HIGH COURT OF AUSTRALIA

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

PETER ROBERT GARLETT APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA & ANOR RESPONDENTS

Garlett v Western Australia
[2022] HCA 30
Date of Hearing: 10 & 11 March 2022
Date of Judgment:7 September 2022
P56/2021

ORDER

The part of the appeal pending in the Court of Appeal of the Supreme Court of Western Australia removed into the High Court of Australia be dismissed.

Representation

G R Donaldson SC with R Young for the appellant (instructed by Roe Legal Services)

Submitting appearance for the first respondent

J A Thomson SC, Solicitor-General for the State of Western Australia, with S R Pack for the second respondent (instructed by State Solicitor's Office (WA))

A M Mitchelmore SC with M A Hosking for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales, with J S Caldwell for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor's Office (NSW))

G A Thompson QC, Solicitor-General of the State of Queensland, with P M Clohessy and F J Nagorcka for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

M J Wait SC, Solicitor-General for the State of South Australia, with S T O'Flaherty for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

R J Orr QC, Solicitor-General for the State of Victoria, with F I Gordon and T M Wood for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor's Office)

S K Kay SC, Solicitor-General for the State of Tasmania, with J L Rudolf for the Attorney-General for the State of Tasmania, intervening (instructed by Office of the Solicitor-General (Tasmania))

Mr Derek Ryan appearing as amicus curiae, limited to written submissions

CATCHWORDS

Garlett v Western Australia

Constitutional law (Cth) – Judicial power of Commonwealth – Jurisdiction vested in State courts – Institutional integrity of State courts – Where *High Risk Serious Offenders Act 2020* (WA) ("Act") required State court to make restriction order in relation to serious offender if satisfied that order necessary to ensure adequate protection of community against unacceptable risk that offender will commit serious offence – Where robbery specified as "serious offence" under item 34 of Subdiv 3 of Div 1 of Sch 1 to Act – Where appellant imprisoned for offences including robbery – Where State sought restriction order in relation to appellant – Whether State court acting under dictation of executive government – Whether function conferred by Act on State court incompatible with State court being repository of judicial power of Commonwealth – Whether function conferred by Act on State court compromises institutional integrity of State court.

Words and phrases – "adequate protection of the community", "dictation from the executive", "high risk serious offender", "indefinite detention", "institutional integrity", "involuntary detention", "*Kable* principle", "preventive detention", "protective purpose", "public confidence in the judicial process", "repository of federal jurisdiction", "repository of the judicial power of the Commonwealth", "restriction order", "serious offence", "unacceptable risk of harm to the community".

Constitution, Ch III.
High Risk Serious Offenders Act 2020 (WA), ss 7, 48, Sch 1, Div 1, Subdiv 3, item 34.

1 KIEFEL CJ, KEANE AND STEWARD JJ. On 19 November 2017, the appellant ("Mr Garlett"), in company with others, entered a dwelling without consent and, with threats of violence, stole a pendant necklace and $20 in cash. He pretended to be armed with a handgun. He was arrested the following day and remanded in custody. He was charged with, and pleaded guilty to, the offences of robbery and assault with intent to rob, contrary to ss 392 and 393, respectively, of the *Criminal Code* (WA)[1] ("the November 2017 offending").

2 For the November 2017 offending, Mr Garlett was sentenced in July 2019 to a total effective sentence of three years and six months' imprisonment, backdated to commence on 20 November 2017[2]. On 12 January 2021, he was sentenced to a further five months' imprisonment for an offence of criminal damage committed while he was in prison. Mr Garlett's release date was 19 October 2021[3].

3 Mr Garlett was 23 years old at the time of the November 2017 offending[4]. He has a lengthy history of offending, which includes numerous aggravated burglaries, aggravated robberies and stealing motor vehicles[5]. Generally speaking, he has a record of poor behaviour while in custody[6]. His history of offending, with his first recorded convictions in April 2007, is related to his abuse of alcohol and drugs, which was already manifest when he was 12 years old. Mr Garlett was released into the community in September 2017 from imprisonment for earlier offending, but shortly thereafter he tested positive for methylamphetamine, amphetamine and cannabis[7]. It is noteworthy that the November 2017 offending occurred only two months later. By his admission, Mr Garlett was injecting methylamphetamine daily at the time of that offending[8].

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1 *Western Australia v Garlett* (2021) 362 FLR 284 at 287 [1].

2 *Western Australia v Garlett* [2019] WASCSR 74 at [146]-[147]; *Western Australia v Garlett* (2021) 362 FLR 284 at 287 [2].

3 *Western Australia v Garlett* (2021) 362 FLR 284 at 288 [3]-[4].

4 *Western Australia v Garlett* [2019] WASCSR 74 at [50].

5 *Western Australia v Garlett* (2021) 362 FLR 284 at 343 [236], [240].

6 *Western Australia v Garlett* (2021) 362 FLR 284 at 343 [239], 343-344 [241].

7 *Western Australia v Garlett* (2021) 362 FLR 284 at 343 [236]-[238].

8 *Western Australia v Garlett* (2021) 362 FLR 284 at 343 [237].

4 In *Fardon v Attorney-General (Qld)*[9], Gleeson CJ observed that "difficult questions involving the reconciliation of rights to liberty and concerns for the protection of the community ... typically arise in the case of a small number of unfortunate individuals who suffer disorders which make them dangerous to others". The November 2017 offending, and Mr Garlett's history of offending, associated with his long-term abuse of alcohol and drugs, particularly methylamphetamine, may be reason for a concern that he is one of these unfortunate individuals.

5 The *High Risk Serious Offenders Act 2020* (WA) ("the HRSO Act") is addressed to that concern and to reconciling that concern with the right to liberty. The HRSO Act provides that the first respondent ("the State") may apply to the Supreme Court of Western Australia for a restriction order in relation to a "serious offender under custodial sentence who is not a serious offender under restriction"[10].

6 On 29 July 2021, the State applied for a restriction order in relation to Mr Garlett, on the basis of the November 2017 offending. In response to the State's application, Mr Garlett challenged the validity of the HRSO Act or parts of it. Subsequently, his challenge was confined to the validity of items 34 and 35 of Subdiv 3 of Div 1 of Sch 1 to the HRSO Act. These items specify that the offences of robbery and assault with intent to rob[11] – of which Mr Garlett was convicted – are both a "serious offence" for the purposes of the HRSO Act[12].

7 Initially, Mr Garlett's challenge was put on several bases[13]; but the only basis now pursued is that the HRSO Act, insofar as its provisions apply to a person who has been convicted of robbery, as referred to in item 34, is contrary to Ch III of the *Constitution* by reason of the principle in *Kable v Director of Public*

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9 (2004) 223 CLR 575 at 592 [20].

10 s 35(1) of the HRSO Act; *Western Australia v Garlett* (2021) 362 FLR 284 at 288 [5].

11 *Criminal Code* (WA), ss 392, 393.

12 *Western Australia v Garlett* (2021) 362 FLR 284 at 288 [6]-[7], [9].

13 *Western Australia v Garlett* (2021) 362 FLR 284 at 288 [8].

Prosecutions (NSW)[14]. The decision in *Kable*[15] established that, by reason of the integrated system of courts postulated by the provisions of Ch III of the *Constitution*[16], State legislation which purports to confer upon a State Supreme Court a function which substantially impairs the institutional integrity of such a court in its role as a repository of federal jurisdiction is "repugnant to or incompatible with" that role and is, therefore, invalid[17].

8 For the reasons that follow, the question whether item 34 of Subdiv 3 of Div 1 of Sch 1 to the HRSO Act infringes the *Kable* principle should be resolved in favour of the validity of the HRSO Act. This conclusion accords with the decision of this Court in *Fardon*, which concerned legislation, the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ("the DPSO Act"), which is, as will be explained, materially indistinguishable from the HRSO Act.

The proceedings

9 A preliminary hearing of the State's application for a restriction order was held on 13 October 2021. As Mr Garlett was due to be released from custody soon thereafter, it was necessary to determine promptly whether orders should be made under s 46 of the HRSO Act. That required a decision as well on the challenge to the validity of the impugned parts of the HRSO Act[18].

10 The primary judge (Corboy J) concluded that the impugned parts of the HRSO Act did not confer powers on the Court that were repugnant to or incompatible with that Court's role as a repository of federal jurisdiction under Ch III of the *Constitution*[19]. Relevantly, his Honour declared that none of the provisions of the HRSO Act contravened Ch III of the *Constitution*, insofar as they apply to a serious offender under custodial sentence who has been convicted of the

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14 (1996) 189 CLR 51.

15 (1996) 189 CLR 51 at 103-104, 114-115. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15]; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 246 [55].

16 ss 71, 77 of the *Constitution*.

17 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103.

18 *Western Australia v Garlett* (2021) 362 FLR 284 at 288-289 [10], [13].

19 *Western Australia v Garlett* (2021) 362 FLR 284 at 289 [14].

offence of robbery as referred to in item 34 of Subdiv 3 of Div 1 of Sch 1 to the HRSO Act.

11 His Honour also concluded that there were reasonable grounds for believing that the Court might, in accordance with s 7 of the HRSO Act, find that Mr Garlett was a "high risk serious offender"; and consequently held that an order should be made under s 46(2)(c) of the HRSO Act for Mr Garlett to be detained until the application was finally determined[20].

12 Mr Garlett appealed to the Court of Appeal of the Supreme Court of Western Australia seeking to set aside the declaration on grounds which included the *Kable* ground. On 21 December 2021, Gordon J ordered that that part of the cause pending in the Court of Appeal concerned with the *Kable* ground be removed into this Court pursuant to s 40 of the *Judiciary Act 1903* (Cth).

13 As the primary judge noted, the legal consequences of the designation of an offence as a "serious offence" attach only by force of other relevant provisions of the HRSO Act, and so it is "not especially meaningful" to consider the validity of item 34 separately from the rest of the HRSO Act[21]. In order to appreciate the arguments agitated by Mr Garlett in this Court, it is necessary to set out the provisions of the HRSO Act at some length.

The HRSO Act

14 The HRSO Act commenced in 2020, save one provision that is not presently relevant[22]. It repealed the *Dangerous Sexual Offenders Act 2006* (WA) ("the DSO Act"). The application of the DSO Act was limited to persons who had been convicted of a "serious sexual offence"[23]. The HRSO Act is broader, applying

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20 *Western Australia v Garlett* (2021) 362 FLR 284 at 289 [14(e)-(f)].

21 *Western Australia v Garlett* (2021) 362 FLR 284 at 296 [51].

22 See item 1 of Subdiv 1 of Div 2 of Sch 1 to the HRSO Act, which is to commence on a date to be fixed by proclamation.

23 ss 3, 8(1) of the DSO Act; *Evidence Act 1906* (WA), s 106A.

to persons who have been convicted of a "serious offence"[24] as listed in Sch 1 to that Act. The list of serious offences includes, relevantly, robbery[25].

15 Section 8 states the objects of the HRSO Act to be:

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

16 The relevant "community" is defined in s 4 to include any community and is not limited to the community of Western Australia or Australia.

17 Section 7 was said by the primary judge to be "central" to the contentions concerning the *Kable* principle[26]. Section 7 defines a "high risk serious offender" in the following terms:

> "(1) An offender is a ***high risk serious offender*** if the court dealing with an application under this Act finds that it is satisfied, by acceptable and cogent evidence and to a high degree of probability, that it is necessary to make a restriction order in relation to the offender to ensure adequate protection of the community against an unacceptable risk that the offender will commit a serious offence.
>
> (2) The State has the onus of satisfying the court as required by subsection (1).
>
> (3) In considering whether it is satisfied as required by subsection (1), the court must have regard to the following –
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> (a) any report prepared under section 74 for the hearing of the application and the extent to which the offender cooperated in the examination required by that section;

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24 s 5 of the HRSO Act.

25 item 34 of Subdiv 3 of Div 1 of Sch 1 to the HRSO Act; *Criminal Code* (WA), s 392.

26 *Western Australia v Garlett* (2021) 362 FLR 284 at 296-297 [56].

(b) any other medical, psychiatric, psychological, or other assessment relating to the offender;

(c) information indicating whether or not the offender has a propensity to commit serious offences in the future;

(d) whether or not there is any pattern of offending behaviour by the offender;

(e) any efforts by the offender to address the cause or causes of the offender's offending behaviour, including whether the offender has participated in any rehabilitation programme;

(f) whether or not the offender's participation in any rehabilitation programme has had a positive effect on the offender;

(g) the offender's antecedents and criminal record;

(h) the risk that, if the offender were not subject to a restriction order, the offender would commit a serious offence;

(i) the need to protect members of the community from that risk;

(j) any other relevant matter.

(4) In considering whether it is satisfied as required by subsection (1), the court must disregard the possibility that the offender might temporarily be prevented from committing a serious offence by –

(a) imprisonment; or

(b) remand in custody; or

(c) the imposition of bail conditions."

18 Section 11(1) provides, relevantly, that the Attorney-General for the State of Western Australia may make applications under the HRSO Act in the name of the State.

19 Section 82(1) provides that proceedings under the HRSO Act, or on an appeal under the Act, are taken to be criminal proceedings for all purposes. However, sub-s (1) does not require anything that is to be evidenced for the

purposes of the HRSO Act to be evidenced to a higher standard than is required by s 7(1)[27].

20 Part 2 of the HRSO Act creates the High Risk Serious Offenders Board[28]. Its functions are specified in s 15(1), and it has the power to do "all things necessary or convenient to be done for, or in connection with, or as incidental to, the performance of its functions"[29]. The membership of the Board comprises: the chief executive officer or chief employee, or an appointed member of staff, of the Department of the public service principally assisting in the administration of the HRSO Act; the Chief Psychiatrist or an appointed member of staff of the Chief Psychiatrist; the chief executive officer or chief employee, or an appointed member of staff, for a number of government agencies (which are generally concerned with health, housing and police); and community members[30].

21 Two types of restriction order may be made under the HRSO Act: a "continuing detention order" under s 26, and a "supervision order" under s 27. A continuing detention order, in relation to an offender, is an order that the offender be detained in custody for an indefinite term for control, care or treatment[31]. A supervision order, in relation to an offender, is an order that the offender, when not in custody, is to be subject to stated conditions that the Court considers appropriate, in accordance with s 30[32].

22 Section 29 limits the power of the Court to make a supervision order, rather than an order for continuing detention. It is in the following terms:

> "(1) A court cannot make, affirm or amend a supervision order in relation to an offender unless it is satisfied, on the balance of probabilities, that the offender will substantially comply with the standard conditions of the order as made, affirmed or amended.

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27 s 82(2) of the HRSO Act.

28 s 14 of the HRSO Act.

29 s 15(2) of the HRSO Act.

30 ss 3, 17 of the HRSO Act. See also s 18.

31 s 26(1) of the HRSO Act.

32 s 27(1) of the HRSO Act.

(2) The onus of proof as to the matter described in subsection (1) is on the offender.

(3) This section does not apply to the making of an interim supervision order."

23 Section 30(2) states the standard conditions of a supervision order. It relevantly provides:

"A supervision order in relation to an offender must require that the offender –

(a) report to a community corrections officer at the place, and within the time, stated in the order and advise the officer of the offender's current name and address; and

(b) report to, and receive visits from, a community corrections officer as directed by the court; and

(c) notify a community corrections officer of every change of the offender's name, place of residence or place of employment at least 2 days before the change happens; and

(d) be under the supervision of a community corrections officer and comply with any reasonable direction of the officer ...; and

(e) not leave, or stay out of, the State of Western Australia without the permission of a community corrections officer; and

(f) not commit a serious offence during the period of the order; and

(g) be subject to electronic monitoring under section 31."

24 Section 30(5) provides that a supervision order may also contain any other terms that the Court thinks appropriate: to ensure adequate protection of the community; or for the rehabilitation, care or treatment of the offender subject to the order; or to ensure adequate protection of victims of serious offences committed by the offender subject to the order.

25 An application for a restriction order must be accompanied by any affidavits to be relied upon by the State for the purpose of seeking an order or orders under

s 46. A copy of both the application and any accompanying affidavits must be provided to the offender within seven days after making the application[33].

26 After an application for a restriction order is made by the State, the Court must fix a day for a preliminary hearing before it[34]. Affidavits for use in a preliminary hearing must be confined to evidence that the person making it could give orally, except that they may contain statements based on information and belief if the person making the affidavit states the source of the information and the grounds for the belief[35].

27 As to the preliminary hearing, s 46 provides, relevantly:

> "(1) The main purpose of the preliminary hearing is to decide whether the court is satisfied that there are reasonable grounds for believing that the court might, in accordance with section 7, find that the offender is a high risk serious offender.
>
> (2) If the court is satisfied as described in subsection (1) –
>
> (a) the court must order that the offender undergo examination by a psychiatrist and a qualified psychologist for the purpose of preparing reports in accordance with section 74 to be used on the hearing of the restriction order application; and
>
> (b) the court may, on the application of the State or of the offender, order that a person or body named by the court prepare a report in accordance with section 75 to be used on the hearing of the restriction order application on questions or topics set out in the order; and
>
> (c) the court may –
>
> (i) if the offender is in custody and might otherwise be released from custody before the restriction order application is finally decided, order that the offender be detained in custody for the period stated in the order; and

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33 s 37(1), (2) of the HRSO Act.

34 s 43(1) of the HRSO Act.

35 s 45 of the HRSO Act.

(ii) if the offender is not in custody, order that the offender be detained in custody for the period stated in the order;

and

(d) the court must, except as provided in subsection (3), fix a day for the hearing of the restriction order application."

28 An offender must disclose any expert evidence material and may file and serve affidavits upon which the offender proposes to rely prior to a preliminary hearing[36]. Conversely, the State is under a continuing obligation of disclosure, subject to certain exceptions, after a preliminary hearing has been conducted[37].

29 Section 48 makes provision for the determination of an application for a restriction order. Its operation depends upon the evaluative judgment contemplated by s 7. Section 48 provides:

"(1) If the court hearing a restriction order application finds that the offender is a high risk serious offender, the court must –

(a) make a continuing detention order in relation to the offender; or

(b) except as provided in section 29, make a supervision order in relation to the offender.

(2) In deciding whether to make an order under subsection (1)(a) or (b), the paramount consideration is to be the need to ensure adequate protection of the community."

30 It may be noted that s 48(1) provides that, if the Court finds that the offender is a high risk serious offender in accordance with s 7, the Court "must" make a restriction order.

31 Part 5 of the HRSO Act provides for periodic review of detention under a continuing detention order. In this regard, s 64(2) requires the State to apply for a review to be carried out: as soon as practicable after the end of the period of one year commencing when the offender is first in custody pursuant to the continuing detention order; and as soon as practicable after the end of the period of two years

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36 ss 41, 44 of the HRSO Act.

37 ss 34, 39 of the HRSO Act.

commencing when the detention was most recently reviewed under s 64 or s 65. Alternatively, the offender may, with the leave of the Court, apply for review of his or her continuing detention order[38].

32 A continuing detention order must be rescinded if, on a review, the Court does not find that the offender remains a "high risk serious offender". If the Court finds that the offender does remain a "high risk serious offender", it must affirm the continuing detention order, or rescind it and make a supervision order. In deciding which order to make, the paramount consideration is to be the need to ensure adequate protection of the community[39].

33 Part 6 of the HRSO Act provides for appeals against decisions made under the Act, including the making of a restriction order. Either the State or a person in relation to whom the Court makes a decision under the HRSO Act may appeal to the Court of Appeal against the decision. However, an appeal does not lie against, inter alia, a decision on an order made at a preliminary hearing[40].

The primary judge's reasons

34 The primary judge concluded, by reference to *Fardon*, that the legislature had not compromised the independence or impartiality of the Court by conditioning the making of a restriction order under the HRSO Act upon the commission of a "serious offence" of the kind identified in Sch 1[41].

35 His Honour made three points about the operation of s 7(3). First, the matters for the Court's consideration were specified by Parliament, and were not specified "by an executive act in any relevant sense"[42]. Secondly, what is a "relevant matter" that the Court is permitted to take into account by virtue of s 7(3)(j) is determined by the objects of the HRSO Act and a consideration of its provisions as a whole[43]. And thirdly, s 7(3) emphasised the evaluative nature of

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38 s 65(1) of the HRSO Act.

39 s 68 of the HRSO Act.

40 s 69(1), (3)(b) of the HRSO Act.

41 *Western Australia v Garlett* (2021) 362 FLR 284 at 313 [109]. See also 312-313 [106]-[108].

42 *Western Australia v Garlett* (2021) 362 FLR 284 at 314 [121].

43 *Western Australia v Garlett* (2021) 362 FLR 284 at 314 [122].

the decision required by s 7(1): it does not constrain the matters which the Court may consider in making a finding under s 7(1)[44].

