which would have the courts reassess Parliament's assumption that a serious Pt 5.3 offence always has the potential to involve harm to the community so as to warrant continuing detention in cases where the likelihood of committing a serious Pt 5.3 offence is sufficiently high and the consequences of the offence involve sufficient threat to "the safety and protection of the community" as to make the risk of

466 *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1244-1245 [24]; 374 ALR 1 at 8, quoting *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 593 [23].

467 (1996) 517 US 559.

468 *BMW of North America Inc v Gore* (1996) 517 US 559 at 568.

469 See Robinson, "Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice" (2001) 114 *Harvard Law Review* 1429 at 1456.

470 *McGarry v The Queen* (2001) 207 CLR 121 at 129 [20].

committing the offence "unacceptable". The example is the offence contained in s 101.4(1) in Pt 5.3, punishable by up to 15 years' imprisonment, of possessing a thing connected with preparation for, the engagement of a person in, or assistance in a terrorist act where the person in possession knows of that connection. When that offence was first introduced into Parliament, it was proposed as one of absolute liability with a penalty of a maximum term of life imprisonment⁴⁷¹, although the mental element was introduced following a report by the Senate Legal and Constitutional Legislation Committee⁴⁷². Mr Benbrika's submission effectively invites this Court to conclude that, even when committed with the required mental element of knowledge of the connection with terrorism, Parliament erred by treating such conduct as always having the potential to involve harm to the community so as to empower continuing detention in cases involving relevantly "unacceptable" risk. This is so despite that conduct being connected with action which strikes at the heart of a civilised society, involving advancing a political, religious or ideological cause by intimidation or coercion, and excluding reasons of advocacy, protest, dissent or industrial action unless the action is intended to cause various types of serious harm to people.

230 An approach which asserts that the commission of any serious Pt 5.3 offences is not sufficient to empower a continuing detention order in appropriate cases is also inconsistent with this Court's decision in *Fardon*, which upheld the validity of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). That regime empowered continuing detention orders to be made against a person serving a term of imprisonment for the commission of a "serious sexual offence", which was defined in the Schedule to the Act in terms which, irrespective of circumstances, extended to all offences of a sexual nature committed involving violence or against children. The definition of "serious sexual offence" contained in the Schedule has since been amended also to include offences of a sexual nature "against a person, including a fictitious person represented to the prisoner as a real person, whom the prisoner believed to be a child under the age of 16 years". Notwithstanding the vast range and "spectrum of conduct"⁴⁷³ involved in the included sexual offences, this Court in *Fardon* quite rightly did not second-guess Parliament's conclusion that all such offences could potentially involve harm to the community sufficient to permit consideration of a continuing detention order. It is hard to see why such an approach should be apt for sexual offences but not for offences of terrorism. This is particularly so in circumstances where the statutory

⁴⁷¹ *Security Legislation Amendment (Terrorism) Bill 2002*, Sch 1, item 4.

⁴⁷² Parliament of Australia, Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No 2]*, Report (May 2002) at 40-45 [3.81]-[3.100].

⁴⁷³ *CTM v The Queen* (2008) 236 CLR 440 at 450 [16].

scheme in *Fardon* provided for continuing detention orders to be ordered in relation to the risk of the commission of offences that are subject to any term of imprisonment, a power which contrasts with Div 105A, where a continuing detention order can be ordered only in relation to the risk of the commission of offences which carry sentences, none of which any party suggested to be contrived, that must be, at a minimum, seven years' imprisonment.

231

Mr Benbrika's submission that the judiciary should draw a distinction, independently of the purpose of Parliament, between those crimes the commission of which will always involve harm to the community and those crimes which will not always do so has a strong resonance with Blackstone's distinction between those serious crimes and misdemeanours that are naturally wrongful, *mala in se*, and those that are only wrongful because Parliament has forbidden them, *mala prohibita*, "for promoting the welfare of the society, and more effectually carrying on the purposes of civil life"⁴⁷⁴. The classification of those wrongs that are naturally wrongful, causing harm between people, and those that are not, has always been fraught with difficulty. For instance, serious offences such as robbery and burglary for which sentences even at Federation could still deprive people of their lives and not merely their liberty⁴⁷⁵ were considered at one point by Blackstone not to be "offences against natural, but only against social, rights"⁴⁷⁶. The distinction was described by Bentham as "being so shrewd and sounding so pretty" but having no meaning⁴⁷⁷. By 1822, Best J described the distinction as "long since exploded"⁴⁷⁸ and much later, in this Court, Brennan J described the distinction as "discarded"⁴⁷⁹. Whatever the merits of the distinction elsewhere, it is not a basis for discerning whether the exercise of the judicial power of the Commonwealth to detain is justified or not.