36 The primary judge held that s 48 of the HRSO Act was to be interpreted as requiring the Court to make the order that is "least invasive or destructive" of the right to liberty of the person subject to the order, while ensuring an adequate degree of protection for the community[45]. In this regard, his Honour followed the approach of Beech J in *Director of Public Prosecutions (WA) v DAL [No 2]*[46] in determining whether a continuing detention order or supervision order should be made under s 48[47].

37 The primary judge held that the HRSO Act incorporated procedures that are the "hallmarks of traditional forms and procedures" of the judicial process: the onus of proof rests on the State; the "ordinary" rules of evidence apply (with one common exception relating to statements of information and belief[48]); the offender has a right to appear and adduce evidence[49]; experts must prepare an "independent report"[50]; the State is under a continuing obligation of disclosure and must serve expert reports; hearings are conducted in public; and there is a right of appeal[51]. Having regard to the circumstances, his Honour concluded that the provisions of the HRSO Act maintained the "essential character" of the Court as a court exercising State and federal judicial power: impartiality, independence, procedural fairness, and open decision-making[52].

38 The primary judge also concluded that the purpose of the HRSO Act was protective, not punitive. His Honour noted that the central provisions of the HRSO Act and its objects were, in substance, protective and not punitive in

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44 *Western Australia v Garlett* (2021) 362 FLR 284 at 314 [123], [125].

45 *Western Australia v Garlett* (2021) 362 FLR 284 at 320 [145].

46 [2016] WASC 212.

47 *Western Australia v Garlett* (2021) 362 FLR 284 at 320 [146].

48 ss 45, 84 of the HRSO Act.

49 ss 84(3)(b), 86(2), (3) of the HRSO Act.

50 s 75(1)(b) of the HRSO Act.

51 *Western Australia v Garlett* (2021) 362 FLR 284 at 320-321 [147].

52 *Western Australia v Garlett* (2021) 362 FLR 284 at 324-325 [161].

character[53]. Three further features of the HRSO Act confirmed its protective character, namely the establishment of the High Risk Serious Offenders Board, the imposition of obligations on "supporting agencies" in respect of serious offenders, and the circumstance that the HRSO Act required periodic reviews and thereby did not provide for indefinite detention in any relevant sense[54].

Mr Garlett's arguments in this Court

39 While Mr Garlett's challenge to the validity of item 34 of Subdiv 3 of Div 1 of Sch 1 to the HRSO Act invoked the *Kable* principle, the argument advanced on his behalf conflated the *Kable* issue with a contention that the power exercisable under ss 7 and 48 of the HRSO Act was not judicial power such as might be conferred upon a court exercising federal jurisdiction consistently with Ch III of the *Constitution*. In this regard, Mr Garlett relied upon the statement of principle by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[55] that:

> "putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".

40 Mr Garlett's argument was not put on the basis that the Court, in exercising the powers conferred on it by the HRSO Act, exercises federal jurisdiction. Rather, it was that its exercise of those powers is inconsistent with it being a repository of federal jurisdiction because the exercise of power pursuant to the impugned provisions is non-judicial. The manner in which the argument is framed rightly recognises that the power to make a continuing detention order or a supervision order under the HRSO Act has been conferred by a State Parliament on a State court. Whether or not that power is judicial or non-judicial in character is not determinative as to whether the *Kable* principle has been infringed. The suggestion that investing a power in a State court to order preventive detention is repugnant to its institutional integrity as a Ch III court cannot stand with this Court's decision in *Fardon*; and that is so whether or not that power is properly characterised as

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53 *Western Australia v Garlett* (2021) 362 FLR 284 at 322 [150].

54 *Western Australia v Garlett* (2021) 362 FLR 284 at 322 [151]-[152].

55 (1992) 176 CLR 1 at 27.

judicial power[56]. Accordingly, the *Lim* principle has no application to establish the invalidity of the HRSO Act. Even if the HRSO Act were a law of the Commonwealth, it would not contravene the *Lim* principle.

41 Nevertheless, Mr Garlett sought to maintain the submission that the power conferred by the HRSO Act, being non-judicial in character, was a factor pointing to the conclusion that the impugned provisions of the HRSO Act substantially impair the institutional integrity of the Court. That argument should be rejected. Indeed, the circumstance that the power invested in the Court is recognisable as an orthodox exercise of judicial power may be seen as a positive indicator of validity.

42 Mr Garlett sought to sideline the authority of *Fardon* by noting differences between the HRSO Act and the DPSO Act. It was said that because s 48 of the HRSO Act provides that the Court must make a restriction order if satisfied of the matters in s 7, the absence of a discretion in the Court not to make the order means that the Court is required to act under dictation from the executive.

43 It was also argued that the HRSO Act is significantly different from the DPSO Act, which applied only to a "serious sexual offence"[57]. This submission was developed by a number of contentions advanced in various ways; but the gravamen of Mr Garlett's argument was that the offence of robbery under s 392 of the *Criminal Code* (WA) simply cannot be sufficiently "serious" to be a permissible basis for seeking a restriction order. It was also said on Mr Garlett's behalf that because there is no correlation in the HRSO Act between the nature of the "serious offence" which may trigger the operation of the Act, and the risk of harm against which a detention order is to protect, the HRSO Act impermissibly creates a scheme under which the Court may decide that a person, having served a term for rape, should not be released from prison because of the risk that the person might commit a robbery.

44 Mr Garlett's arguments may now be considered.

The *Lim* principle

45 The HRSO Act establishes a non-punitive scheme that has as its object the protection of the community from harm.

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56 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [18], 598-601 [36]-[42], 614 [85]-[86], 655-656 [219].

57 See s 13(2) and Sch 1 of the DPSO Act.

46 The proposition that, under the laws of the Commonwealth, the function of adjudging or punishing criminal guilt is exclusively the province of Ch III courts was stated in *Lim* in terms which expressly recognised that it did not encompass laws the purpose of which were to protect the community from harm, such as laws relating to quarantine from infectious diseases and laws for the confinement of some categories of mentally ill persons[58]. This Court's decision in *Minister for Home Affairs v Benbrika*[59] affirmed that the distinction between detention of an individual for the punishment for a crime, and detention of an individual for the protection of the community from a proven unacceptable risk of serious harm, is not illusory.

47 In *Benbrika*, the plurality said of the legislation there under consideration[60]:

> "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 accurately." (footnote omitted)

48 The decision in *Benbrika* confirms the statement of the primary judge that a State law will not be invalid "merely because it provides for the detention of a person as a preventative measure to protect the community from the risk of future harm", and that a determination about the risk of future harm is judicial in nature[61]. The assessment of whether the subject of an application for a restriction order is a "high risk serious offender" involves consideration of the risk of the person committing a "serious offence" and consideration of the harm that may be occasioned to the community if the risk were to materialise.

49 It may be said that because the protection of the community is one of the purposes which informs the exercise of the judicial discretion to impose a proper

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58 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27-28, 58.

59 (2021) 95 ALJR 166 at 181 [35]-[36], 183 [41]-[43]; 388 ALR 1 at 14, 16-17.

60 *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 181 [34]; 388 ALR 1 at 14.

61 *Western Australia v Garlett* (2021) 362 FLR 284 at 306 [88].

sentence upon an offender following conviction of a crime, it may not be possible to discern the operation of the protective purpose of the criminal law separately and distinctly from the deterrent or retributive purpose of the criminal law. That may well have been so in relation to criminal sentencing in earlier times, but it is not so in relation to orders under the HRSO Act.

50 In the late 18th century, Sir William Blackstone wrote[62]:

> "As to the *end* ... of human punishments. This is not by way of atonement or expiation for the crime committed ... but as a precaution against future offences of the same kind. This is effected three ways: either by the amendment of the offender himself; for which purpose all corporal punishments, fines, and temporary exile or imprisonment are inflicted: or, by deterring others by the dread of his example from offending in the like way, ... or, lastly, by depriving the party injuring of the power to do future mischief; which is effected by either putting him to death, or condemning him to perpetual confinement, slavery, or exile. The same one end, of preventing future crimes, is endeavoured to be answered by each of these three species of punishment."

Oliver Wendell Holmes Jr, writing in the late 19th century, said that "probably most English-speaking lawyers would accept the preventive theory without hesitation"[63].

51 As is apparent from the passage cited from Blackstone, at the time that author wrote, the protective or preventive purpose of the criminal law was vindicated to the most extreme extent possible by the removal of the offender from the community either by the imposition of the death penalty or by "perpetual confinement, slavery, or exile". And in the United States, when Holmes wrote, the death penalty was routinely imposed for serious crimes. None of the means of prevention of crime mentioned by Blackstone is now available in Australia as a result of legislative intervention to mitigate the extreme harshness of the criminal law of these earlier times. But the merciful development of the criminal law has also meant that the risk to the community posed by the release of a disordered individual who has served his or her proper sentence has been revealed as an issue left unresolved by the enforcement of the criminal law.

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62 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 1 at 11-12.

63 Holmes, *The Common Law* (1881) at 43.

52 Late in the 20th century in Australia, the cases of *Veen v The Queen*[64] and *Veen v The Queen [No 2]*[65] added special poignancy to this unresolved issue. These decisions established as a principle of the criminal law in relation to sentencing that protection of the community from the dangerous propensities of an offender could not justify a sentence disproportionate to the moral culpability of the offender and the need for retribution appropriate to the seriousness of the offending. The principle stated by this Court in *Veen [No 1]* and *Veen [No 2]* imposed a limit upon the extent to which the protection of the community from a disordered individual could be taken into account in the exercise of the discretion of a sentencing judge.

53 In *Fardon*, Gleeson CJ, in discussing this Court's decisions in *Veen [No 1]* and *Veen [No 2]*, noted the tension between the practical effect of each of the two decisions[66]. In *Veen [No 1]*, this Court upheld an appeal against a sentence of life imprisonment imposed for the protection of the community upon Mr Veen, who had been charged with murder but convicted of manslaughter on the ground of diminished responsibility, the sentencing judge having taken the view that, by reason of brain damage which could cause uncontrolled aggression when affected by alcohol, Mr Veen was likely to kill or injure someone if he were released. This Court reduced Mr Veen's sentence to imprisonment for 12 years. Subsequently, Mr Veen was released from custody, and nine months later he stabbed and killed a man. For this crime, the Crown accepted a plea of manslaughter on the ground of diminished responsibility. Once again, Mr Veen was sentenced to life imprisonment, on the ground that he was a danger to society, and was likely to kill again when released. This Court upheld that sentence in *Veen [No 2]*.

54 In *Fardon*, Gleeson CJ did not seek to reconcile the outcome in *Veen [No 1]* with the outcome in *Veen [No 2]*, given that there was no apparent difference of approach in terms of principle; but his Honour observed that "[t]he facts of the case reveal a common problem with which courts and legislatures have to deal"[67]. One legislative response to that problem was the DPSO Act and its analogues, such as the HRSO Act. That response addressed the need to protect the community from disordered individuals in a way that the criminal law as expounded in *Veen [No 1]* and *Veen [No 2]* does not; and that response proceeded by way of a regime which

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64 (1979) 143 CLR 458 at 467, 468, 482-483, 495 ("*Veen [No 1]*").

65 (1988) 164 CLR 465 at 472-473.

66 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 588-589 [7]-[9].

67 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 588 [9].

eschewed entirely the purposes of deterrence and retribution that characterise punishment under the criminal law.

55 The purpose of a legislative regime, such as the DPSO Act or the HRSO Act, is discernibly distinct from the imposition of retribution or deterrence pursued by the criminal law. To the extent that detention or supervised release is part of the legislative regime, the character of the curtailment of the liberty of the individual offender under the regime can be seen to be protective rather than punitive because any curtailment of liberty must be supported by the risk evaluation contemplated by s 7 of the HRSO Act. In that evaluation, considerations of retribution and deterrence, central to sentencing by way of punishment under the common law, have no part to play. In addition, any curtailment of liberty must be no greater than is necessary adequately to protect the community from the demonstrated unacceptable risk of harm to the community[68]. Further, any curtailment of liberty is subject to regular review to ensure that the evaluation of risk and response remains current. Where detention can be justified only by that evaluation and cannot be continued beyond the currency of such an evaluation, the purpose of detention and of the regime under which it is imposed can readily be seen to be distinct from the purpose of punishment.

56 The HRSO Act can be seen to be protective, rather than punitive, in its purpose and effect because:

(a) it operates by reason of the evaluation by reference to criteria concerned solely with the risk of harm to the community rather than considerations of retribution or deterrence;

(b) the evaluation of risk to the community is given effect only to the extent that interference with an offender's liberty is necessary to protect the community;

(c) the processes by which the evaluation is undertaken and given effect are familiar as exercises of judicial power and, as such, serve to ensure the fairness and rationality of the making of, and giving effect to, the evaluation. There was, in the course of argument in this Court, a suggestion that the imposition of the obligation of disclosure upon an offender was a departure from ordinary judicial processes. That suggestion was without foundation: that obligation relates only to

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68 *Western Australia v Latimer* [2006] WASC 235 at [49]; *Western Australia v ACJ* [2021] WASC 219 at [32]; *Western Australia v Quartermaine [No 2]* [2021] WASC 267 at [14]; *Western Australia v Dragon [No 2]* [2022] WASC 189 at [15].

material upon which the offender proposes to rely. Moreover, it is a familiar aspect of the process of criminal justice[69]; and

(d) the provisions for regular review serve to ensure that the restrictions upon an offender's personal liberty do not continue any longer than is necessary for the protection of the community.

Kable

57 In *Kable*, the *Community Protection Act 1994* (NSW) authorised the Supreme Court of New South Wales to issue a preventive detention order against Mr Kable, who had been convicted of the manslaughter of his wife. A majority of this Court (Toohey, Gaudron, McHugh and Gummow JJ) held that the *Community Protection Act* was invalid on the basis that it impaired the institutional integrity of the Supreme Court. Essential to the need to maintain the integrity of Ch III courts was the maintenance of their independence from the other branches of government, so that they should be free to act impartially in accordance with judicial process[70]. Where the Court acted as an "instrument of executive government policy", as required by the *Community Protection Act*, public confidence in the Court "must inevitably be impaired"[71].

58 Although the *Community Protection Act* was framed in general terms, s 3 made it clear that it was confined in its operation to Mr Kable; the ad hominem focus of the legislation was seen to be problematic[72].

59 In *Attorney-General (NT) v Emmerson*[73], French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ said:

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69 *Criminal Procedure Act 2004* (WA), s 62(4)(b). See also *Criminal Procedure Act 1986* (NSW), s 143(1)(h); *Criminal Procedure Act 2009* (Vic), s 189(1); *Criminal Procedure Act 1921* (SA), s 123(4)(e); *Criminal Code* (Qld), s 590B(1).

70 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98, 107, 108, 117-118, 133.

71 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 124.

72 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98.

73 (2014) 253 CLR 393 at 425 [42].

> "The ad hominem legislation in *Kable* (the stated object of which was 'to protect the community'[74]) authorised the Supreme Court of New South Wales to order preventive detention without any breach of the law being alleged or any adjudication of guilt[75]. A majority of this Court found that task incompatible with the institutional integrity of the Supreme Court because the legislation drew the Court into implementing what was essentially a political decision or government policy that Mr Kable should be detained, without the benefit of ordinary judicial process[76]."

60 The general proposition for which *Kable* stands[77] must be understood and applied bearing in mind that all legislation reflects political decisions and government policy as a source of laws, substantive and adjectival; and that it is the essential role of the judiciary to enforce those laws by the exercise of judicial power[78]. It is within this context that it can be appreciated that the vice of the *Community Protection Act* was that it enlisted the Supreme Court to give effect to a decision on the part of the executive government that Mr Kable should remain in detention.

Fardon

61 In *Fardon*, a majority of this Court held that the DPSO Act did not infringe the *Kable* principle. This Court rejected the contention that the involvement of the Supreme Court of Queensland in deciding whether prisoners who have been convicted of sexual offences should be the subject of continuing detention orders, on the ground that they pose a danger of harm to the community, was incompatible with the role of the Supreme Court as a repository of federal judicial power.

62 Gleeson CJ noted a number of features of the DPSO Act which distinguished it from *Kable* and supported its validity[79]:

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74 *Community Protection Act 1994* (NSW), s 3(1), (2).

75 *Community Protection Act 1994* (NSW), ss 3(1), (3), 5(1).

76 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98, 106-107, 122, 124, 133-134.

77 See *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 426 [44].

78 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592-593 [21].

79 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592 [19].

> "The [DPSO] Act is a general law authorising the preventive detention of a prisoner in the interests of community protection. It authorises and empowers the Supreme Court [of Queensland] to act in a manner which is consistent with its judicial character. It does not confer functions which are incompatible with the proper discharge of judicial responsibilities or with the exercise of judicial power. It confers a substantial discretion as to whether an order should be made, and if so, the type of order. If an order is made, it might involve either detention or release under supervision. The onus of proof is on the Attorney-General [of the State of Queensland]. The rules of evidence apply. The discretion is to be exercised by reference to the criterion of serious danger to the community. The Court is obliged, by s 13(4) of the [DPSO] Act, to have regard to a list of matters that are all relevant to that criterion. There is a right of appeal. Hearings are conducted in public, and in accordance with the ordinary judicial process. There is nothing to suggest that the Supreme Court is to act as a mere instrument of government policy. The outcome of each case is to be determined on its merits."

63 Gleeson CJ then observed[80]:

> "It might be thought that, by conferring the powers in question on the Supreme Court of Queensland, the Queensland Parliament was attempting to ensure that the powers would be exercised independently, impartially, and judicially. Unless it can be said that there is something inherent in the making of an order for preventive, as distinct from punitive, detention that compromises the institutional integrity of a court, then it is hard to see the foundation for the appellant's argument."

64 His Honour, and most other members of the majority[81], therefore rejected the proposition that there is something inherent in the making of an order for preventive, as distinct from punitive, detention that compromises the institutional integrity of a court. Rather, it was held that the purpose of the DPSO Act was to protect the community, not to impose punishment, or further punishment, on an offender[82]. Their Honours emphasised that the DPSO Act required the Court to act independently of the other arms of government. The Court was required to make,

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80 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592 [20].

81 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 613 [83], 647-648 [196], 653 [214], 654 [217].

82 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 589-590 [11]-[14], 602 [44], 653-654 [214]-[217].

and give effect to, its own evaluative judgment as to whether it was satisfied that there was an "unacceptable risk" that a prisoner would commit a serious sexual offence; and that evaluation was to be made in accordance with the rules of evidence, and other processes that bore the "hallmarks of traditional judicial forms and procedure"[83].

65 In *Emmerson*, French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ, having noted the basis on which the *Community Protection Act* had been held invalid in *Kable*, went on to say[84]:

> "By comparison with *Kable*, in *Fardon v Attorney-General (Qld)*[85], legislation of general application authorising the continued detention or supervised release of prisoners who were 'a serious danger to the community' was upheld as valid. This was because the adjudicative process required of the State Supreme Court in that case supported the maintenance of the institutional integrity of the Court[86] and the adjudicative process required could be performed 'independently of any instruction, advice or wish of the legislative or executive branches of government'[87]."

The complexity of the task

66 Mr Garlett argued that the application of s 7 of the HRSO Act is a task so complex and difficult that it is inherently incompatible with the judicial function. This contention cannot be accepted. A contention to similar effect was rejected in *Fardon*[88]; and in *Vella v Commissioner of Police (NSW)*, Bell, Keane, Nettle and Edelman JJ observed that "open-textured criteria" – such as "an unacceptable risk to the safety, welfare or order of the community", "reasonably necessary", "reasonably appropriate and adapted", "sufficient grounds" and "considers

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83 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 602 [44], 619 [107], 656 [220].

84 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 425-426 [43].

85 (2004) 223 CLR 575.

86 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592 [19]-[20], 596-597 [34], 621 [114]-[115], 648 [198], 658 [234].

87 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 621 [116]. See also 598 [35], 600-602 [41]-[44].

88 See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 593 [22], 596-597 [34], 657 [225].

appropriate"[89] – have been deployed by the legislature to confer power on courts without falling foul of the concern that the power so conferred was not properly characterised as judicial power[90].

67 It is, no doubt, true to say that the evaluative task required of the Court under ss 7 and 48 of the HRSO Act is difficult. But its difficulty should not be exaggerated. It is certainly no more onerous than the task given to the Court by the DPSO Act. In *Fardon*, Gleeson CJ said[91]:

> "No doubt, predictions of future danger may be unreliable, but, as the case of *Veen* shows, they may also be right. Common law sentencing principles, and some legislative regimes, permit or require such predictions at the time of sentencing, which will often be many years before possible release. If, as a matter of policy, the unreliability of such predictions is a significant factor, it is not necessarily surprising to find a legislature attempting to postpone the time for prediction until closer to the point of release."

68 The function to be performed by the Court under ss 7 and 48 of the HRSO Act is materially indistinguishable from the function required of the Supreme Court of Queensland by s 13 of the DPSO Act. Just as the DPSO Act was not held to impose on the Supreme Court of Queensland a "grossly unjudicial chore"[92], so the HRSO Act does not require the Supreme Court of Western Australia to carry out an unjudicial task.

Distinguishing *Fardon*

69 The arguments advanced on behalf of Mr Garlett did not invite this Court to reconsider its decision in *Fardon*. Rather, Mr Garlett sought to draw attention to some respects in which the HRSO Act differs from the DPSO Act, in order to take this case outside the authority of *Fardon*. An examination of these supposed

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89 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 258 [84]. See *Thomas v Mowbray* (2007) 233 CLR 307; *Wainohu v New South Wales* (2011) 243 CLR 181; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38.

90 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 235 [23]. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 593 [22].

91 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 589-590 [12].

92 cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 133, quoting *Hobson v Hansen* (1967) 265 F Supp 902 at 930.

points of difference shows that the two Acts are, in substance, materially indistinguishable.

"Must" not "may"

70 Section 48 of the HRSO Act contemplates that the Supreme Court "must" make a restriction order if it is satisfied that the offender is a "high risk serious offender". The DPSO Act preserved a discretion in the Supreme Court of Queensland as to whether to make an order where a prisoner was assessed to pose an unacceptable risk of harm to the community[93]. On Mr Garlett's behalf, emphasis was placed on this circumstance as a point of distinction between the two Acts. That submission must be rejected.

71 The terms of s 7(1) must be read in conjunction with s 48[94]. Section 48 authorises and requires the Court to make a restriction order only where a positive determination has been made in accordance with s 7 of the HRSO Act.

72 The circumstance that the Court is not invested with a residual discretion to decline to make a restriction order does not establish that it is acting upon the dictation of the executive government as to the manner of deciding the case or its outcome. While s 48(1) is couched in mandatory terms, the terms of s 48(2) and the definition of "high risk serious offender" in s 7(1) mean that the judicial evaluation upon which the Court's determination depends is essential to the making of a restriction order. The decisive nature of the Court's evaluation is distinctly inconsistent with the suggestion that it must act upon the dictation of the legislature or the executive as to whether a restriction order should be made in any particular case.

73 Whether or not a risk that an offender will commit a "serious offence" is "unacceptable" is a question which requires the Court's judgment as to the nature and extent of the harm said to be in prospect. Further, whether a restriction order is "necessary" to protect against that risk requires recognition of what would otherwise be the offender's entitlement to be at liberty, an entitlement not lightly to be denied. The Court must consider whether a restriction order is necessary to ensure adequate protection of the community[95]. The Court is required to perform this evaluative exercise and come to its own determination as to whether to make

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93 See s 13(1), (5) of the DPSO Act.

94 *Kelly v The Queen* (2004) 218 CLR 216 at 253 [103].

95 s 7(1) of the HRSO Act.

a restriction order; it does not automatically follow from the inclusion of an offence in Sch 1 that a restriction order must be made.

74 In *Emmerson*, French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ observed that the legislation under consideration in that case provided that the "Supreme Court [of the Northern Territory was] authorised to determine whether the statutory criteria set out [were] satisfied and, if they [were], the Court must make the declaration sought" by the executive government[96]. The legislation then "provide[d] the consequences which follow from the Supreme Court's declaration". Their Honours said[97]:

> "Together, these steps are an unremarkable example of conferring jurisdiction on a court to determine a controversy between parties which, when determined, will engage stated statutory consequences."

75 The same may be said of ss 7 and 48 of the HRSO Act. This part of Mr Garlett's argument cannot stand with the decision in *Emmerson*.

A serious offence?

76 It was submitted on behalf of Mr Garlett that *Fardon* is authority only for the narrow proposition that legislation empowering a State court to order detention of a person serving a sentence for a "serious sexual offence", for the purpose of protecting the community and on the terms provided for in the DPSO Act, does not attract the *Kable* principle.

77 It was said that the offence of robbery under s 392 of the *Criminal Code* (WA) is inherently insufficiently serious to be capable of being regarded as a basis for a restriction order. Mr Garlett focussed on what was said to be the unexceptional nature of robbery as an offence to argue that the making of a restriction order, in addition to the sentence imposed on the offender for the offence of which he or she was convicted, is disproportionate to the seriousness of that offence for which proper punishment has already been imposed. These contentions cannot be accepted.

78 First, Mr Garlett's argument fails to appreciate that the imposition of a restriction order is not by way of further punishment for the "serious offence" of

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96 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 419-420 [24], 431 [59]-[60]. See *Misuse of Drugs Act 1990* (NT), s 36A; *Criminal Property Forfeiture Act 2002* (NT), s 94(1).

97 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 431 [60].

which the offender has been convicted, but a precaution that has been judicially assessed as necessary for the purpose of protecting the community. A restriction order does not contravene the principle of "double jeopardy"[98], in the sense that it punishes the offender twice, for the offence that engages the application of the HRSO Act. The protective purpose of the HRSO Act is not undermined by a lack of correlation between the past offence, which conditions the operation of the legislation, and the harm to the community from the commission of any "serious offence" in the future.

79 Secondly, Mr Garlett's argument confuses orthodox notions of proportionality in sentencing with the radically different notion of a judicial usurpation of the responsibility of the legislature to determine the degree of culpability appropriate to various categories of misconduct. The determination of the relative seriousness of criminal offences, reflected in the maximum sentences for those offences, is a matter for the legislature.

80 The inclusion of an offence, such as robbery, in Sch 1 to the HRSO Act reflects a legislative judgment as to the kinds of offences which may be such as to cause harm of a kind from which the community needs protection different from that provided by the criminal law. It is not inimical to the institutional integrity of the Court to act upon a legislative judgment that robbery should be included in the serious offences listed in Sch 1. That is especially so where an element of the offence is violence to person or property, or the threat of such violence. It is to be borne in mind that the maximum penalty for a contravention of s 392 of the *Criminal Code* (WA) ranges between imprisonment for 14 years, 20 years and life, depending upon the circumstances of the contravention.

81 It is also to be noted that the sexual offences in respect of which the operation of the DPSO Act depended covered a range of seriousness, with some offences attracting higher penalties than others, but with any one offence being sufficient to engage the application of the regime. In *Benbrika*, Edelman J noted that this Court in *Fardon* respected the judgment of the legislature that all the offences on this spectrum "could potentially involve harm to the community sufficient to permit consideration of a continuing detention order"[99].

82 As his Honour also noted, "'conduct is regarded as criminal for the very reason that its commission harms society, or some part of it', and it is rarely the

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98 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 610 [74]; *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 220 [214]; 388 ALR 1 at 64-65.

99 *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 224 [230]; 388 ALR 1 at 70.

role of a court to second-guess Parliament's decision about the seriousness of the harm that various crimes will have to the community"[100]. Similarly, in *Vella*, the range of offending on which the power of the Supreme Court and the District Court of New South Wales was conditioned was acknowledged to be "very wide"[101].

83 In *Magaming v The Queen*[102], it was said:

> "The enactment of sentences by the legislature, whether as maxima or minima, involves the resolution of broad issues of policy by the exercise of legislative power. A sentence enacted by the legislature reflects policy-driven assessments of the desirability of the ends pursued by the legislation, and of the means by which those ends might be achieved. It is distinctly the province of the legislature to gauge the seriousness of what is seen as an undesirable activity affecting the peace, order and good government of the Commonwealth and the soundness of a view that condign punishment is called for to suppress that activity, and to determine whether a level of punishment should be enacted as a ceiling or a floor."

84 Whatever may be said in the abstract of the relative seriousness of an offence designated as a "serious offence" for the purposes of the HRSO Act, it is always for the Court to determine whether there is an "unacceptable risk" that the offender will commit such an offence, having regard to the evidence as to the nature of the offending and the circumstances of the offender. Importantly, the evaluative exercise contemplated by s 7 of the HRSO Act is not an exercise involving the notional ordering in the abstract of the relative culpability of categories of offences. Rather, s 7 contemplates a practical evaluation concerned with the circumstances of the particular offending and the particular offender. While the requirement of an evaluation under s 7 depends upon the offender having been convicted of a "serious offence", ss 7 and 48 do not envisage the possibility that a restriction order might be made to prevent the commission of a serious offence, whether of the same kind or of another kind, unless the risk of further offending involves a real threat of harm to the community[103].

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100 *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 224 [228]; 388 ALR 1 at 69, quoting *McGarry v The Queen* (2001) 207 CLR 121 at 129 [20].

101 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 230 [3].

102 (2013) 252 CLR 381 at 414 [105].

103 See *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 184-185 [46]; 388 ALR 1 at 18.

85 In the case of Mr Garlett, that practical evaluation could be expected to involve consideration of the November 2017 offending, and the relationship between his history of offending and his long-term abuse of methylamphetamine. The Court would be required to consider the implications of these circumstances in relation to the likelihood that he would reoffend, and the nature of that offending, if he were to be released into the community with or without supervision. A restriction order will only be made consequent upon an assessment of all the circumstances of the "serious offence" and the offender. There can be no doubt that a judge tasked with the determination of the State's application for a restriction order against Mr Garlett would make a restriction order of either kind only after anxious consideration of Mr Garlett's prospects of freeing himself from the grip of methylamphetamine and the extent to which those prospects bear upon the likelihood that the community will continue to be exposed to robberies and like crimes involving, for example, the horrors of home invasions[104]. As Derrick J said in *Western Australia v Patrick [No 5]*[105]:

> "The scheme of the [HRSO] Act requires that the court do no more than is necessary to achieve an adequate degree of protection to the community."

86 A similar point was made in the reasons of the plurality in *Benbrika* in relation to the protective regime under consideration in that case[106]:

> "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 ... offence where that offence is of a kind that could not be seen to pose a real threat of harm to the community .... Correctly understood, a continuing detention order could not properly be made by a Court ... 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."

87 This aspect of Mr Garlett's argument culminated in a plea that this Court strike down the HRSO Act lest the legislature be emboldened to designate a failure

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104 See s 7(3)(e), (f) of the HRSO Act.

105 [2022] WASC 61 at [56].

106 *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 184-185 [46]-[47]; 388 ALR 1 at 18-19.

to wear a helmet while riding a bicycle as a "serious offence" for the purposes of the HRSO Act.

88 In *Gerner v Victoria*[107], this Court, following *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("the *Engineers' Case*")[108], observed that "[t]o point to the possibility that legislative power may be misused is distinctly not to demonstrate a sufficient reason to deny its existence". The rhetorical deployment of extreme and distorting examples of the possibility of the abuse of legislative power is an appeal to "a jaundiced view of the integrity or wisdom or practical competence of the representatives chosen by the people"[109]. This kind of rhetorical device provides no substantial basis for regarding robbery as something other than a serious offence.

Other considerations relating to the institutional integrity of the Supreme Court

Public confidence

89 It was submitted on behalf of Mr Garlett that preventive detention under the HRSO Act required to be enforced by the Court would adversely affect public confidence in the Court.

90 In *Fardon*, Gleeson CJ, noting that an aspect of the reasoning in *Kable* was concerned with the maintenance of public confidence in the judicial process, clarified that those observations were made in the context of a statute that involved the Court in an ad hominem exercise: "[n]othing that was said in *Kable* meant that a court's opinion of its own standing is a criterion of validity of law"[110]. Gleeson CJ said that[111]:

> "nothing would be more likely to damage public confidence in the integrity and impartiality of courts than judicial refusal to implement the provisions of a statute upon the ground of an objection to legislative policy".

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107 (2020) 270 CLR 412 at 423-424 [18].

108 (1920) 28 CLR 129 at 151-152.

109 *Gerner v Victoria* (2020) 270 CLR 412 at 424 [18] (footnote omitted).

110 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 593 [23] (footnote omitted).

111 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 593 [23].

91 As Edelman J said recently in *Benbrika*[112]:

> "[T]he very integrity and impartiality of the courts which the [*Kable*] principle protects would be seriously impaired if the judiciary could generally refuse to implement statutory provisions on the grounds of an objection to legislative policy[113]."

92 It may be noted here that the legislative removal of procedural safeguards of fairness, characteristic of the exercise of judicial power, has been significant in subsequent decisions where legislation has been successfully challenged as infringing the *Kable* principle. These cases may conveniently be discussed by reference to the submissions made by Mr Ryan.

Procedural safeguards

93 Mr Derek Ryan is currently subject to a supervision order under the HRSO Act. Like Mr Garlett, he was convicted of the "serious offence" of robbery. Mr Ryan was granted leave to provide written submissions on the basis that he sought to make submissions "which the Court should have to assist it to reach a correct determination"[114], and which had not then been presented.

94 The thrust of Mr Ryan's submissions in this regard was that the HRSO Act enlists the Court to give effect to legislative policy[115].

95 Challenges to State legislation have succeeded in this Court in *International Finance Trust Co Ltd v New South Wales Crime Commission*[116], *South Australia v Totani*[117] and *Wainohu v New South Wales*[118]. None of these cases was concerned with a preventive detention regime. The legislation challenged in the first of these

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112 *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 223 [226]; 388 ALR 1 at 69.

113 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 235 [24], quoting *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 593 [23].

114 *Roadshow Films Pty Ltd v iiNet Ltd [No 1]* (2011) 248 CLR 37 at 39 [3].

115 See *Kuczborski v Queensland* (2014) 254 CLR 51 at 98 [140].

116 (2009) 240 CLR 319.

117 (2010) 242 CLR 1.

118 (2011) 243 CLR 181.

cases provided for asset-freezing orders[119]. *Totani* and *Wainohu* were concerned with control orders[120]. In each of these two cases, the flaw in the legislation lay in the co-opting of the courts by the executive to implement decisions of the executive.

96 Mr Ryan relied particularly upon this Court's decision in *Totani*. The Magistrates Court of South Australia was required to make a control order on an application by the Commissioner of Police against a defendant if the defendant was a member of a "declared organisation" without any need to determine, by ordinary judicial processes, whether the defendant was actually engaged in serious criminal activity, a "declared organisation" being an organisation declared to be such by another member of the executive government[121]. This was a clear case of enlistment of the Court to give effect to the decision of the executive government in relation to particular individuals.

97 Under the HRSO Act, as with the DPSO Act, there is no enlistment of the Court to implement the decisions of the executive government. As has been explained, under the HRSO Act, the Court, in making a restriction order, is required to make a substantial evaluative judgment in order to make that determination. In addition, the Court is obliged to proceed to make that determination by reference to the processes characteristic of the exercise of judicial power. And the Supreme Court must support its determination by giving reasons for its decision.

98 The Court is not permitted to act as the judges acting as "personae designatae" under the provisions challenged in *Wainohu* were permitted to act, contrary to the characteristic judicial obligation of giving reasons to justify a judicial decision[122].

99 In addition, the offender is assured a full opportunity to engage in the process to determine whether or not a restriction order should be made, in contrast to the legislation considered in *International Finance Trust* which obliged the Supreme Court of New South Wales to proceed to make a restraining order without

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119 See *Criminal Assets Recovery Act 1990* (NSW).

120 See *Serious and Organised Crime (Control) Act 2008* (SA); *Crimes (Criminal Organisations Control) Act 2009* (NSW).

121 *South Australia v Totani* (2010) 242 CLR 1 at 21 [3]-[4].

122 *Wainohu v New South Wales* (2011) 243 CLR 181 at 192 [7], 213-215 [54]-[59], 228 [104].

regard for ordinary judicial processes[123]. The legislation in question purported to direct the Supreme Court as to the manner and outcome of its exercise of jurisdiction[124].

The community

100 On behalf of Mr Garlett it was said that it would be "incredulous" to a fair-minded lay observer that the HRSO Act requires the Court to assess "adequate protection of the community" by reference to the Western Australian community, and the Australian community, *and* "all other communities" – apparently even Tunisia[125]. Thus, it was sought to emphasise the excessive scope, and hence the illusory character, of the protective purpose of the HRSO Act.

101 The scope of the expression "community" is indeed broad, but its use is appropriate to direct attention to the risk of harm that the offender poses to the members of the organised society with whom he or she may happen to live from time to time. Indeed, it is in this sense that the expression is frequently used in legislation and in the reasons for judgment in the cases, such as *Fardon*[126]: it is the ordinary and natural language of this field of discourse. The references throughout the HRSO Act to protection of the "community", in the extended sense, also serve the practical purpose of ensuring that the protective purpose of the HRSO Act cannot be defeated by the simple expedient of an offender stating an intention to leave Western Australia or the Commonwealth.

Sections 29 and 30(2)(f) of the HRSO Act

102 It was said on Mr Garlett's behalf, picking up an argument put on behalf of Mr Ryan, that the effect of s 30(2)(f) of the HRSO Act was that the making of a supervision order was a logical impossibility. This was said to demonstrate a restriction upon the independence of the Court inconsistent with the due exercise of judicial power. The problem was said to arise because, given that the State must be taken to have discharged the burden upon it under s 29, the offender could not discharge the onus cast upon him or her by s 30(2)(f).

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123 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 355 [56], 366-367 [97]-[98], 386-387 [159]-[161].

124 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 360 [77].

125 See s 4 of the HRSO Act.

126 See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 588 [7]-[8].

103 This view of the combined operation of ss 29 and 30(2)(f) fails to appreciate that the evaluation of whether or not an offender can discharge the onus of showing a likelihood that he or she will not commit any further serious offences while under a supervision order must inevitably be affected by the restraints upon the offender's conduct imposed by the other conditions referred to in s 30(2)(a)-(e) and (g) of the HRSO Act. In this regard, in *Western Australia v ACJ*[127], Fiannaca J observed:

> "The question of whether the respondent will substantially comply with the standard conditions of the supervision order requires consideration of all of the circumstances, both personal to him and external, which will affect him. External circumstances include the conditions of the supervision order, the available means to monitor, supervise and treat him, and any pro-social support available to him."

104 These observations by Fiannaca J correctly state the operation of s 30(2)(f). This understanding of the relationship between ss 29 and 30(2)(f) underpins the making of numerous supervision orders by the Court[128]. The argument for Mr Garlett failed to acknowledge these decisions.

105 In *Attorney-General v Francis*[129], the Court of Appeal of the Supreme Court of Queensland said, in relation to the choice to be made by the Supreme Court of Queensland between a continuing detention order and a supervision order by the analogous provisions of the DPSO Act:

> "The question is whether the protection of the community is adequately ensured. If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the [DPSO] Act upon the liberty of the subject are exceptional, and the liberty

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127 [2021] WASC 219 at [416].

128 See *Western Australia v Lewis [No 2]* [2020] WASC 377 at [102]-[111]; *Western Australia v Atkinson [No 2]* [2020] WASC 379 at [87]-[95]; *Western Australia v TJZ* [2020] WASC 407 at [158]-[169]; *Western Australia v PCA* [2020] WASC 478 at [388]-[406]; *Western Australia v Yorkshire [No 2]* [2021] WASC 261 at [117]-[146]; *Western Australia v Quartermaine [No 2]* [2021] WASC 267 at [155]-[170]; *Western Australia v D'Rozario [No 3]* [2021] WASC 412 at [136]-[140]; *Western Australia v Atkins [No 2]* [2022] WASC 45 at [140]-[156].

129 [2007] 1 Qd R 396 at 405 [39].

of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint."

106 That s 29 of the HRSO Act does not require an approach different from that which has been accepted under the DPSO Act has been rightly, and consistently, recognised by the Supreme Court of Western Australia[130]. So, in *ACJ*, Fiannaca J said of the operation of s 48 with s 7 of the HRSO Act[131]:

> "The court should make the order that is least invasive of the respondent's right to liberty, while at the same time ensuring an adequate degree of protection of the community, having regard to the paramount consideration stipulated in s 48(2)[132]. As was decided in respect of s 17(2) of the DSO Act, that requirement does not exclude other considerations. Further, the use of the word 'adequate' indicates that a qualitative assessment is required. It cannot simply be assumed that the most assured preventative measure is detention and, therefore, the protection of the community will always favour such an order[133]."

Conclusion

107 The function of the Supreme Court of Western Australia under the HRSO Act is not incompatible with the role of the Court as a repository of the judicial power of the Commonwealth. The HRSO Act does not require the Court to give effect to any decision of the legislature or the executive government. Rather, the Court, in making a restriction order, is required to act upon its own evaluative judgment, by reference to prescribed criteria, in order to determine whether such an order is necessary for the purpose of protecting the community from harm. The performance by the Court of this function proceeds by processes which are familiar aspects of the exercise of judicial power[134].

108 The challenge to the validity of item 34 of Subdiv 3 of Div 1 of Sch 1 to the HRSO Act fails.

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130 See *Director of Public Prosecutions (WA) v DAL [No 2]* [2016] WASC 212 esp at [33].

131 *Western Australia v ACJ* [2021] WASC 219 at [32].