474 Blackstone, *Commentaries on the Laws of England* (1765), bk 1, Introduction at 54-55.

475 *Crimes Act 1890* (Vic) (54 Vict No 1079), ss 111, 122; *The Criminal Law Consolidation Ordinance 1865* (WA) (29 Vict No 5), s 4.

476 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 1 at 9.

477 Bentham, *A Comment on the Commentaries: A Criticism of William Blackstone's Commentaries on the Laws of England* (1928), Section VIII at 80.

478 *Bensley v Bignold* (1822) 5 B & Ald 335 at 340-341 [106 ER 1214 at 1215-1216].

479 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 579.

Division 105A creates judicial power to be exercised judicially

Division 105A involves power that is judicial in form

232 Mr Benbrika pointed to two aspects of the power to make a continuing detention order under Div 105A that, in his submission, supported the conclusion that the form of the power is not judicial: it creates new rights rather than determining existing rights or obligations; and it lacks the conclusiveness that attends an exercise of the judicial power of the Commonwealth because it is subject to continuing review which depends on an application for that review by the Minister⁴⁸⁰. As explained above, particular indicia such as these are not conclusive. In a different context, the failure of a power to determine existing rights or obligations or the involvement of the Executive might support a conclusion that the power is not, in form, judicial. But other significant aspects of Div 105A point powerfully to the judicial character of the power.

233 First, the conferral on a court of the power to make a continuing detention order founds an inference that the power is a judicial power⁴⁸¹. This inference is all the more compelling since the subject matter of the power to detain is analogous to traditional criminal punishment, which has long been accepted to be the exclusive province of the judiciary, and since the power is to be exercised, as described below, with the usual incidents of a judicial exercise of power. Secondly, as was explained in the joint judgment in *Vella*⁴⁸², although preventive justice powers might be enacted with considerable judicial latitude to develop governing principles within open-textured criteria, the development of the scope of judicial power in this epexegetical manner is consistent with history, authority, and principle and the approach of balancing matters including magnitude and likelihood of risk is an exercise in which courts engage nearly every day⁴⁸³. Finally, even if there were doubt about whether the making of continuing detention orders by courts involved an exercise of judicial power, historical considerations would provide confirmation⁴⁸⁴. Since the 14th century, preventive order regimes such as binding over orders, writs of supplicavit, and injunctions to restrain the

480 *Criminal Code*, s 105A.10(4).

481 *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305; *Thomas v Mowbray* (2007) 233 CLR 307 at 341 [59].

482 (2019) 93 ALJR 1236 at 1257-1260 [82]-[90]; 374 ALR 1 at 25-28.

483 (2019) 93 ALJR 1236 at 1259 [88]; 374 ALR 1 at 27-28.

484 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 574 [105], quoting *R v Davison* (1954) 90 CLR 353 at 382.

commission of criminal acts and public wrongs have all been part of the exercise of judicial power⁴⁸⁵.

The judicial power to make a continuing detention order is required by Div 105A to be exercised judicially

234 There are many aspects of Div 105A that require that the judicial power in s 105A.7 be exercised in a judicial manner. The formal hearing is conducted according to established and accepted judicial methods⁴⁸⁶. Civil rules of evidence and procedure generally apply⁴⁸⁷; rules of procedural fairness are expressly or impliedly required⁴⁸⁸; provision is made for financial assistance to obtain legal representation⁴⁸⁹; reasons are required for decision⁴⁹⁰; and rights of appeal are created⁴⁹¹. However, Mr Benbrika submitted that the power to make a continuing detention order would not be exercised in a judicial manner, and hence could not be conferred by the Commonwealth Parliament consistently with Ch III of the *Constitution*, because it involves the imposition of criminal punishment but not in the traditional category of a response to an anterior finding of criminal guilt. As explained above, this submission is too blunt. Although the judicial power of the Commonwealth contemplated by Ch III of the *Constitution* concerns power that must be exercised judicially, this does not preclude a court from making orders that impose an injustice upon an individual where that injustice is justified by the purpose of Parliament.

235 Division 105A of the *Criminal Code* is not unjustified on the basis that Parliament's purpose in empowering continuing detention orders by s 105A.7 could easily be met to the same extent by reasonable, less restrictive alternatives. The regime of continuing detention of serious sexual offenders that was considered

485 *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1257 [83]; 374 ALR 1 at 25.

486 See *Thomas v Mowbray* (2007) 233 CLR 307 at 335 [30], 508 [598]-[599]; *New South Wales v Kable* (2013) 252 CLR 118 at 132 [27].

487 *Criminal Code*, ss 105A.13, 105A.14.

488 See, eg, *Criminal Code*, s 105A.14.

489 *Criminal Code*, s 105A.15A.