132 *Western Australia v Latimer* [2006] WASC 235 at [49].

133 *Director of Public Prosecutions (WA) v Decke* [2009] WASC 312 at [14].

134 See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

109 That part of the appeal pending in the Court of Appeal of the Supreme Court of Western Australia which was removed into the High Court of Australia should be dismissed.

110 GAGELER J. This appeal tests the scope and contemporary veracity of the canonical observation in the joint reasons for judgment in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[135] that, "exceptional cases" aside, "the involuntary detention of a citizen in custody by the [s]tate 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".

Ch III: *Boilermakers* and *Kable*

111 The *Lim* observation was framed as an observation about the relationship between the citizen and the state under our system of government. It was made in the context of expounding an implication of the structural separation of the "judicial power of the Commonwealth" effected by Ch III of the *Constitution*. That structural separation constitutes "the *Constitution*'s only general guarantee of due process"; yet its implications are "far-reaching"[136].

112 The structural separation of the judicial power of the Commonwealth effected by Ch III of the *Constitution* had been recognised before *Lim*. It had come to be associated with *R v Kirby; Ex parte Boilermakers' Society of Australia*[137]. The structural separation operates first and foremost to restrict the legislative capacity of the Commonwealth Parliament. It implies that the Commonwealth Parliament: cannot itself exercise any part of the judicial power of the Commonwealth; cannot confer authority to exercise any part of the judicial power of the Commonwealth other than on a court; and cannot confer on a court any authority which is not part of, or incidental to, the judicial power of the Commonwealth.

113 The *Lim* observation was made in the context of examining the second of those implied restrictions on Commonwealth legislative power. The observation led in that context to the specific conclusion that, with limited exceptions, "the citizens of this country enjoy ... constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth"[138]. However, the import of the observation is much broader than that.

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135 (1992) 176 CLR 1 at 27.

136 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580. See also *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 580-581.

137 (1956) 94 CLR 254 at 270.

138 (1992) 176 CLR 1 at 28-29.

114 To appreciate the import of the *Lim* observation, and in particular to appreciate the generality of its reference to our system of government, it is necessary to begin by noting the range of courts on which the Commonwealth Parliament is permitted to confer the judicial power of the Commonwealth and in respect of which the Commonwealth Parliament is correspondingly restricted from conferring non-judicial power. Those courts are not confined to the High Court[139] and other federal courts created by the Commonwealth Parliament[140]. They encompass all State courts[141], together with all Territory courts[142]. In short, they encompass all courts in Australia.

115 A "court" within the meaning of Ch III is an institution for the administration of justice[143]: "an independent and impartial tribunal"[144] having the institutional capacity to exercise "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"[145] through a fair and transparent judicial process the outcome of which is determined by the application of law as ascertained to facts as found[146]. Because the separated judicial power of the Commonwealth cannot admit of "different grades or qualities of justice"[147] depending on which court in Australia is administering it, the legislative capacity of the Commonwealth Parliament to confer the judicial power of the Commonwealth on all courts in Australia implies that every court in Australia must

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139 Sections 71 and 76 of the *Constitution*.

140 Sections 71 and 77(i) of the *Constitution*.

141 Sections 71 and 77(iii) of the *Constitution*.

142 Sections 71 and 122 of the *Constitution*.

143 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 618 [120].

144 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29].

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

146 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 553 [27].

147 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 89 [123].

meet and maintain the standard of institutional integrity requisite of any court having the capacity to exercise it.

116 Hence, a secondary operation of Ch III, which came to be recognised after *Lim* and to be associated with *Kable v Director of Public Prosecutions (NSW)*[148], is as an implied restriction on the legislative capacities of State Parliaments and Territory legislatures. The restriction has application in relation to the permissible structure of State and Territory courts[149]. The restriction likewise has application in relation to the content[150] and manner of exercise[151] of the State and Territory jurisdiction that can be conferred on State and Territory courts.

117 As *Kable* was explained in *Forge v Australian Securities and Investments Commission*[152]:

> "[T]he relevant principle is one which hinges upon maintenance of the defining characteristics of a 'court' … It is to those characteristics that the reference to 'institutional integrity' alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies."

The explanation continued[153]:

> "It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so. An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of

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148 (1996) 189 CLR 51.

149 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 162-164 [26]-[33]; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 75-76 [62]-[64].

150 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *South Australia v Totani* (2010) 242 CLR 1.

151 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; *Wainohu v New South Wales* (2011) 243 CLR 181.

152 (2006) 228 CLR 45 at 76 [63].

153 (2006) 228 CLR 45 at 76 [64].

> adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal."

118 The secondary operation of Ch III can therefore be expressed, sufficiently for present purposes, as being to invalidate a State or Territory law which purports to confer upon a State or Territory court a function that "substantially impairs its institutional integrity" considered in terms of its capacity to be (and be seen to be) an institution for the administration of justice according to the common law system of adjudication[154].

119 The restriction on Commonwealth legislative power associated with *Boilermakers* and the restriction on State and Territory legislative powers associated with *Kable* are accordingly complementary implications from Ch III's separation of the judicial power of the Commonwealth. Each is a structural implication implicit in, and directed to the preservation of, the distinctive nature of the separated judicial power of the Commonwealth. Each serves ultimately to maintain the integrity of the exercise of that judicial power.

120 The relationship of one to the other is derivative in the sense that the *Kable* restriction follows as a matter of "practical, if not logical necessity" from the *Boilermakers* restriction[155]:

> "To render State and Territory courts able to be vested with the separated judicial power of the Commonwealth, Ch III of the *Constitution* preserves the institutional integrity of State and Territory courts. A State or Territory law that undermines the actuality or appearance of a State or Territory court as an independent and impartial tribunal is incompatible with Ch III because it undermines the constitutionally permissible investiture in that court of the separated judicial power of the Commonwealth."

121 The derivative nature of the relationship between the *Kable* restriction and the *Boilermakers* restriction logically entails that a State or Territory law will not transgress the *Kable* restriction if a Commonwealth law in the same terms would not transgress the *Boilermakers* restriction[156]. The derivative nature of the relationship correspondingly entails that the converse does not hold: to conclude

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154 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15]; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 424 [40].

155 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 106 [183].

156 *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 [10]; *Baker v The Queen* (2004) 223 CLR 513 at 526-527 [22]-[24]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 90 [126].

"that a State [or Territory] law does not infringe the principles associated with *Kable* does not conclude the question whether a like Commonwealth law for a Ch III court would be valid"[157]. That is because a State or Territory law can confer on a State or Territory court a non-judicial power, provided always that the non-judicial power is compatible with the institutional integrity of that court as a repository of federal jurisdiction; whereas a Commonwealth law cannot confer a non-judicial power on any Australian court, even if that non-judicial power is compatible with the institutional integrity of that court as a repository of federal jurisdiction[158].

122 The *Kable* restriction on State and Territory legislative power and the *Boilermakers* restriction on Commonwealth legislative power have a common purpose and complementary operation. If the Commonwealth Parliament could not itself confer a function on a court as an incident of the judicial power of the Commonwealth, the reason why the function lies beyond the power of the Commonwealth Parliament to confer on that court can inform determination of whether the function is properly characterised as incompatible with the institutional integrity of a court so as to be also beyond the power of a State Parliament or Territory legislature to confer on a State or Territory court[159]. In particular, if a function is not judicial for the reason that its conferral on a court would impair the integrity of that court as an institution for the administration of justice, not only must that function for that reason lie beyond the power of the Commonwealth Parliament to confer on any Australian court, but the same function for the same reason must lie beyond the power of a State Parliament or Territory legislature to confer on any State or Territory court.

123 That leads to the proposition that if a function is non-judicial for the reason that having that function would impair the institutional integrity of a court, legislative conferral of that function must be offensive to the *Kable* restriction on State and Territory legislative power in the same way as it is offensive to the *Boilermakers* restriction on Commonwealth legislative power. In respect of a non-judicial function of that nature, the *Boilermakers* restriction and the *Kable* restriction are indistinguishable.

Ch III: *Lim*, "institutional integrity" and "the rule of law"

124 That brings me to the content of the *Lim* observation and to the significance of that observation to what was described in *Forge* as an "important element ... in

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157 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 90 [126].

158 See *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 89-90 [124]-[125].

159 See *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 278 [147].

the institutional characteristics of courts in Australia", being "their capacity to administer the common law system of adversarial trial"[160].

125 The *Lim* observation "has its foundation in the concern for the protection of personal liberty lying at the core of our inherited constitutional tradition", and needs to be understood in the context of liberty having been recognised as "the most elementary and important of those basic common law rights, which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom"[161].

126 The observation was introduced within the structure of the joint reasons in *Lim* by the notation that the adjudgment and punishment of criminal guilt is the "most important" of the functions "which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character". From that characterisation of the function as exclusively judicial, it was noticed to follow that, consistently with the *Boilermakers* restriction on Commonwealth legislative power, the Commonwealth Parliament could not confer the function other than as part of the judicial power of the Commonwealth on a court[162].

127 Why the adjudgment and punishment of criminal guilt has always been characterised as an exclusively judicial function, as I have said in the past, "is 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*"[163]. Bearing in mind that "[m]any of our fundamental freedoms are guaranteed by ancient principles ... which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished

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160 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [64].

161 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 610 [94], quoting *Williams v The Queen* (1986) 161 CLR 278 at 292 and *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11 (cleaned up).

162 (1992) 176 CLR 1 at 27.

163 *Magaming v The Queen* (2013) 252 CLR 381 at 400 [63]. See also *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 276 [141].

force"[164], I recognise that the nature of the relationship to which I referred cannot be taken for granted and calls for further elaboration[165].

128 Now attempting to provide that further elaboration, I hesitate to use the language of "the rule of law". The language can become hackneyed and the profoundness of the constitutional values encapsulated within it can be diminished by over-theorisation. Still, the essence of the relationship between the individual and the state underpinned by the commitment of the function of adjudging and punishing of criminal guilt exclusively to courts has to be acknowledged to have been a core component of Albert Venn Dicey's prototypical exposition of the "rule of law"[166] which came to prominence in the final decade of the nineteenth century when the *Constitution* was in the process of formation.

129 Expressed in Dicey's words, the essence of the relationship between the individual and the state under our system of government is that the individual is "ruled by the law, and by the law alone" such that the individual "may with us be punished for a breach of law, but ... for nothing else"[167]. Notably, those exact words were quoted in the joint reasons for judgment in *Lim*[168] in support of the canonical observation.

130 The import of the *Lim* observation can only be fully appreciated having regard to the standard incidents of the common law system within which that exclusive judicial function of adjudging and punishing criminal guilt has historically been performed[169]. Those standard incidents have long been that "[t]he judiciary is called on ... to hear and authoritatively determine a controversy about an existing liability of the individual which is claimed by the executive [as the representative of the state] to arise solely from the operation of some positive law on some past event or conduct" as a result of which "[d]eprivation of the liberty of the individual occurs only if the determination of the controversy is by conviction"

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164 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520-521.

165 See Stellios, "Liberty as a Constitutional Value: The Difficulty of Differing Conceptions of 'The Relationship of the Individual to the State'", in Dixon (ed), *Australian Constitutional Values* (2018) 177.

166 Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 215-216.

167 Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 215. See also *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 79.

168 (1992) 176 CLR 1 at 27-28.

169 *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 189 [71]; 388 ALR 1 at 24-25.

and then "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"[170].

131 Those standard incidents reflect what Dixon and Evatt JJ described in *R v Federal Court of Bankruptcy; Ex parte Lowenstein*[171] as a "long course of development" that "produced a conception of the judicial process which placed the court in the position of a detached tribunal entertaining and determining civil and criminal pleas brought before it". "It is true that in relation to contempt of court the courts of justice are armed with powers of summary punishment, at all events for contempts *in facie curiae* exercisable *ex mero motu*", their Honours added, "[b]ut this has always been regarded as an exceptional power based on the necessity of keeping order and of preserving the court from actual interference in the discharge of its duties".

132 The constitutional characterisation of the function of adjudging and punishing criminal guilt as exclusively judicial, and therefore as able to be performed only by a court other than in an exceptional case, is obviously protective of individual liberty in the procedural sense of preventing detention in custody at the initiative of the state other than through the agency of an independent and impartial tribunal according to a fair and transparent process. But the deeper and broader import of the *Lim* observation is to be found in the standard incidents of the common law system of adversarial trial protecting individual liberty in the substantive sense of allowing for detention in custody at the initiative of the state only where detention in custody is the penal consequence prescribed by law for an existing criminal liability determined to have arisen from the operation of positive law on past events or conduct[172].

133 That substantive constitutional significance of consigning the function of adjudging and punishing criminal guilt exclusively to the judicial branch of government is the central contribution that our common law system of adversarial trial has made to establishing and maintaining the relationship between the individual and the state within our inherited conception of the rule of law. Although rarely articulated, and all too readily overlooked, it lies at the heart of our system of government.

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170 *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 188-189 [69]; 388 ALR 1 at 24.

171 (1938) 59 CLR 556 at 588-589.

172 See *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 189 [71]-[72]; 388 ALR 1 at 24-25.

134 The *Lim* observation spelt out that the relationship between the individual and the state protected by Ch III is a relationship within which freedom of the individual from involuntary detention by the state, other than as a penal consequence prescribed by law for an existing criminal liability determined to have arisen from the operation of positive law on past events or conduct, is the norm. Exceptional cases have always existed and can be expected always to exist. The plurality in *Lim* was careful both to acknowledge the inevitability of exceptional cases and to avoid seeking to bring them within a closed category. Much more, however, was the plurality in *Lim* at pains to emphasise their exceptionality.

135 Other than in what is truly an exceptional case, and other than as an incident of the adjudgment and punishment of criminal guilt, conferral on a court of a function that involves the creation of a liability to detention in custody through an act of adjudication is not simply antithetical to the character of that court as an institution for the administration of justice. Conferral of such a function is antithetical to the very conception of justice which it is the responsibility of courts to administer.

136 The significance of the *Lim* observation for present purposes is therefore that legislative conferral on a court of a function that involves the creation of a liability to detention in custody through an act of adjudication other than as an incident of the adjudgment and punishment of criminal guilt must infringe both the *Boilermakers* restriction on Commonwealth legislative power and the *Kable* restriction on State and Territory legislative power, unless conferral of that function can be justified as within a category of exceptional case. That is so irrespective of whether the function can be performed in accordance with a judicial process.

137 That understanding of the significance of the *Lim* observation to the *Kable* restriction on State and Territory legislative power is underscored by the significance attributed to the observation by each member of the majority in *Kable* in holding invalid a State law purporting to confer jurisdiction on a State court to order the continuing detention of a named individual. The observation was "applied as a step in the reasoning" of two members of the majority[173] and was "reflected" in the reasoning of two other members of the majority[174].

138 The upholding by the majority in *Fardon v Attorney-General (Qld)*[175] of the conferral on a State court by a State Parliament of a function of creating a liability

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173 (1996) 189 CLR 51 at 97-98, 131-132.

174 (1996) 189 CLR 51 at 106-107, 121-122. See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 611 [77].

175 (2004) 223 CLR 575.

to be detained in custody in order to safeguard against a "serious danger to the community" arising by reason of "an unacceptable risk" that the individual would commit "an offence of a sexual nature ... involving violence [or] against children" is explicable on the basis of the conferral of that function having been within a category of exceptional case so as not to have infringed the *Kable* restriction. The conferral was characterised by Gleeson CJ in the language of Deane J in *Veen v The Queen [No 2]*[176] as an incident of an "acceptable statutory system of 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"[177].

139 The upholding by the majority in *Minister for Home Affairs v Benbrika*[178] of the conferral on a court by the Commonwealth Parliament of a function of creating a liability to be detained in custody in order to protect the community from "an unacceptable risk" of a "serious" offence relating to terrorism is similarly explicable on the basis of the conferral of that function having been within a category of exceptional case so as not to have infringed the *Boilermakers* restriction. I will say something more about *Benbrika* in the context of addressing the identification of an exceptional case.

Identifying an exceptional case

140 Dissenting in *Fardon*[179], Kirby J remarked that "[t]he categories of exception to deprivations of liberty treated as non-punitive may not be closed; but they remain exceptions". His Honour added that "[t]hey are, and should continue to be, few, fully justifiable for reasons of history or reasons of principle developed by analogy with the historical derogations from the norm". I agree with that approach. I do not think that its adoption is countermanded by the decision of the majority in that case or in any subsequent case.

141 *Vella v Commissioner of Police (NSW)*[180], like *Thomas v Mowbray*[181], concerned a legislative conferral on a court of a function which involved the court in the imposition of a restriction of liberty falling short of detention in custody.

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176 (1988) 164 CLR 465 at 495.

177 (2004) 223 CLR 575 at 588-589 [9], 592 [20].

178 (2021) 95 ALJR 166; 388 ALR 1.

179 (2004) 223 CLR 575 at 634 [155].

180 (2019) 269 CLR 219.

181 (2007) 233 CLR 307.

The issue in *Vella* was as to the compatibility of State legislation with the *Kable* restriction on State legislative power. The issue in *Thomas* was as to the compatibility of Commonwealth legislation with the *Boilermakers* restriction on Commonwealth legislative power.

142 In *Vella*, albeit in dissent, I advanced the following general proposition[182]:

> "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."

143 Consistently with that proposition, and albeit again in dissent, I drew attention in *Benbrika*[183] to the prior formulation of a more specific principle for determining when 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 can be taken to fall within *Lim*'s reference to exceptional cases. The principle was formulated by Gummow J in *Kruger v The Commonwealth*[184] and adopted by Callinan and Heydon JJ in *Fardon*[185]:

> "The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature, so as to attract the operation of Ch III, depends upon whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective. The categories of non-punitive, involuntary detention are not closed."

144 Within the principle so formulated, the term "legitimate" is an important qualifier. As elsewhere in constitutional analysis[186], the term signifies a need for compatibility with the constitutionally prescribed system of government. Used to qualify "non-punitive", the term serves to emphasise that a legislative objective

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182 (2019) 269 CLR 219 at 287 [171].

183 (2021) 95 ALJR 166 at 190-191 [78]; 388 ALR 1 at 26-27.

184 (1997) 190 CLR 1 at 162.

185 (2004) 223 CLR 575 at 653-654 [215].

186 See *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 191 [78]; 388 ALR 1 at 26-27, citing *McCloy v New South Wales* (2015) 257 CLR 178 at 231 [130]. See also *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 324.

sought to be pursued by means of involuntary detention is not automatically to be accepted as compatible with the constitutionally prescribed system of government merely because that objective can be characterised as non-punitive.

145 Elaborating on the principle formulated by Gummow J in *Kruger*, with particular reference to the subsequent analysis of Gummow J in *Fardon*[187], I sought to explain in *Benbrika* why mere prevention of the commission of a criminal offence cannot be a legitimate non-punitive objective whilst acknowledging that protection from harm can be a legitimate non-punitive objective if the harm sought to be protected from by preventing the commission of the offence can be characterised as grave and specific[188].

146 My reasoning in *Benbrika* did not deny that, under our system of government, it is for the legislative branch of government to prescribe the severity of the punishment that can be imposed by a court where an existing criminal liability is determined by a court to have arisen from the operation of positive law on past events or conduct. My reasoning cast no doubt on the proposition that "[i]t is distinctly the province of the legislature to gauge the seriousness of what is seen as an undesirable activity affecting the peace, order and good government of the [polity] and the soundness of a view that condign punishment is called for to suppress that activity"[189].

147 The burden of my analysis in *Benbrika* was rather to discern and put into words a principled basis for the identification of a legitimate non-punitive legislative objective such as might be capable of justifying the conferral on a court of the extraordinary function of creating a liability to detention in custody in order to prevent a criminal offence from being committed in the future.

148 To accept prevention of the commission of a criminal offence in the future to be capable of justifying conferral on a court of the function of creating a liability to detention, without a requirement for the criminal offence to be capable of giving rise to grave and specific harm if committed, it seemed to me, would be to admit of the extraordinary becoming the ordinary – the exception becoming the rule. To concede to a legislature an unconstrained choice as to which criminal offences are to be treated as capable of giving rise to harm of sufficient magnitude or "seriousness" to justify conferral of such a function on a court, it seemed to me also, would be to admit of the same result.

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187 (2004) 223 CLR 575 at 608-614 [68]-[89].

188 (2021) 95 ALJR 166 at 188-193 [66]-[89]; 388 ALR 1 at 23-29.

189 *Magaming v The Queen* (2013) 252 CLR 381 at 414 [105]. See also at 397-398 [52], 414 [106]-[107].

149 To any suggestion that such a result ought to be excluded from constitutional analysis as a "distorting possibility"[190], two responses are appropriate. One is to recall the lesson of history that "[t]he preventive function of government ... is far more liable to be abused, to the prejudice of liberty, than the punitory function" given that "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"[191]. The other is to observe the contemporary trend towards expansion in the range of offences legislatively designated to be sufficiently "serious" to justify preventive detention that can be seen in the sequence of cases beginning with *Kable* and moving on to *Fardon*, to *Benbrika*, and now to the present case.

150 So it seemed to me at the time of the decision in *Benbrika*; so it seems to me now. To accept without qualification that prevention of the commission of a criminal offence in the future is an objective capable of justifying the conferral on a court of the function of creating a liability to detention in custody would be to permit the *Lim* exception to hollow out the *Lim* norm. That outcome would alter in a fundamental respect the nature of the relationship conventionally understood to exist between the individual and the state under our inherited conception of the rule of law. I cannot regard that outcome as permissible within our constitutional structure.

151 Revisiting *Benbrika* with the benefit of argument in this appeal, I adhere to the principle formulated by Gummow J in *Kruger* as I there elaborated it. I am persuaded by the argument of the appellant that its acceptance is not precluded by the holding in *Benbrika* that the legislation there in issue did not infringe the *Lim* restriction on legislative power and that the difference between the majority and the minority can be seen to have turned on a difference in preparedness to accept the gravity of the harm sought to be protected against across the range of terrorism offences legislatively designated as "serious".

152 Explaining the *Lim* exception, the plurality in *Benbrika* said that 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". The plurality emphasised that a non-punitive purpose is "essential" but would not "suffice" to engage the *Lim* exception and further emphasised that as a "matter of substance, the power must have as its object the protection of the community from harm"[192]. As to the gravity of the requisite harm, the conclusion of the plurality

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190 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 381 [88], quoting *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 275.

191 Mill, *On Liberty* (1859) at 172.

192 (2021) 95 ALJR 166 at 181 [36]; 388 ALR 1 at 14.

that there was "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" was expressly premised on the assessment that "[t]errorism poses a singular threat to civil society"[193] and was the result of the reasoned satisfaction of the plurality that the legislation in issue was "rightly characterised as directed to ensuring the safety and protection of the community from the risk of harm posed by the threat of terrorism"[194].

Robbery is not exceptional

153 "The *Constitution* is a political instrument. It deals with government and governmental powers"[195]. But the *Constitution* is also supreme law and, axiomatically[196], "[i]t is, emphatically, the province and duty of the judicial department to say what the law is"[197]. Making contestable judgments of degree is inescapable in constitutional adjudication[198]; it is a judicial responsibility.

154 If the foregoing analysis is correct, then it must be accepted that assessment of the gravity of harm sufficient for protection from the harm to be characterised as a legitimate non-punitive objective, capable of justifying legislative conferral of a power of involuntary detention outside the *Lim* norm, is a judgment of that nature. The judgment falls to be made with an eye on history, including recent history[199], cognisant of the consequences of departing from the *Lim* norm other than in truly exceptional cases, and mindful of the need in recognising exceptional cases to avoid what has been called "the domino method of constitutional

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193 (2021) 95 ALJR 166 at 181 [36]; 388 ALR 1 at 14.

194 (2021) 95 ALJR 166 at 185 [47]; 388 ALR 1 at 19.

195 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82.

196 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262-263.

197 *Marbury v Madison* (1803) 5 US 137 at 177.

198 eg *Austin v The Commonwealth* (2003) 215 CLR 185 at 249 [124].

199 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 646 [190], citing *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 187-188.

adjudication ... wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation"[200].

155 Embracing that responsibility in the present case, I cannot accept that the offences of robbery and assault with intent to rob[201] are capable of giving rise to harm of sufficient gravity to justify conferral on a court of a function of creating a liability to detention in custody in order to "ensure adequate protection of the community against an unacceptable risk"[202] of their commission.

156 Never have robbery and assault not been offences known to the law. Never has loss of either life or liberty not been a penal consequence prescribed by law for their commission.

157 Neither offence, of course, is victimless: each involves the use or threat of violence to a person or to property. Yet in the gravity of the harm it has potential to cause, neither offence is analogous to an offence of a sexual nature involving violence or against a child as in *Fardon*, or to an offence relating to terrorism as in *Benbrika*.

158 If robbery is an offence protection from harm from which is sufficient to justify empowering a court to order pre-emptive detention in custody, it needs to be asked: what offence is not?

159 Unless the observation in *Lim* is to be treated as no longer descriptive of our system of government, a State or Territory law purporting to empower a State or Territory court to order detention in custody merely to ensure adequate protection of the community against an unacceptable risk of harm from robbery must contravene the restriction on State and Territory legislative power recognised in *Kable* just as a Commonwealth law in the same terms must contravene the restriction on Commonwealth legislative power recognised in *Boilermakers*.

160 In the result, I would allow the appeal and make the consequential orders proposed by Gordon J.

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200 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 94 [137], quoting Friendly, "The Bill of Rights as a Code of Criminal Procedure" (1965) 53 *California Law Review* 929 at 950.

201 Sections 392 and 393 of the *Criminal Code* (WA), referred to in items 34 and 35 of Subdiv 3 of Div 1 of Sch 1 to the *High Risk Serious Offenders Act 2020* (WA).

202 Section 7(1) of the *High Risk Serious Offenders Act 2020* (WA).

161 GORDON J. This case concerns a preventive detention regime – the *High Risk Serious Offenders Act 2020* (WA) ("the HRSO Act") – in relation to the offence of "robbery"[203]. It raises a question, fundamental to the rule of law in a democratic society, about whether, consistently with Ch III of the *Constitution*, the judiciary, as the protector of the liberty of the individual, may deprive an individual of their liberty, not to punish them for a crime committed but to prevent the prospect of a further offence based on an individual's propensity to commit robbery.

162 Under the HRSO Act, which authorises the coercive and preventive detention of individuals, the Supreme Court of Western Australia is the key player. Insofar as that regime concerns the offence of robbery, the role of the Supreme Court is contrary to Ch III of the *Constitution* – its role is antithetical to its status as an institution "established for the administration of justice"[204].

163 The premise of the HRSO Act is that those who have offended may offend again. Detention – imprisonment – of any individual protects society from anything and everything that that individual might do if at large in society[205]. Labelling the HRSO Act scheme, and the role of the Supreme Court, as "preventive justice" is a misnomer. It is not justice. The HRSO Act scheme, at least in its operation with respect to robbery, is contrary to Ch III and undermines the two key rationales – or constitutional values – underpinning Ch III's strict separation of Commonwealth judicial power from executive and legislative power: first, the historical judicial protection of liberty against incursions by the legislature or the Executive; and second, the protection of the independence and impartiality of the judiciary so as to ensure that the judiciary can operate effectively as a check on legislative and executive power[206].

164 Before addressing Ch III of the *Constitution*, liberty and punishment, four matters should be addressed at the outset.

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203 HRSO Act, Sch 1, Div 1, Subdiv 3, item 34. See also *Criminal Code* (WA), s 392.

204 cf *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 621 [134] ("*NAAJA*").

205 cf *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 292 [186].

206 See *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 201 [136]; see also 202-203 [138]-[142]; 388 ALR 1 at 40; see also 41-42.

Preventive detention regimes and "preventive justice"

165 First, "preventive justice"[207] (use of "coercive preventive measures"[208]) is not a new concept; it is a concept with "over two hundred years of history"[209]. But it is important to understand what "coercive preventive measures" seek to achieve and how. They have two aspects: they are not only preventive, they are coercive. "[A] measure is *preventive* if it is created in order to avert, or reduce the frequency or impact of, behaviour that is believed to present an unacceptable risk of harm"; and "[i]t is *coercive* if it involves state-imposed restrictions on liberty of action, backed by a coercive response, or the threat of a coercive response, to the restricted individual"[210] (emphasis added). The HRSO Act scheme contains both aspects. Although the HRSO Act authorises the making of two different types of coercive preventive measures, both referred to as "restriction order[s]"[211] – which is defined to mean a "continuing detention order"[212] or a "supervision order"[213] – it is sufficient for present purposes to focus on the validity of the HRSO Act insofar as it authorises the making of a continuing detention order. There was no dispute that the supervision order regime cannot be severed from the continuing detention order regime – they are inextricably intertwined and cannot be disentangled by severance[214].

166 Second, this proceeding is the latest in a series of cases[215] involving challenges to the validity of coercive preventive justice regimes on the basis that

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207 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 18 at 248, referring to the power to bind persons to keep the peace. See also *Thomas v Mowbray* (2007) 233 CLR 307 at 329 [16]; *Vella* (2019) 269 CLR 219 at 236-237 [29], 281 [156].

208 See Ashworth and Zedner, *Preventive Justice* (2014) at 2, 5-7, 20-21.

209 Zedner, "Taking the Preventive Justice Project Forward", in Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (2017) xiii at xiii.

210 Ashworth and Zedner, *Preventive Justice* (2014) at 20.

211 HRSO Act, s 3 definition of "restriction order".

212 HRSO Act, s 26.

213 HRSO Act, s 27; see also s 30.

214 See, eg, HRSO Act, ss 3 definition of "restriction order", 7(1), 35(4), 48.

215 See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Thomas* (2007) 233 CLR 307; *South*

the regimes infringed Ch III of the *Constitution*. Other than in *Kable v Director of Public Prosecutions (NSW)*[216] and *South Australia v Totani*[217], in each of those cases the Court upheld the validity of the impugned regimes[218]. Some of the regimes considered by the Court involved post-sentence continuing detention[219]; others involved restrictions on liberty falling short of detention in custody[220]. They are not all alike[221].

167 Third, propositions embraced incrementally by this Court in those decisions (since *Kable*[222]) have led to coercive preventive justice regimes becoming "an increasingly prominent feature of lawmaking in Australia"[223] and to Parliaments adjusting the design of such regimes to be more far-reaching and

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Australia v Totani (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181; *Pollentine v Bleijie* (2014) 253 CLR 629; *Vella* (2019) 269 CLR 219; *Benbrika* (2021) 95 ALJR 166; 388 ALR 1.

216 (1996) 189 CLR 51.

217 (2010) 242 CLR 1. And leaving aside *Wainohu* (2011) 243 CLR 181, in which the Court held wholly invalid the impugned legislation but on a basis that is not presently relevant: see 217-220 [65]-[70], 228-230 [104]-[109]; cf 220 [72], 230 [111]; 249-251 [178]-[185].

218 See *Fardon* (2004) 223 CLR 575 at 593 [24], 601-602 [43]-[44], 619-622 [106]-[120], 647-648 [195]-[198], 658 [234]; cf 646-647 [191]-[194]; *Thomas* (2007) 233 CLR 307 at 326-335 [10]-[30], 342-358 [61]-[126], 506-509 [591]-[600], 526 [651]; cf 366 [157], 412-437 [298]-[371], 462-480 [458]-[517]; *Pollentine* (2014) 253 CLR 629 at 651 [52]-[53], 658 [77]; *Vella* (2019) 269 CLR 219 at 234 [20], 261 [91]; cf 262 [94], 291 [181], [182]; *Benbrika* (2021) 95 ALJR 166 at 185-186 [53], 227 [239]; cf 187 [64], 193-195 [90]-[99], 196 [109], 210-211 [177]-[179]; 388 ALR 1 at 20, 74; cf 22, 29-32, 33, 52.

219 *Kable* (1996) 189 CLR 51; *Fardon* (2004) 223 CLR 575; *Benbrika* (2021) 95 ALJR 166; 388 ALR 1.

220 *Totani* (2010) 242 CLR 1; *Vella* (2019) 269 CLR 219. See also *Wainohu* (2011) 243 CLR 181.

221 cf *Thomas* (2007) 233 CLR 307 at 356 [116].

222 (1996) 189 CLR 51.

223 See Tulich, Murray and Skead, "Antipodean Perspectives on Preventive Justice: The High Court and Serious Crime Prevention Orders" (2021) 30 *Griffith Law Review* 211 at 232.

intrusive[224]. Regimes which once were seen as exceptional measures to address specific community fears about particular kinds of crime – terrorism or serious sexual offences – now risk becoming the norm[225], and extending to protect the community against the commission of a broad category of offences and conduct where the nature and extent of the harm that may be caused to persons or property by the prospective commission of an offence varies widely[226]. And that is not without danger. Where *risk* comes to prevail as the main driver of policy, there is a danger of "the logic of risk reduction ... permit[ting] ever more intrusive and liberty-eroding incursions"[227]. As John Stuart Mill warned in 1859, "[t]he preventive function of government ... is far more liable to be abused, to the prejudice of liberty, than the punitory function"[228].

168 That leads to the fourth observation: the potential normalisation of regimes that override individuals' liberty on the grounds of legislatively asserted "preventive" or "protective" imperatives, unrelated to the adjudgment and punishment of criminal guilt, inevitably presents risks to the institutional integrity of courts – institutions established for the administration of justice[229] – and the separation of powers. The coercive preventive justice regimes that are enacted must reflect and respect the two key rationales – or constitutional values – that underpin, and are protected by, Ch III's strict separation of federal judicial power[230]. Those core constitutional values – "conventions of [the] 'rule of law'" – cannot be waived or set aside for the protection of the community against what is

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224 cf Loughnan and Selchow, "Preventive Detention Beyond the Law: The Need to Ask Socio-Political Questions", in Keyzer (ed), *Preventive Detention: Asking the Fundamental Questions* (2013) 261 at 269.

225 McSherry and Keyzer, *Sex Offenders and Preventive Detention: Politics, Policy and Practice* (2009) at 114. See also Zedner, "Taking the Preventive Justice Project Forward", in Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (2017) xiii at xxii.

226 cf *Benbrika* (2021) 95 ALJR 166 at 209 [167]; 388 ALR 1 at 50.

227 Zedner, "Neither Safe Nor Sound? The Perils and Possibilities of Risk" (2006) 48 *Canadian Journal of Criminology and Criminal Justice* 423 at 425.

228 Mill, *On Liberty* (1859) at 172.

229 cf *NAAJA* (2015) 256 CLR 569 at 621 [134].

230 See *Benbrika* (2021) 95 ALJR 166 at 201 [136]; see also 202-203 [138]-[142]; 388 ALR 1 at 40; see also 41-42.

asserted to be a "growing number of 'predators'"[231], relevantly in this case: (a) persons convicted of a "serious offence"[232] (whether robbery[233] or another "serious offence") who pose an unacceptable risk of committing a robbery in the future[234]; and (b) persons convicted of robbery who pose an unacceptable risk of committing a "serious offence" in the future (whether robbery or another "serious offence").

Ch III of the *Constitution*, liberty and punishment

169 The doctrine of separation of powers enshrined in Ch III of the *Constitution* – underpinned by and protecting the two core constitutional values discussed above – mandates "an allocation of the judicial power of the Commonwealth which is both exclusive and exhaustive"[235].

170 "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'"[236]. The separation of the different branches of government – itself a "safeguard of individual liberty"[237] – was and remains achieved "by requiring a distinction to be maintained between powers described as legislative, executive and judicial", by reference "not to fundamental functional differences between powers, but to distinctions … between classes of powers requiring different 'skills and professional habits' in the authorities entrusted with their exercise"[238].

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231 Rose, "Government and Control" (2000) 40 *British Journal of Criminology* 321 at 334. See also *Totani* (2010) 242 CLR 1 at 91 [233].

232 HRSO Act, s 5; see also Sch 1, Divs 1 and 2.

233 HRSO Act, Sch 1, Div 1, Subdiv 3, item 34. See also *Criminal Code* (WA), s 392.

234 HRSO Act, s 7(1).

235 *NAAJA* (2015) 256 CLR 569 at 613 [104].

236 *Vella* (2019) 269 CLR 219 at 276 [141], quoting *R v Davison* (1954) 90 CLR 353 at 380-382.

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

238 *Davison* (1954) 90 CLR 353 at 381-382, quoted with approval in *Vella* (2019) 269 CLR 219 at 276 [141], 292 [190] and *Benbrika* (2021) 95 ALJR 166 at 188 [67], 202 [139]; 388 ALR 1 at 23, 41. See also *White v Director of Military Prosecutions*

171 In the criminal law context, the different skills and professional habits of the legislature, Executive and judiciary are of fundamental importance. As explained in *Vella*[239]:

> "It is the *legislature* that has the power, skills and resources to identify what conduct should be unlawful, to legislate to make that conduct unlawful and then to take any other steps the legislature considers necessary to reinforce the fact that, and to explain why, that conduct is now unlawful. It is the legislature that prescribes norms of conduct which govern the manner in which individuals are required to behave. It is the legislature that determines how best to protect the public against criminal behaviour by determining what conduct should be prohibited, how it should be punished, and what powers and resources the police force should have to detect and prevent crime." (emphasis added)

172 It is the *Executive* that executes the laws made by the Parliament[240]. In the criminal law context, the Executive is responsible for law enforcement[241], policing and detecting crime[242], preventing the commission of crime to the extent possible[243] and executing sentences imposed by courts as punishment for criminal offences[244]. It is the Executive that has the skills and professional habits to undertake those functions.

(2007) 231 CLR 570 at 594 [45]; *Thomas* (2007) 233 CLR 307 at 464 [463]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 123-124 [303]; *Palmer v Ayres* (2017) 259 CLR 478 at 502-503 [62]; *Brown v Tasmania* (2017) 261 CLR 328 at 467 [436].

239 (2019) 269 CLR 219 at 293 [191].

240 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 158 [373], quoting *R v Kidman* (1915) 20 CLR 425 at 441. See also *Davis v The Commonwealth* (1988) 166 CLR 79 at 108; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416.

241 See *Lipohar v The Queen* (1999) 200 CLR 485 at 576 [237], 583 [254].

242 See *Benbrika* (2021) 95 ALJR 166 at 207 [160]; 388 ALR 1 at 48.

243 See *Vella* (2019) 269 CLR 219 at 293 [191].

244 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 471; *Nicholas v The Queen* (1998) 193 CLR 173 at 187 [18].

173 Adjudgment and punishment of criminal guilt, on the other hand, is an exclusively judicial function[245]. Although judicial power is not susceptible to an exhaustive or exclusive definition[246], it is at its core "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"[247]. The standard incidents of the exercise of judicial power in the adjudgment and punishment of criminal guilt 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*"[248]. As Gageler J explained in *Minister for Home Affairs v Benbrika*[249], in the "[t]rial

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245 *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175; *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 536, 609-610, 612, 646, 685-686, 721; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258, 269; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109 [40]; *Magaming v The Queen* (2013) 252 CLR 381 at 396 [47], 399-400 [61]-[63]; *Kuczborski v Queensland* (2014) 254 CLR 51 at 120 [233]; *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 [15]; *Benbrika* (2021) 95 AJLR 166 at 177-178 [18]-[19], 189 [72], 202 [140], 207 [160], 218 [207]-[208]; 388 ALR 1 at 9-10, 25, 41-42, 48, 62.

246 *Benbrika* (2021) 95 ALJR 166 at 204 [146]; 388 ALR 1 at 43, citing *Davison* (1954) 90 CLR 353 at 366, *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 373, *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189, *Brandy* (1995) 183 CLR 245 at 267-268, *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 22 [51], *Thomas* (2007) 233 CLR 307 at 414 [306] and *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 592 [151].

247 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357, quoted with approval in *Vella* (2019) 269 CLR 219 at 279 [151] and *Benbrika* (2021) 95 ALJR 166 at 204 [146]; 388 ALR 1 at 43. See also *Waterside Workers' Federation of Australia v J W Alexander Ltd* (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]; *Totani* (2010) 242 CLR 1 at 86 [220].

248 *Benbrika* (2021) 95 ALJR 166 at 189 [70]; 388 ALR 1 at 24, quoting *Magaming* (2013) 252 CLR 381 at 400 [63].

249 (2021) 95 ALJR 166 at 188 [69]; 388 ALR 1 at 24.

of an individual for an offence at the instigation of the executive, whether by jury or by judge alone, ... [t]he judiciary is called on ... 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 conduct". It is only if the determination of the controversy is by conviction that the individual may be deprived of their liberty pursuant to judicial pronouncement of a sentence[250].

174 Those characteristics of "judicial power" and of the judiciary (the institution qualified to exercise it) "are deeply rooted in a tradition within which judicial protection of individual liberty against legislative or executive incursion has been a core value"[251]. The Court, therefore, must be cognisant of, and vigilant to protect against, laws that are corrosive to or erode those key rationales – or constitutional values – underpinning the separation of judicial power. That cognisance and vigilance is not limited to laws that involve some overt or "outright conscription"[252] of the judiciary to do the work of the legislative or executive branches of government. The Court must be cognisant of, and vigilant to protect against, "the creeping normalisation of piecemeal borrowing of judicial services to do the work of the legislature or the executive" that gradually erodes judicial independence[253].