490 *Criminal Code*, s 105A.16. See *Wainohu v New South Wales* (2011) 243 CLR 181 at 225 [92].

491 *Criminal Code*, s 105A.17.

in *Fardon* permitted a "lesser option"⁴⁹² of conditional release under a "supervision order". The terrorism regime in Div 105A goes further. It expressly requires, before a continuing detention order can be made under s 105A.7(1), that the court is satisfied that there is "no other less restrictive measure that would be effective in preventing the unacceptable risk" of the terrorist offender committing a serious Pt 5.3 offence.

236 Further, as explained above, the proper interpretation of s 105A.7(1) requires the judicial assessment of whether the risk of commission of a serious Pt 5.3 offence is "unacceptable" to take into account both the likelihood of the risk and the magnitude of the harm to the community, including by the mandatory consideration of "the safety and protection of the community"⁴⁹³. The alternative interpretation contemplated by Mr Benbrika, which ignores the magnitude of harm in an attempt to find invalidity, is not reasonably open⁴⁹⁴. And even if it were open it would be an example of an approach to interpretation deprecated by this Court as one of "mutilating narrowness"⁴⁹⁵.

237 Nor can it be said that Div 105A is unjustified because the extreme restraint on liberty of a continuing detention order under s 105A.7 could be made for slight or trivial reasons. The legislative purpose, enunciated in s 105A.1, of providing for the possibility of continuing detention for those who pose an unacceptable threat of committing serious Pt 5.3 offences is one which concerns the protection of the community from offences which can be aimed at the very destruction of civilised society. The Commonwealth Parliament treated this as a purpose of great importance and no submission was made to suggest the contrary. Weighed against the importance of this purpose, Div 105A imposes a serious constraint on liberty by protective punishment but Div 105A also places limits upon the protective punishment of the continuing detention order. The maximum term of an initial continuing detention order is three years⁴⁹⁶. Reviews of the order are required at least on an annual basis⁴⁹⁷. And the terrorist offender can apply for a review of the

492 (2004) 223 CLR 575 at 619 [109].

493 *Criminal Code*, s 105A.8(1)(a).

494 cf *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1249 [51]; 374 ALR 1 at 15.

495 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [28], quoting *United States v Hutcheson* (1941) 312 US 219 at 235.

496 *Criminal Code*, s 105A.7(5).

497 *Criminal Code*, s 105A.10.

order if there are new facts or circumstances which would justify the review or if a review would be in the interests of justice having regard to the purposes of the order and the manner and effect of its implementation⁴⁹⁸.

238 Finally, it should be noted that Mr Benbrika's submissions were premised upon the assumption that the protective punishment occasioned by a continuing detention order against him would arise from the order of a court. Mr Benbrika made no submission that the retrospective operation of Div 105A upon him, insofar as the regime of continuing detention applied to offenders like him whose offences were committed prior to its enactment, meant that the regime imposed punishment by the Commonwealth Parliament. A significant obstacle to such a submission in this case, as in *Fardon*, would be that the legislation created only the liability for protective punishment and that the form of protective punishment created was primarily forward-looking to Mr Benbrika's circumstances in the final 12 months of his sentence.

Conclusion

239 As these reasons have explained, in answering the question reserved, namely whether all or any part of Div 105A is invalid for the reasons asserted, "deception or false labelling"⁴⁹⁹ should be avoided and it should be recognised that a continuing detention order under s 105A.7 is within the category of "punishment" in a broad sense as contemplated by the joint judgment in *Lim*. But, howsoever described, the issues anterior to the question reserved are: (i) is the power in s 105A.7 of a nature that is exclusively judicial? If so, and in order for the conferral of power to be valid, (ii) has the power been conferred only upon the judiciary in the form of judicial power? and (iii) is the power to be exercised only judicially? The answers to these questions are "yes", "yes", and "yes". For these reasons the question reserved should be answered "no".

240 Mr Benbrika sought to make further submissions concerning costs in light of this Court's reasons for decision if the question were answered adversely to him. It appears that he had in mind submissions concerning provisions such as s 105A.15A and protective costs orders that were made in his favour in the Supreme Court of Victoria. I would have granted him that liberty. But in the absence of that liberty, and hence without considered submissions by Mr Benbrika concerning any connection between, on the one hand, the reasons given by this Court and, on the other hand, the issues in the proceedings heard in the Supreme

498 *Criminal Code*, s 105A.11.

499 Husak, "Preventive Detention as Punishment? Some Possible Obstacles", in Ashworth, Zedner and Tomlin (eds), *Prevention and the Limits of the Criminal Law* (2013) 178 at 179.

109.

Court of Victoria and costs orders in that Court, the usual order as to costs should be made requiring Mr Benbrika to pay the costs of the applicant.