Lim

175 It is the two key rationales – or constitutional values – that underpin and are protected by Ch III's strict separation of federal judicial power that are reflected in the principle articulated in *Chu Kheng Lim v Minister for Immigration*,

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250 *Benbrika* (2021) 95 ALJR 166 at 189 [69]; see also 189 [73]; 388 ALR 1 at 24; see also 25.

251 *Vella* (2019) 269 CLR 219 at 276 [141]. See also *Magaming* (2013) 252 CLR 381 at 400-401 [63]-[67]; *NAAJA* (2015) 256 CLR 569 at 610-611 [94]-[97]; *Benbrika* (2021) 95 ALJR 166 at 188 [68], 202 [138]-[140]; 388 ALR 1 at 23, 41-42. See generally Stellios, "Liberty as a Constitutional Value: The Difficulty of Differing Conceptions of 'The Relationship of the Individual to the State'", in Dixon (ed), *Australian Constitutional Values* (2018) 177.

252 *Vella* (2019) 269 CLR 219 at 277 [145].

253 *Vella* (2019) 269 CLR 219 at 277 [145]; see also, quoted there, Redish, "Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of *Morrison* and *Mistretta*" (1989) 39 *DePaul Law Review* 299 at 303.

Local Government and Ethnic Affairs[254]. For present purposes, the central principle derived from *Lim* "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'"[255].

176 Where a law authorises detention in custody, the "default characterisation" is that the detention is penal or punitive[256]. What is punitive in nature about involuntary detention is the deprivation of liberty[257]. And it is the involuntary deprivation of liberty by itself that ordinarily constitutes punishment[258]. "Punishment is punishment, whether it is imposed in vindication or for remedial or coercive purposes. And there can be no doubt that imprisonment ... constitute[s] punishment"[259].

177 There are some exceptional cases where detention other than as punishment for breach of a law may be authorised, such as in the context of mental illness or infectious disease, or to secure attendance at trial for an offence[260].

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254 (1992) 176 CLR 1 at 27-29. See *Benbrika* (2021) 95 ALJR 166 at 201 [136], 202-203 [138]-[142]; 388 ALR 1 at 40, 41-42.

255 *Benbrika* (2021) 95 ALJR 166 at 201 [134]; 388 ALR 1 at 40, quoting *Lim* (1992) 176 CLR 1 at 27. See also *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 528 [121]; *Re Woolley* (2004) 225 CLR 1 at 12 [16]; *Vasiljkovic v The Commonwealth* (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]; *Falzon* (2018) 262 CLR 333 at 341 [16]; *Vella* (2019) 269 CLR 219 at 280 [152].

256 *NAAJA* (2015) 256 CLR 569 at 611 [98]. See also *Falzon* (2018) 262 CLR 333 at 342 [24]; *Benbrika* (2021) 95 ALJR 166 at 182-183 [40], 189 [73], 202 [140]; 388 ALR 1 at 16, 25, 41-42.

257 *Behrooz* (2004) 219 CLR 486 at 499 [20].

258 *Behrooz* (2004) 219 CLR 486 at 499 [21].

259 *Witham v Holloway* (1995) 183 CLR 525 at 534. See also *Muldrock v The Queen* (2011) 244 CLR 120 at 140 [57].

260 *Lim* (1992) 176 CLR 1 at 28-29; *Benbrika* (2021) 95 ALJR 166 at 177 [18], 189-190 [73]-[75], 201 [135]; 388 ALR 1 at 9-10, 25-26, 40.

Another exceptional category, reflected in the outcome in *Lim*[261], is executive detention, pursuant to statutory power, of a person unlawfully in Australia, pending either expulsion from Australia or grant of permission to remain in Australia. It may be accepted that the exceptions do not fall within "precise and confined categories"[262] and that the categories of exceptional cases are not closed[263].

178 Reflecting "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 separation"[264], 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"[265]. That is a limitation on power inherent in the division of powers[266].

179 In *Benbrika*[267], the plurality stated that "[i]t is the protective purpose that qualifies a power as an exception to a principle that is recognised under our system of government as a safeguard on liberty". But, consistently with Ch III of the *Constitution*, that cannot mean that any protective purpose, even when accompanied by a form of judicial process[268], justifies the imposition of preventive detention as "exceptional". Nowhere in *Lim* was it suggested, expressly or

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261 *Lim* (1992) 176 CLR 1 at 10, 32, 58, 71. See also *Behrooz* (2004) 219 CLR 486 at 499 [20]; *Vasiljkovic* (2006) 227 CLR 614 at 648 [108], 668 [183]; *Benbrika* (2021) 95 ALJR 166 at 189-190 [73]-[75]; 388 ALR 1 at 25-26.

262 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 110; *Vasiljkovic* (2006) 227 CLR 614 at 631 [37]; *Benbrika* (2021) 95 ALJR 166 at 202 [140]; 388 ALR 1 at 42.

263 *Benbrika* (2021) 95 ALJR 166 at 190 [75]-[77], 202 [140]; 388 ALR 1 at 25-26, 41-42. See also *Al-Kateb v Godwin* (2004) 219 CLR 562 at 646 [251]; *Vasiljkovic* (2006) 227 CLR 614 at 648 [108].

264 *Benbrika* (2021) 95 ALJR 166 at 201 [135]; 388 ALR 1 at 40.

265 *Fardon* (2004) 223 CLR 575 at 612 [80]. See also *Vella* (2019) 269 CLR 219 at 280 [152]; *Benbrika* (2021) 95 ALJR 166 at 179-180 [24]-[27], 189 [71], 201 [135]; 388 ALR 1 at 11-12, 25, 40.

266 *Benbrika* (2021) 95 ALJR 166 at 189 [71], 201-202 [137]-[140]; 388 ALR 1 at 25, 40-42. See also *Foucha v Louisiana* (1992) 504 US 71 at 82-83.

267 (2021) 95 ALJR 166 at 181 [36]; 388 ALR 1 at 14.

268 *Totani* (2010) 242 CLR 1 at 51 [78]; *Vella* (2019) 269 CLR 219 at 295 [201]. See also *Kable* (1996) 189 CLR 51 at 98, 106-108, 121-122, 131. cf *Fardon* (2004) 223 CLR 575 at 602 [44], 614 [90], 648 [198], 654 [216]-[217], 656 [220].

impliedly, that the exceptional category of cases where detention other than as punishment for breach of a law may be authorised extended generally to laws with a purpose of protecting the community from harm[269]. The imposition of punishment for criminal wrongdoing is and must be subject to clear limits that protect the liberty of the individual from the exercise of one of the most extreme forms of public power. Preventive detention has the same punitive consequences and effects on the liberty of the individual as detention in custody as punishment for criminal offending and yet it is too often sought to be justified "by no more than passing reference to a poorly articulated claim that the general public has a right to protection"[270]. Neither a legislative assertion of a preventive purpose, nor the fact that it may be possible to characterise a power as having a purpose of protecting the public, can alone be determinative of compatibility with Ch III of the *Constitution*[271]. The plurality in *Benbrika* should not be understood as denying the possibility that a law with a protective purpose may "pursue that purpose in a manner incompatible with the doctrine [of separation of judicial power]"[272]. If the position were otherwise, there would be no meaningful limit on the exercise of coercive powers by the State to restrict individual liberty in the name of protection; overreach would be inevitable. The "exception" would deprive Ch III, and the separation of powers, of content[273].

180 There must, therefore, be a *principled* limit on the extent to which a "protective" purpose can qualify a power to order detention in custody as an exception to the *Lim* principle[274]. Legislation that confers power to constrain liberty according to what someone might do in the future lies outside the "general rule" that the exercise of judicial power settles for the future "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"[275]. And while

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269 See also Dyer, "*Minister for Home Affairs v Benbrika* and the Capacity of Chapter III of the *Commonwealth Constitution* to Protect Prisoners' Rights" (2022) 45 *University of New South Wales Law Journal* 209 at 235-236.

270 Ashworth and Zedner, *Preventive Justice* (2014) at 146.

271 See *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 146 [35]; see also *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 584-585 [106]; 401 ALR 438 at 463.

272 *Alexander* (2022) 96 ALJR 560 at 584-585 [106]; 401 ALR 438 at 463.

273 cf *Benbrika* (2021) 95 ALJR 166 at 210-211 [178]; 388 ALR 1 at 52.

274 cf *Benbrika* (2021) 95 ALJR 166 at 181 [36]; 388 ALR 1 at 14.

275 *Vella* (2019) 269 CLR 219 at 279 [151], quoting *Tasmanian Breweries* (1970) 123 CLR 361 at 374; see also 282 [158].

there might be strong policy reasons for courts to exercise such power[276], "[w]here 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"[277].

Kable and the relevance of Ch III and the Lim principle

181 The HRSO Act is State legislation. Its validity depends on limits on State legislative power and, in particular, the reach of the *Kable* principle[278]. Chapter III does not permit of "different grades or qualities of justice" as between Commonwealth and State courts[279]. State legislation which purports to confer upon a State court "a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid"[280].

182 In assessing whether legislation substantially impairs the institutional integrity of a State court or courts, regard may be had to the effect of the legislation

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276 See *Vella* (2019) 269 CLR 219 at 282 [158]. cf *Grollo v Palmer* (1995) 184 CLR 348 at 367; *Thomas* (2007) 233 CLR 307 at 329 [17]; *Vella* (2019) 269 CLR 219 at 260-261 [90].

277 *Vella* (2019) 269 CLR 219 at 287 [171], quoted in *Benbrika* (2021) 95 ALJR 166 at 205 [151]; 388 ALR 1 at 45. See also *Tasmanian Breweries* (1970) 123 CLR 361 at 374-375.

278 *Kable* (1996) 189 CLR 51 at 96, 101-103, 114-119, 127-128, 138, 143. See also *Fardon* (2004) 223 CLR 575 at 591 [15]; *Totani* (2010) 242 CLR 1 at 47-48 [69], 81 [201]-[202], 83-84 [212]; *Wainohu* (2011) 243 CLR 181 at 208-209 [44]; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 424 [40]; *Kuczborski* (2014) 254 CLR 51 at 72-73 [38], 98 [139]; *NAAJA* (2015) 256 CLR 569 at 593-595 [39]; *Vella* (2019) 269 CLR 219 at 245-246 [55], 274-275 [138].

279 *Kable* (1996) 189 CLR 51 at 103; see also 115, 127-128; cf 82. See also *Fardon* (2004) 223 CLR 575 at 617 [101]; *Wainohu* (2011) 243 CLR 181 at 209-210 [45], 228-229 [105], 247 [171]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 88-89 [123]; *Vella* (2019) 269 CLR 219 at 278 [147]; *Benbrika* (2021) 95 ALJR 166 at 178 [20]; 388 ALR 1 at 10.

280 *Vella* (2019) 269 CLR 219 at 275 [138], quoting *Fardon* (2004) 223 CLR 575 at 591 [15].

on public confidence in the courts[281] – institutions established for the administration of justice[282], including criminal justice – and the defining characteristics of courts, including the reality and appearance of independence and impartiality[283]. There is no single comprehensive statement of the content to be given to the essential notion of repugnancy to, or incompatibility with, the institutional integrity of State courts[284]. It therefore would be futile to attempt to provide some all-embracing characterisation or taxonomy of the circumstances in which "a State law might be repugnant [to] or incompatible with the exercise of Commonwealth judicial power or the essential attributes of a State court, or what might undermine a court's institutional integrity"[285].

183 The Court, however, must be "attentive to creative [and incremental] ways in which State Parliaments might establish impermissible relationships between courts and the political arms of government"[286]. Otherwise, the *Kable* principle will be stripped of its content and impermissibly constrained in its application. The application of the *Kable* principle depends on underlying

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281 *Kable* (1996) 189 CLR 51 at 98, 107-108, 116-118, 124, 133; *Fardon* (2004) 223 CLR 575 at 617-618 [102], 638 [166], 653 [213]; *Totani* (2010) 242 CLR 1 at 82 [206]; *NAAJA* (2015) 256 CLR 569 at 595 [40]; *Vella* (2019) 269 CLR 219 at 277 [144], 291 [183].

282 cf *NAAJA* (2015) 256 CLR 569 at 621 [134].

283 See, eg, *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63]-[64]; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 552-553 [10]; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 530 [89], 559 [204]; *Wainohu* (2011) 243 CLR 181 at 208 [44]; *Pompano* (2013) 252 CLR 38 at 71-72 [67]-[68], 89-90 [125], 105 [177], 110 [194]; *Emmerson* (2014) 253 CLR 393 at 426 [44]; *NAAJA* (2015) 256 CLR 569 at 594 [39], 618 [120]-[121].

284 *Fardon* (2004) 223 CLR 575 at 618 [104]-[105]; *K-Generation* (2009) 237 CLR 501 at 530 [90]; *Kuczborski* (2014) 254 CLR 51 at 72-73 [38], 89 [103], 90 [106].

285 Stellios, *The Federal Judicature: Chapter III of the Constitution*, 2nd ed (2020) at 564.

286 Stellios, *The Federal Judicature: Chapter III of the Constitution*, 2nd ed (2020) at 566.

principle, not just on what form the laws in issue in previous cases took or what was said in those cases in the context of different legislative regimes[287].

184 The *Lim* principle (a principle developed in the context of the strict separation of Commonwealth judicial power from executive and legislative power) is not irrelevant to the assessment of whether *State* legislation is compatible with Ch III of the *Constitution*. There is no separation of powers at the State level[288]. The *Kable* principle is less strict than the limitations on *Commonwealth* legislative power derived from Ch III, in the sense that it protects the independence and institutional integrity of State courts, and that "the notions of repugnancy to and incompatibility with the continued institutional integrity of the State courts are not to be treated as if they simply reflect what Ch III requires in relation to the exercise of the judicial power of the Commonwealth"[289]. But the fact that the *Kable* principle has its roots in Ch III of the *Constitution* remains of fundamental importance[290]. Chapter III requires that the judicial power of the Commonwealth be invested only in institutions sufficiently distinct from other arms of government to answer the description of "courts"[291].

Fardon and Benbrika

185 It is now established that assessments and predictions of risk to the community are not matters that are incapable of judicial evaluation[292] and that

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287 See *Totani* (2010) 242 CLR 1 at 83-84 [212]; *Pompano* (2013) 252 CLR 38 at 94 [137]; *Kuczborski* (2014) 254 CLR 51 at 90 [106]; *Vella* (2019) 269 CLR 219 at 277-278 [146], 292 [188]; *Benbrika* (2021) 95 ALJR 166 at 205 [152]; 388 ALR 1 at 45-46.

288 *Kable* (1996) 189 CLR 51 at 66-67, 78, 103-104, 109, 137, 142; *Fardon* (2004) 223 CLR 575 at 614 [86]; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 573 [69]; *Pompano* (2013) 252 CLR 38 at 89-90 [124]-[125]; *Pollentine* (2014) 253 CLR 629 at 649 [42]; *Burns v Corbett* (2018) 265 CLR 304 at 386 [183]; *Benbrika* (2021) 95 ALJR 166 at 201 [137]; 388 ALR 1 at 40.

289 *Pollentine* (2014) 253 CLR 629 at 649 [42], quoting *Pompano* (2013) 252 CLR 38 at 90 [125]. See also *Kable* (1996) 189 CLR 51 at 104; *Baker v The Queen* (2004) 223 CLR 513 at 534 [51]; *Benbrika* (2021) 95 ALJR 166 at 201 [137]; 388 ALR 1 at 40-41.

290 *Totani* (2010) 242 CLR 1 at 83-84 [212]; *Vella* (2019) 269 CLR 219 at 275 [140].

291 *Vella* (2019) 269 CLR 219 at 275 [140], 277-278 [146].

292 See *Fardon* (2004) 223 CLR 575 at 589-590 [12], 593 [22], 597 [34], 616-617 [97]-[98], 657 [225]-[226]; *Thomas* (2007) 233 CLR 307 at 330-331 [19], 333-334

"[d]ispensation of 'preventive justice' ... is not inherently incompatible with judicial power"[293]. And, most relevantly for present purposes, as *Fardon v Attorney-General (Qld)*[294] and *Benbrika*[295] demonstrate, post-sentence preventive detention regimes are not, in all circumstances, contrary to Ch III of the *Constitution*. Neither case was challenged by the appellant, Mr Garlett.

186 But neither *Fardon*[296] nor *Benbrika*[297] is determinative of the validity of the HRSO Act. "[T]he constitutional validity of one law cannot be decided simply by taking what has been said in earlier decisions of the Court about the validity of other laws and assuming, without examination, that what is said in the earlier decisions can be applied to the legislation now under consideration"[298]. The Court must be wary of "domino" reasoning; "[i]t is a mistake to take what was said in other cases about other legislation and apply those statements without close attention to the principle at stake"[299].

187 The majority in *Fardon*[300] decided that a State law could validly authorise post-sentence detention of a person serving a period of imprisonment for a "serious sexual offence"[301] who posed a serious danger to the community because there was an unacceptable risk that the person would commit a further "serious sexual offence" if released from custody, and that the judiciary could determine, pursuant to a judicial process, whether an offender was to be subject to

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[27]-[28], 347-348 [78]-[79], 355 [109]. See also *Pompano* (2013) 252 CLR 38 at 96 [143].

293 *Vella* (2019) 269 CLR 219 at 279 [149].

294 (2004) 223 CLR 575.

295 (2021) 95 ALJR 166; 388 ALR 1.

296 (2004) 223 CLR 575.

297 (2021) 95 ALJR 166; 388 ALR 1.

298 *Pompano* (2013) 252 CLR 38 at 94 [137].

299 *Vella* (2019) 269 CLR 219 at 292 [188]; see also 277-278 [146]; *Benbrika* (2021) 95 ALJR 166 at 205 [152]; 388 ALR 1 at 45-46.

300 (2004) 223 CLR 575 at 593 [24], 601-602 [43]-[44], 619-622 [106]-[120], 648 [198], 658 [234].

301 "[S]erious sexual offence" was defined as an offence of a sexual nature involving violence or against children: see *Fardon* (2004) 223 CLR 575 at 604 [51].

that regime. The majority in *Benbrika*[302] decided that a Commonwealth law could validly authorise post-sentence detention of a person who was serving a sentence of imprisonment for certain terrorism offences[303] who posed an unacceptable risk of committing a terrorist offence if released from custody, and that the judiciary could determine, by orthodox judicial process, whether an offender was to be subject to that regime. Both *Fardon*[304] and *Benbrika*[305] concerned legislative regimes which depended on close identification between past offending (serious sexual offences or terrorism offences) and possible future offending (serious sexual offences or terrorism offences). Each applied only to a narrow class of offenders. In *Benbrika*[306] the Court divided over how close the nexus between the past and possible future offending must be. The minority view was that only some future terrorism offences could justify a post-sentence preventive detention order[307].

188 The post-sentence preventive detention regimes upheld in *Fardon*[308] and *Benbrika*[309] should be seen as exceptional and as depending on the nature and character of the past offending for which the persons subject to preventive detention were detained in custody and on the nature and character of the possible future offending sought to be prevented by subjecting those persons to continuing detention. "Sexual offences are almost universally given special significance" in criminal justice systems[310]. Repeated serious sexual offending is often driven by

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302 (2021) 95 ALJR 166 at 172-173 [2], 185 [48], 227 [239]; 388 ALR 1 at 3, 19, 74.

303 The specified terrorism offences were defined as "serious Pt 5.3 offences": see *Benbrika* (2021) 95 ALJR 166 at 174 [8], 183-184 [44]; 388 ALR 1 at 5, 17-18.

304 (2004) 223 CLR 575.

305 (2021) 95 ALJR 166; 388 ALR 1.

306 (2021) 95 ALJR 166; 388 ALR 1.

307 *Benbrika* (2021) 95 ALJR 166 at 187 [64], 193-194 [93], [97], 195 [100]-[101], 209 [168]-[170], 210 [175]; see also 210 [177]; 388 ALR 1 at 22, 30, 31, 32, 50-51, 51-52; see also 52.

308 (2004) 223 CLR 575.

309 (2021) 95 ALJR 166; 388 ALR 1.

310 Floud and Young, *Dangerousness and Criminal Justice* (1981) at 50.

psychological factors and disordered sexual attitudes[311] – some, perhaps many, paedophiles will never change[312].

189 Terrorism offences are defined by reference to motive – religious, political or ideological – and those motives may never change. "[A] special sort of moral outrage should be reserved for terrorist crimes, as distinguished from other homicides or acts of destruction ... [W]e put definitional pressure on our ability to articulate this sense that special outrage is appropriate for these offences"[313]. Terrorism offences "address the combination of violent destruction and political or ideological motivation which is unique to terrorism but which is largely absent from other crimes. The underlying motivation of terrorism provides a compelling, nihilistic drive to terrorists that often trumps their value of the perpetrators' own lives. It would be short-sighted to divorce these motivational contexts from the crimes themselves when they directly inform the

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311 See Guttmacher and Weihofen, *Psychiatry and The Law* (1952) at 110, 113; Zedner, "Sexual Offences", in Stockdale and Casale (eds), *Criminal Justice Under Stress* (1992) 265 at 274-283; Gunn and Taylor (eds), *Forensic Psychiatry: Clinical, Legal and Ethical Issues* (1993) at 323, 567; Beckett, "Assessment of Sex Offenders", in Morrison, Erooga and Beckett (eds), *Sexual Offending Against Children: Assessment and Treatment of Male Abusers* (1994) 55; Commonwealth, *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (2017), vol 2 at 138, 206 fn 20. See also *Fardon* (2004) 223 CLR 575 at 588 [9], quoting *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 495; *Kansas v Crane* (2002) 534 US 407 at 413, 415.

312 "Paedophilia or paedophilic disorder is a psychiatric diagnosis which indicates a sustained sexual preference towards prepubescent children": Commonwealth, *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (2017), vol 2 at 206 fn 20. See also Guttmacher and Weihofen, *Psychiatry and The Law* (1952) at 115; Glaser, "Paedophilia: The Public Health Problem of the Decade", in James (ed), *Paedophilia: Policy and Prevention* (1997) 4 at 6; *Kansas* (2002) 534 US 407 at 414.

313 Ashworth and Zedner, *Preventive Justice* (2014) at 179, quoting Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (2010) at 49.

gravity of the conduct"[314]. As the plurality in *Benbrika*[315] put it, "[t]errorism poses a *singular threat* to civil society" (emphasis added).

HRSO Act, in its operation to robbery, is contrary to Ch III

190 The HRSO Act is different. Four features of the HRSO Act are significant. First, there is a broad category of offences and conduct that may engage the coercive preventive justice regime under the HRSO Act. What constitutes a "serious offence"[316] and, correspondingly, the conduct captured by the definition of "serious offence" is very broad[317]. Second, "[t]he nature and extent of the harm that may be caused to persons or property by commission of a ['serious offence'] will vary widely"[318]. The harm sought to be protected against is not "grave and specific"[319]. Third, there is no correlation required by the HRSO Act between the nature or character of the prior offending that a person is serving a sentence of imprisonment for and the nature or character of the offence that a person is found to be at risk of committing and that a restriction order is designed to protect against, save that the offending conduct must have been identified by the Parliament of Western Australia as falling within the definition of "serious offence"[320]. Fourth, the requirements to obtain and consider reports prepared by a psychiatrist and a psychologist apply in all circumstances[321], even if there is no reason to think

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314 Ruddock, "Law as a Preventative Weapon Against Terrorism", in Lynch, MacDonald and Williams (eds), *Law and Liberty in the War on Terror* (2007) 3 at 5. See also Conte, *Human Rights in the Prevention and Punishment of Terrorism – Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand* (2010) at 9-11.

315 (2021) 95 ALJR 166 at 181 [36]; 388 ALR 1 at 14.

316 HRSO Act, s 5; see also Sch 1, Divs 1 and 2.

317 cf *Vella* (2019) 269 CLR 219 at 294 [197]; *Benbrika* (2021) 95 ALJR 166 at 206 [157]; 388 ALR 1 at 47.

318 cf *Benbrika* (2021) 95 ALJR 166 at 209 [168]; 388 ALR 1 at 50.

319 cf *Benbrika* (2021) 95 ALJR 166 at 191 [79]; 388 ALR 1 at 27. See also *Fardon* (2004) 223 CLR 575 at 588 [9], quoting *Veen* (1988) 164 CLR 465 at 495.

320 See HRSO Act, ss 3 definitions of "offender" and "serious offender under custodial sentence", 7(1), 7(3)(c)-(d), 7(3)(g)-(i). cf *Fardon* (2004) 223 CLR 575 at 619 [108].

321 HRSO Act, ss 7(3)(a), 46(2)(a), 74. cf *Fardon* (2004) 223 CLR 575 at 656 [222]; *Benbrika* (2021) 95 ALJR 166 at 174 [9]; 388 ALR 1 at 5.

that psychiatric or psychological factors played any part in the offender's prior offending.

191 The HRSO Act goes beyond the exceptional. It can be engaged in respect of any of numerous so-called "serious offences". Not only that, but the future conduct to be considered is equally broad and, in the case of robbery, is not so exceptional as to warrant such a scheme. The judiciary is left to perform the executive function of preventing a wide range of crimes one offender at a time. And it is required to do that without identifying any underlying justification of the kind that might be identified with respect to sexual offending or terrorism – factors peculiar to the psychology of sexual offenders or the motives of terrorism offenders are wholly absent.

192 The potential expansion of preventive detention to address all manner and kinds of criminal offending is by no means far-fetched – it is not an extreme or distorting possibility[322]. Nor is the problem new. An example from the United Kingdom (albeit in the context of sentencing offenders, rather than post-sentence preventive detention[323]) well illustrates the point. Section 10 of the *Prevention of Crime Act 1908* (UK) provided for a court to order preventive detention of "habitual criminal[s]". Where the court passed a sentence of penal servitude and was of the opinion that by reason of the offender's "criminal habits and mode of life" it was "expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years", the court could pass a further sentence of preventive detention.

193 A report of an Advisory Council on the Treatment of Offenders in the United Kingdom stated that "[b]etween 1908 and 1911 it had become apparent that the police, in presenting cases to the Director of Public Prosecutions for indictment as habitual criminals, were applying widely varying standards and were presenting offenders for whom preventive detention had not been intended"[324]. A 1911 memorandum by the Home Secretary recorded that the *Prevention of Crime Act*

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322 cf *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 275; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 380-381 [88]; *Egan v Willis* (1998) 195 CLR 424 at 505 [160]; *Singh v The Commonwealth* (2004) 222 CLR 322 at 384 [155], see also 418 [268]-[269]; *XYZ v The Commonwealth* (2006) 227 CLR 532 at 549 [39].

323 See *Fardon* (2004) 223 CLR 575 at 613 [83].

324 United Kingdom, Home Office, *Preventive Detention: Report of the Advisory Council on the Treatment of Offenders* (1963) at 1 [8].

was intended to deal with "the persistent dangerous criminal" and not with persons who were "a nuisance rather than a danger to society"[325].

194 The Advisory Council relevantly observed that, after a new provision dealing with preventive detention was enacted in the *Criminal Justice Act 1948* (UK)[326] several decades later, "[i]t [was] clear ... that preventive detention [had] not infrequently been imposed for relatively minor offences", including where the value of the property concerned was £10 or less[327]. The Advisory Council acknowledged that it was, to some extent, borne out that under the *Criminal Justice Act* it remained the "nuisances" rather than the dangerous criminals who had been the recipients of preventive detention[328]. The Advisory Council also referred to research that had "shown conclusively that the majority of preventive detainees [were] of the passive-inadequate type, feckless and ineffective in every sphere, who regard the commission of crime as a means of escaping immediate difficulties rather than a part of a deliberately anti-social way of life. Very few of them [were] of the seriously violent or aggressive type of personality"[329]. They added that it must, however, be recognised that "the community ought to be protected ... both from the dangerous criminals ... and *from the more numerous offenders* who practise thefts or frauds on victims who may be severely afflicted by the loss of a small sum or seriously distressed by what may rank as very minor housebreakings"[330] (emphasis added). Put simply, as that historical experience suggests, "[i]mprisonment to protect society from predicted but unconsummated offences is ... fraught with danger of excesses and injustice"[331].

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325 See United Kingdom, Home Office, *Preventive Detention: Report of the Advisory Council on the Treatment of Offenders* (1963) at 1 [8].

326 See *Criminal Justice Act 1948* (UK), s 21.

327 United Kingdom, Home Office, *Preventive Detention: Report of the Advisory Council on the Treatment of Offenders* (1963) at 5 [17].

328 United Kingdom, Home Office, *Preventive Detention: Report of the Advisory Council on the Treatment of Offenders* (1963) at 7-8 [21].

329 United Kingdom, Home Office, *Preventive Detention: Report of the Advisory Council on the Treatment of Offenders* (1963) at 8 [21].

330 United Kingdom, Home Office, *Preventive Detention: Report of the Advisory Council on the Treatment of Offenders* (1963) at 8 [21].

331 *Williamson v United States* (1950) 184 F 2d 280 at 282.

195 "The premise which underpins making any conduct a crime is that its commission works some harm to society"[332] and, as explained, detaining a person in custody will always prevent that person from committing a crime that they would commit if released from custody. If it is permissible, consistently with Ch III, for preventive detention to be ordered to protect against an unacceptable risk that a person convicted of a "serious offence" (whether robbery or another "serious offence") in the past will commit a robbery in the future or that a person convicted of robbery in the past will commit a "serious offence" in the future (whether robbery or another "serious offence"), then what is the basis for a limitation on State legislatures extending preventive detention to any offence that involves harm or a threat of harm to a person? And where does it stop? What is the outer limit? It is difficult to see why preventive detention could not be ordered in respect of a range of property offences – for example, "theft" not in the presence of any victim and unaccompanied by any threat or act of violence or fraud. Indeed, the Solicitor-General for Western Australia frankly acknowledged during oral argument that, on the submissions of the Attorney-General for Western Australia, "as a matter of principle", there was "probably not" any offence in the *Criminal Code* (WA) that could not be the subject of the preventive detention regime under the HRSO Act. That cannot be accepted.

196 Speaking of the HRSO Act as "protective" presents a question, not the answer. How is it protective? Is it protective in a way in which the judicial branch should and can be involved? The answer is "no". It is "no" because the HRSO Act seeks to protect against recidivism in relation to a broad range of offences.

197 Under the HRSO Act, "preventive justice" is punishment on the basis of a risk of recidivism or tendency to commit crime; preventive detention is being used "to deal with the problem of the persistent offender"[333]. It may be that factors such as drug and alcohol abuse commonly contribute to certain types of repeat offending behaviour which the HRSO Act regime seeks to protect the community from; but that is hardly exceptional. The preventive detention regime under the HRSO Act applies to an extraordinarily large class of potential offenders; not to "a small number of unfortunate individuals who suffer disorders which make them dangerous to others"[334]. Not all recidivist offenders are "disorder[ed]" individuals of the kind described by Gleeson CJ in *Fardon*[335].

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332 *Benbrika* (2021) 95 ALJR 166 at 209 [167]; 388 ALR 1 at 50.

333 cf United Kingdom, Home Office, *Preventive Detention: Report of the Advisory Council on the Treatment of Offenders* (1963) at 1 [7].

334 cf *Fardon* (2004) 223 CLR 575 at 592 [20].

335 (2004) 223 CLR 575 at 592 [20].

198 Loss of liberty as a punishment is ordinarily one of the hallmarks reserved to criminal proceedings conducted in courts, with the protections and assurances that criminal proceedings provide[336]. Those assurances include that in the trial of an individual for an offence at the instigation of the Executive, "[t]he judiciary is called on ... 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 conduct"[337] (emphasis added). The normalisation of judicial preventive detention orders means that "the distinctive character of the judiciary as the constitutional arbiter of disputes about rights between the citizen and the State will become increasingly less distinct. Incrementally but inexorably the judiciary will be drawn ever more deeply into a process in which institutional boundaries are blurred and by which its institutional independence is diminished"[338].

199 That cannot be permitted because it is corrosive to – it erodes – the core constitutional values underpinning and protected by Ch III of the *Constitution*: the judicial protection of liberty and the protection of the independence and impartiality of the judiciary. That is not a concern limited to the exercise of Commonwealth judicial power; those values must be protected to ensure that State courts are suitable repositories of federal jurisdiction. Chapter III does not permit of different grades or qualities of justice[339], and that is especially so where the justice fundamentally affects the liberty of the individual. Indeed, it would be remiss not to acknowledge that the Justices in the majority in *Kable* were themselves plainly cognisant of the risks posed by State courts imposing post-sentence preventive detention divorced from the function of adjudging and punishing criminal guilt[340]. The Court must remain vigilant to prevent those risks

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336 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 179 [56]. See also *Fardon* (2004) 223 CLR 575 at 612 [79].

337 *Benbrika* (2021) 95 ALJR 166 at 188 [69]; 388 ALR 1 at 24.

338 *Vella* (2019) 269 CLR 219 at 290-291 [180]. See also Stellios, *The Federal Judicature: Chapter III of the Constitution*, 2nd ed (2020) at 574; *Benbrika* (2021) 95 ALJR 166 at 194 [97]; 388 ALR 1 at 31.

339 *Kable* (1996) 189 CLR 51 at 103; see also 115, 127-128; cf 82. See also *Fardon* (2004) 223 CLR 575 at 617 [101]; *Wainohu* (2011) 243 CLR 181 at 209 [45], 228-229 [105], 247 [171]; *Pompano* (2013) 252 CLR 38 at 89 [123]; *Vella* (2019) 269 CLR 219 at 278 [147]; *Benbrika* (2021) 95 ALJR 166 at 178 [20]; 388 ALR 1 at 10.

340 See *Kable* (1996) 189 CLR 51 at 96-98, 106-107, 121-122, 131-134. See also Dyer, "*Minister for Home Affairs v Benbrika* and the Capacity of Chapter III of the

from materialising, whether they are "dramatic and obvious" or "small and incremental"[341].

200 In its operation with respect to robbery, the HRSO Act undermines the two key rationales – or constitutional values – that underpin Ch III's strict separation of federal judicial power. The HRSO Act seeks to normalise preventive detention in the custody of the State, something that must, under our constitutional system, be "exceptional". It opens the door to a general practice of preventive detention – a parallel system of "preventive justice", administered by courts that are repositories of federal jurisdiction – divorced from the administration of the criminal law, where the judiciary is the key player authorising the detention of individuals in custody by the Executive because they are "criminal types". Here, the "criminal type" was a man – Mr Garlett – who, prior to being incarcerated in November 2017, was convicted of his first offences as an adult (then aged 23) for committing burglary and robbery when he entered a home without the occupants' consent and stole, with threats of violence, $20 and a pendant necklace whilst in the presence of others, including his sister, and pretending to be armed with a handgun[342]. That is not exceptional. In its operation with respect to robbery, the preventive detention regime authorised by the HRSO Act simply comes at too great a cost to the constitutional framework required by the separation of powers and the core values protected by that framework.

201 The fact that, in a particular case, the Supreme Court might decide that a particular offender does not present an "unacceptable" risk of committing a serious offence or that it is not "necessary", in a particular case, to make a restriction order to adequately protect the community from an unacceptable risk, does not address or overcome the issues of principle identified above. And the conclusion that the HRSO Act in its operation with respect to robbery is invalid can, and should, be made now; it does not depend on the objective seriousness of the robbery offences in relation to which continuing detention orders are, in fact, made in future under the HRSO Act.

Conclusions and orders

202 For those reasons, the appeal should be allowed with costs. Paragraph (a) of the declaration made by the Supreme Court of Western Australia on 12 November 2021 should be set aside and, in its place, it should be declared that

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Commonwealth Constitution to Protect Prisoners' Rights" (2022) 45 *University of New South Wales Law Journal* 209 at 223-224.

341 cf *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 328 [787].

342 *Western Australia v Garlett* [2019] WASCSR 74 at [4], [12], [50].

the HRSO Act is invalid insofar as it operates in respect of item 34 of Subdiv 3 in Div 1 in Sch 1 to the HRSO Act.

EDELMAN J.

Introduction

203 Notwithstanding the views of many philosophers about free will, a fundamental premise of the criminal law is that individuals have free will. An offence is generally the result of a chosen act. One of the most serious responses of the criminal law is to punish that act, and the individual choice, with imprisonment. But for many years parliaments have also permitted people to be imprisoned, by "continuing detention orders", for choices that they have not yet made, and offences that they have not yet committed. The logic of such "punitive-preventive"[343] orders – protective punishment – "applies without respect for whether the subject is a responsible agent or not"[344].

204 Despite the individual injustice of such imprisonment, this Court has upheld the constitutional validity of regimes of continuing detention orders for anticipated serious sexual offences[345] and for anticipated terrorism-related offences[346]. This appeal presents the same issue in relation to continuing detention orders made by the Supreme Court of Western Australia under the *High Risk Serious Offenders Act 2020* (WA) ("HRSO Act") for anticipated robberies.

205 The HRSO Act authorises the indefinite imprisonment of an offender after completion of their sentence based upon an apprehension that they might commit any of a wide range of offences in the future, with maximum penalties ranging from as low as 12 months' imprisonment when tried summarily[347]. The HRSO Act could potentially lead to the imprisonment of one seventh of the entire prison population of Western Australia for offences that they have not committed[348]. But this appeal is concerned only with the validity of such continuing detention orders in their application to the offence of robbery. It is common ground that the HRSO Act will be entirely invalid in its application to robbery if the legislative provisions

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343 Ashworth and Zedner, *Preventive Justice* (2014) at 16.

344 Ashworth and Zedner, *Preventive Justice* (2014) at 19. See *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 222 [222]; 388 ALR 1 at 67-68.

345 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

346 *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1.

347 See, eg, HRSO Act, Sch 1, Div 1, Subdiv 3, Item 32 read with *Criminal Code* (WA), s 338E(2).

348 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 August 2019 at 5250.

concerning continuing detention orders in respect of robbery are beyond the power of the Parliament of Western Australia.

206 It would be a basic error for this Court to conclude that there could never be any circumstances of robbery which are equivalent to the offences in the regimes that have been upheld, especially since the violence element of a serious robbery offence could itself be conduct that amounts to a serious sexual offence. Principle and respect for precedent require that the HRSO Act be recognised as consistent with the *Constitution* unless there are specific features of the Act in its legal or practical operation, including in relation to robberies that are objectively less serious than offences in regimes that have been upheld, that create such individual injustice as to unjustifiably compromise the institutional integrity of a court.

207 On the material before this Court and the proper, albeit narrow, interpretation of the HRSO Act, the limit of injustice has not been reached in the application of the HRSO Act to robbery, although it is perilously close. If I had not been satisfied that the HRSO Act, in its legal operation and (so far as can be considered on the material in this case) its practical operation, makes continuing detention orders for robbery an order of last resort in cases of the most serious robberies, then I would have concluded that the HRSO Act was invalid in its application to robbery. But on the proper interpretation of the HRSO Act and on the material before this Court, the circumstances in which the legal and practical operation of the HRSO Act permit a continuing detention order for robbery are justified and cannot be meaningfully distinguished from those circumstances related to the many serious sexual offences and terrorism-related offences for which this Court has upheld continuing detention orders.

Mr Garlett

208 In October 2021, Mr Garlett was due to be released from prison. He had been imprisoned for his first adult offences, involving robbery of a pendant necklace and $20 cash whilst pretending to be armed and in the company of his sister and others[349]. But he was not released. Instead, he was detained in prison following the preliminary hearing of an application under the HRSO Act because, in light of a childhood history of burglaries and robberies, it was thought that there were "reasonable grounds for believing" that he might commit another robbery in the future[350]. Ultimately, however, Mr Garlett was not made the subject of any

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349 *Western Australia v Garlett* (2021) 362 FLR 284 at 287-288 [1]-[4], 342 [232].

350 *Western Australia v Garlett* (2021) 362 FLR 284 at 345 [248]-[249], 347 [259], [263]; HRSO Act, s 46(2)(c)(i).

restriction order. But how did such a possibility arise, and is the HRSO Act invalid on its proper interpretation in its application to robbery?

Repeated experiments with models of unjust punishment

209 In its generalised application to a wide range of offences, Western Australia's approach is recent but not novel. As explained in *Vella v Commissioner of Police (NSW)*[351], historically English courts recognised a general power of preventive detention by orders binding over a person, subject to a pledge of money, if there was sufficient apprehension that the person's activities could breach the peace. And the Court of Chancery granted writs of supplicavit to take a person into custody to restrain anticipated breaches of the peace but "the severity of the apprehended harm that might attract Chancery's intervention increased over time"[352].

210 The foundational legislative innovation came in the *Habitual Criminals Act 1869*[353]. That legislation imposed sweeping changes to respond to the problem of recidivist criminals, including introducing post-sentence police supervision and imprisonment of those offenders who, after release on licence, were reasonably believed by a magistrate to be "getting a livelihood by dishonest means"[354]. "Serious deficiencies in the legislation soon appeared"[355]. Following various attempts[356], the United Kingdom Parliament settled upon the model in the *Prevention of Crime Act 1908* (UK)[357], which empowered courts to impose a sentence of preventive detention in addition to a sentence of imprisonment for an offender found to be a "habitual criminal".

211 The *Prevention of Crime Act* was repealed in 1948[358]. In the second reading speech of the repealing Bill, the Secretary of State for the Home Department said

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351 (2019) 269 CLR 219.

352 (2019) 269 CLR 219 at 236-237 [29].

353 32 & 33 Vict c 99. See also *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 237-238 [31].

354 *Habitual Criminals Act 1869* (32 & 33 Vict c 99), ss 3, 8.

355 Radzinowicz and Hood, *A History of English Criminal Law and its Administration from 1750* (1986), vol 5 at 255.

356 Including the *Prevention of Crimes Act 1871* (34 & 35 Vict c 112).

357 See s 10.

358 *Criminal Justice Act 1948* (UK), s 83(3), Sch 10.

that preventive detention had "failed to achieve any substantial results" and that "[j]udges and juries have hesitated to make use of a procedure that looked, at any rate, as if it involved a double sentence"[359]. Nevertheless, the *Criminal Justice Act 1948* (UK) implemented another version of preventive detention which included, in part, "training of a corrective character" during the detention[360].

212 The 1948 regime remained the subject of criticism. The 1963 Report of the Advisory Council on the Treatment of Offenders concluded that "if preventive detention were abolished and nothing were put in its place the general deterrent effect of the penal system would not be weakened to any significant extent" and, in view of "all the disadvantages of the preventive detention system", proposed that the regime be abolished in its entirety[361]. The regime was abolished in 1967 and replaced with a new scheme that included extended sentences for offences[362]. In the course of the debate and second reading speeches in the House of Commons and House of Lords, the abolished 1948 regime was described as involving "not very useful rigidity of categorisation in our prison system"[363] and as "harsh, unjust, oppressive and totally ineffective"[364]. Its abolition was said to be "long overdue"[365] and made "at long last"[366]. In 1991[367], the "unpopular friend" of the extended

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359 United Kingdom, House of Commons, *Parliamentary Debates*, 29 November 1938, vol 342, col 278.

360 *Criminal Justice Act 1948* (UK), s 21.

361 United Kingdom, Home Office, *Preventive Detention: Report of the Advisory Council on the Treatment of Offenders* (1963) at 23 [58].

362 *Criminal Justice Act 1967* (UK), ss 37, 103(2), Sch 7; *Powers of Criminal Courts Act 1973* (UK), ss 28, 56(2), Sch 6.

363 United Kingdom, House of Commons, *Parliamentary Debates*, 12 December 1966, vol 738, col 64.

364 United Kingdom, House of Commons, *Parliamentary Debates*, 12 December 1966, vol 738, col 121.

365 United Kingdom, House of Lords, *Parliamentary Debates*, 10 May 1967, vol 282, col 1434.

366 United Kingdom, House of Lords, *Parliamentary Debates*, 10 May 1967, vol 282, col 1446.

367 *Criminal Justice Act 1991* (UK), s 101(2), Sch 13.

sentence was (temporarily[368]) "laid to rest" by provisions requiring people "to be sentenced for what they have done, not for what it is feared that they may do"[369].

213 Nevertheless, and yet again, preventive detention was reintroduced by the *Criminal Justice Act 2003* (UK). Section 225 required the court to impose a sentence of imprisonment for public protection on a person convicted of a "serious offence" and not sentenced to life imprisonment, where it was "of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences". A serious offence was one of 65 specified violent offences and 88 specified sexual offences[370].

214 The sentence of imprisonment for public protection was, again, one of the most widely criticised of all categories of sentence in the United Kingdom[371]. At the time that the sentence was introduced, it was estimated that there would be around 900 prisoners serving sentences of imprisonment for public protection[372]. By November 2011, there were 6,500 such prisoners[373]. The rigidity of the regime was diluted in 2008, including with the introduction of judicial discretion[374]. It was

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368 *Crime and Disorder Act 1998* (UK), ss 58-60.

369 United Kingdom, House of Commons, *Parliamentary Debates*, 20 November 1990, vol 181, col 171.

370 *Criminal Justice Act 2003* (UK), s 224, Sch 15.

371 Bettinson and Dingwall, *Challenging the Ongoing Injustice of Imprisonment for Public Protection: James, Wells and Lee v The United Kingdom* (2013) 76 *Modern Law Review* 1094 at 1094.

372 United Kingdom, House of Commons Standing Committee B, 23rd sitting, 11 February 2003, col 917.

373 United Kingdom, House of Lords, *Parliamentary Debates*, 21 November 2011, vol 732, col 825.

374 See *Criminal Justice and Immigration Act 2008* (UK), s 13.

abolished altogether in 2012[375] after being described in Parliament as "discredited"[376], "poorly understood"[377], and "something of a lottery"[378].

215 Concurrently with these failed experiments in preventive detention in the United Kingdom, Australian parliaments introduced preventive regimes involving detention or other restrictions on liberty. As was recognised in *Vella*[379], the Australian regimes were in areas concerning domestic and personal violence, problem gambling that was ancillary to domestic violence, public safety and breaches of the peace, sexual and other dangerous offenders, groups associated with criminal activity, and terrorism. One early regime was the *Habitual Criminals Act 1905* (NSW)[380], which had itself been considered a "useful precedent" for the *Prevention of Crime Act 1908* (UK)[381].

216 Two relevant features of the *Habitual Criminals Act* for the offence of robbery were that an order for preventive imprisonment could only be made if (i) the offender had previously been convicted of robbery on three occasions and (ii) a judge exercised their discretion to declare that the offender was a habitual criminal[382]. There was a further discretion for the Governor to direct the release of an offender who was "sufficiently reformed, or for other good cause"[383].

The interpretation and operation of the HRSO Act

217 An essential preliminary to any assessment of the constitutional validity of the HRSO Act is the interpretation of the Act. That interpretation can be set out in

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375 *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK), s 123.

376 United Kingdom, House of Commons, *Parliamentary Debates*, 29 June 2011, vol 530, col 989.

377 United Kingdom, House of Lords, *Parliamentary Debates*, 21 November 2011, vol 732, col 825.

378 United Kingdom, House of Commons, *Parliamentary Debates*, 1 November 2011, vol 534, col 787.

379 (2019) 269 CLR 219 at 237-238 [31].

380 Replaced by the *Habitual Criminals Act 1957* (NSW).

381 Radzinowicz and Hood, *A History of English Criminal Law and its Administration from 1750* (1986), vol 5 at 273.

382 *Habitual Criminals Act 1905* (NSW), s 3(b), read with the Schedule.

383 *Habitual Criminals Act 1905* (NSW), s 7.

a staged approach in the same manner as *Vella*[384]. The interpretation which follows involves a strict and narrow interpretation of the HRSO Act. It focuses upon the provisions central to the subject of the challenge on this appeal – continuing detention orders – although it is necessary to emphasise that the discretion to make an interim detention order under s 46(2)(c) should only ever be exercised when there are reasonable prospects of a continuing detention order being made and, even then, only as a matter of last resort.

218 Although I consider the narrow interpretation below to be the proper interpretation of the HRSO Act, if there were any doubt about any significant aspect of this interpretation then s 7 of the *Interpretation Act 1984* (WA) would require that narrow interpretation to ensure that its application to robbery did not exceed legislative power.

219 **First**, ss 34 and 35 allow the State of Western Australia to apply for a "restriction order" in relation to an offender, requiring the Court to make a finding as to whether the offender is a "high risk serious offender". Since the Court must assess the risk that the offender will commit "a serious offence", the application must specify the serious offence within Sch 1 to the HRSO Act which the State alleges there is an unacceptable risk that the offender will commit[385].

220 **Secondly**, by ss 7(1) and 7(2), the Court is required to assess the level of risk that the offender will commit the specified serious offence. Before a restriction order must be made, ss 7(1) and 7(2) require the State to prove that there is "an unacceptable risk that the offender will commit a serious offence". The open-textured criterion of "unacceptable", similar to criteria such as "oppressive", "unreasonable", or "unjust"[386], is so closely associated with notions of the "adequate" protection of the community and the "necessity" of the restriction order that it is best addressed at the third stage. The second stage can therefore be limited to an assessment of the level of risk that the offender will commit the specified serious offence.

221 In assessing the level of risk that the offender will commit the specified serious offence, the Court may receive, under s 84(5), an offender's antecedents or criminal record, and anything relevant in the official transcript of a proceeding against the offender. The context of s 84(5), including the requirement in s 7(3)(g)

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384 (2019) 269 CLR 219 at 240-245 [39]-[54].

385 See *Bell v Tasmania* (2021) 96 ALJR 22 at 41 [100]; 395 ALR 589 at 613.

386 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 249 [62].

to consider an offender's antecedents and criminal record, demonstrates an intention that such tender will rarely be refused by the Court[387].

222 Section 84(5) is not, however, a free licence for the Court to draw conclusions about the risk of the specified serious offence from unrelated offending. The offending upon which the Court can place any weight must be relevant to establishing a pattern of behaviour, or a propensity, sufficiently proximate in time, showing a likelihood that the offender will commit the specified serious offence[388]. Before concluding that there is any real risk that the offender will commit the specified serious offence, the State will almost always need to prove that the offender has committed prior offences of the same or similar nature. Even a criminal record of numerous other serious offences might say very little or nothing about a different specified serious offence. For instance, the past commission of an offence of robbery, no matter how serious, is unlikely to reveal anything about the risk of commission of an offence of criminal damage by fire, and vice versa.

223 The assessment of the risk of commission of the specified serious offence is not an exercise of mathematical precision. By ss 7(3)(a) and 7(3)(b)[389], the Court must have regard to expert evidence concerning the offender including psychological and psychiatric evidence. Great caution is required in the treatment of this evidence because risk prediction for serious violence, including sexual violence, has been said to be "plagued by high false-positive rates"[390]. Members of this Court have repeatedly emphasised the notorious difficulties in expert evidence in this area[391], including by reference to comments in literature that "[p]redictions of dangerousness have been shown to have only a one-third to 50% success rate"[392]. Caution should be exercised in evaluating any expert evidence based on generalised psychological tools for assessment of recidivism. A fundamental premise of our criminal law is that individuals, with their vast variety of

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387 Compare *Evidence Act 1906* (WA), s 31A. See HRSO Act, s 82.

388 HRSO Act, ss 7(3)(c), 7(3)(d).

389 Read with HRSO Act, s 46(2)(a).

390 Tonry, *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy* (2004) at 142.

391 See, eg, *Veen v The Queen* (1979) 143 CLR 458 at 464; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 123; *McGarry v The Queen* (2001) 207 CLR 121 at 142 [61].

392 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 623 [124], quoting Warner, "Sentencing review 2002-2003" (2003) 27 *Criminal Law Journal* 325 at 338.

backgrounds and circumstances, should be treated based upon their own circumstances.

224 The expert evidence can be taken into account cautiously, but the level of the risk is ultimately a question for the judge, based upon all the evidence and all the factors in s 7(3). This includes "any other relevant matter" in s 7(3)(j), particularly any evidence given by the offender[393], as well as other restrictions imposed upon the offender (apart from imprisonment, remand in custody, or bail conditions)[394]. For instance, an otherwise substantial risk could become negligible if an offender were already subject to a post-sentence supervision order under ss 74D and 74G of the *Sentence Administration Act 2003* (WA), such as wearing an electronic monitoring device.

225 **Thirdly**, by ss 7(1) and 7(2), before a restriction order must be made the State has the onus of proving that it is "necessary to make a restriction order in relation to the offender to ensure adequate protection of the community" against an "unacceptable" risk. "Community" is defined in terms that include "any community" and is not limited to the community of Western Australia or Australia[395]. It would therefore extend to risks to regional communities within Western Australia or communities outside Western Australia, and arguably even overseas.

226 The requirements that the risk be "unacceptable" and that the restriction order be "necessary" to ensure "adequate" protection of the community direct attention to whether the identified risk to the community can be tolerated. That assessment must be made in light of the whole of the burden which would be placed upon the liberty of the offender by the making of a restriction order, including any standard supervision order conditions[396].

227 Section 7 thus requires balancing, on the one hand, the level of the risk identified at the second stage (that is, the probability of the commission of the specified serious offence) together with the magnitude of the harm associated with that risk with, on the other hand, the burden that would be placed upon the liberty of the offender by a restriction order for an offence that they have not committed[397].

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393 HRSO Act, s 84(3)(b).

394 HRSO Act, s 7(4).

395 HRSO Act, s 4.

396 HRSO Act, s 30(2).

397 See *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 260 [88]. See also *Director of Public Prosecutions (WA) v Williams* (2007) 35 WAR 297 at 312-313 [63]-[65]; *Italiano v Western Australia* [2009] WASCA 116 at [4], [46].

Consider, for example, circumstances adapted from those of Mr Garlett, involving an offender who had a pattern of unplanned and reasonably spontaneous burglaries and robberies as a minor[398]. It would not be necessary to make a restriction order to ensure adequate protection of the community from a small to moderate risk that they might commit a robbery that is not at the higher end of seriousness, especially if that offence were unlikely to involve any actual violence[399].

228 Even if the balancing process favoured the making of a restriction order, it might still be unnecessary to make such an order if, for example, the Court were able to make orders under other legislation, such as post-sentence supervision orders under the *Sentence Administration Act*[400]. Such orders might reduce an unacceptable risk to an acceptable one.

229 **Fourthly**, if the Court concludes that the offender is a high risk serious offender then, by s 48, the Court must make a restriction order. There are two types of restriction orders: continuing detention orders, which impose the most extreme constraint upon liberty, and supervision orders. The discretion in s 48 to choose between a continuing detention order and a supervision order preserves the basic principle of justice that detention in the custody of the State should only be ordered as a matter of last resort[401].

230 As to supervision orders, there is a huge range of possible conditions that deprive an offender of their liberty without custodial detention. The Court should consider the conditions that are "appropriate"[402], in addition to the standard conditions in s 30(2). The requirement of appropriateness imposes a duty on the Court to make only the additional supervision conditions required to ensure "adequate" protection of the community[403], while imposing the minimum intrusion on an offender's liberty[404].

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398 *Western Australia v Garlett* (2021) 362 FLR 284 at 345 [249].

399 See *Western Australia v Amoore* (2008) 182 A Crim R 165 at 176 [50]; *Schischka v Western Australia* [2015] WASCA 15 at [33].

400 *Western Australia v D'Rozario [No 3]* [2021] WASC 412 at [21].

401 *Dinsdale v The Queen* (2000) 202 CLR 321 at 328 [14].

402 HRSO Act, s 27(1).

403 HRSO Act, s 48(2).

404 See *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 243-244 [50]-[51].

231 There is, however, one substantial constraint upon the exercise of the discretion by the Court to impose a supervision order rather than a continuing detention order. By s 29, the Court cannot make a supervision order in relation to an offender unless it is satisfied, on the balance of probabilities, that the offender will substantially comply with the standard conditions of the order, including not committing another serious offence. The offender bears the onus of proof under s 29.

232 The onus on the offender in s 29(1) is not an impossible onus which requires negating the possibility of commission of every variant of the many listed serious offences. In an adversarial system of law, s 29(1) should be interpreted to require only that the offender establish that, with a supervision order imposed, the offender will not, on the balance of probabilities, commit the serious offence, or offences, specified in the State's application[405]. For instance, an offender who is alleged in the State's application to pose an unacceptable risk of committing dangerous driving causing grievous bodily harm need not establish that they do not pose a risk of committing a robbery.

233 Although it is invidious to speak of probabilities in the context of predicting human behaviour, the effect of s 29(1) is that a supervision order cannot be made, and a continuing detention order must be made, if the risk of the commission of the specified serious offence remains more likely than not after taking into account the conditions of the supervision order. Nevertheless, subject to the issues related to legislative facts discussed below, which issues were not before this Court on the appeal, a continuing detention order should be a rare order because s 30(5) permits an almost unlimited range of possible conditions beyond the standard supervision order conditions. In most circumstances, a supervision order should be able to satisfy the Court that the specified serious offence will not be committed on the balance of probabilities[406]. In addition to reporting and electronic monitoring, the long list of possible supervision order conditions includes conditions like those before the Court in *Minister for Home Affairs v Benbrika*[407] such as prohibitions on various associations or attending various locations, home curfew, and even, in extreme cases, home detention requirements.

234 For instance, in the case of an offender such as Mr Garlett, if a restriction order had been considered necessary and if the Court were not otherwise satisfied under s 29(1) that the offender would not commit the serious offence of robbery,

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405 See *Bell v Tasmania* (2021) 96 ALJR 22 at 41 [100]; 395 ALR 589 at 613.

406 Compare, however, *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 214-215 [195]; 388 ALR 1 at 57-58.

407 (2021) 95 ALJR 166 at 214 [194]; 388 ALR 1 at 57. See, in detail, *Lee v Benbrika* [2020] FCA 1723, Annexure A.

it should only require a modicum of legal competence to identify additional supervision order conditions which would satisfy the Court on the balance of probabilities that a robbery would not be committed. Even in more extreme cases where common supervision order conditions would not be sufficient for such satisfaction, it is hard to see how, as a measure of nearly last resort, a condition of home detention could not suffice rather than custodial detention. It is noteworthy that senior counsel for Mr Garlett properly conceded that there was a "clear line" between detention in custody, under a continuing detention order, and home detention, under a supervision order. That correct concession further increases the exceptional nature of a continuing detention order.

235 **Fifthly**, although a continuing detention order is indefinite, the HRSO Act requires periodic reviews. The State is usually required to apply for a review as soon as practicable after the offender has been detained for a year, and every two years thereafter[408]. In exceptional circumstances, the offender can apply for a review of their continuing detention order[409].

236 The State is, in effect, required to provide ongoing justification for a continuing detention order at each review. This is because, by s 68(1)(a), the Court must rescind a continuing detention order unless it makes a finding at the review that the offender remains a high risk serious offender, a matter upon which the State bears the onus of proof[410].

237 On review, if the offender remains a high risk serious offender, s 68(1)(b) ensures that a continuing detention order remains an order of last resort. The discretion to make a supervision order ensures that such an order should be made, in the exercise of discretion, if it could reduce the risk that the offender will commit the specified serious offence to an acceptable level.

The *Kable* principle and its application

238 The *Constitution* preserves the existence of State courts and permits them to be vested with federal judicial power. It tolerates the courts being used as instruments of individual injustice in the pursuit of broader social purposes such as the prevention of future crime. But in a line of cases this Court has held that there is a limit to the extent to which courts can be used as instruments of injustice.

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408 HRSO Act, s 64.

409 HRSO Act, s 65.

410 HRSO Act, s 7(2).

The progenitor of those cases was *Kable v Director of Public Prosecutions (NSW)*[411].

239 In *Kable*, a majority of this Court held invalid a New South Wales law that authorised the further detention in custody of Mr Kable after his sentence of imprisonment had expired. Different reasons were given by the four members of the majority. One member of the majority, Toohey J, took a distinctly different approach from the others. His Honour's conclusion of invalidity was dependent upon his reasoning that the matter was within federal jurisdiction[412]. The first question that then arises is to identify the ratio decidendi of *Kable* – that is, the binding principle of law at an appropriate level of generality that can be identified from the reasons of a majority that is sufficient for the decision[413].

240 No sensible judge or academic author has ever supported an approach to ratio decidendi in appellate courts which requires focus upon a majority agreeing on the resolution of the case by reference to reasoning at every level of particularity. On that bizarre approach, *Donoghue v Stevenson*[414] would have been a dull case with a ratio decidendi concerned with dead snails in ginger-beer bottles[415]. And *Kable* would have no ratio decidendi. Indeed, if ratio decidendi were (erroneously[416]) thought to be the only manner in which a decision could be binding authority then *Kable* would not even be a binding authority. It would, on that view, be open to any counsel to seek to have this Court ignore *Kable* without requiring it to be overturned, and to overturn other decisions that had assumed,

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411 (1996) 189 CLR 51.

412 (1996) 189 CLR 51 at 96.

413 Compare the broader view of ratio decidendi: Goodhart, "Determining the Ratio Decidendi of a Case" (1930) 40 *Yale Law Journal* 161 at 168; Mason, "The Use and Abuse of Precedent" (1988) 4 *Australian Bar Review* 93 at 104.

414 [1932] AC 562.

415 Blackshield, "Ratio decidendi", in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 579 at 579. See also Montrose, "The Ratio Decidendi of a Case" (1957) 20 *Modern Law Review* 587 at 591; Lücke, "Ratio Decidendi: Adjudicative Rationale and Source of Law" (1989) 1 *Bond Law Review* 36 at 44.

416 *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 at 37, referring to *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 479; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 46-47 [133]. See also Oliphant, "A Return to Stare Decisis" (1928) 14 *American Bar Association Journal* 71 at 72-73. See further *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 150-151 [134].

without argument, that the decision had a ratio decidendi. Such an approach to precedent has no merit whatsoever[417].

241 At the appropriate level of generality, the ratio decidendi of *Kable* lies in the common reasoning of all members of the majority that legislation will be invalid to the extent that it confers functions upon a court resulting in what Gummow J described as the "incongruity between the discharge of those functions and the exercise of the federal judicial power"[418]. In an integrated Australian court system which includes State courts as repositories of federal jurisdiction, this doctrine has been applied with respect to the impairment of the institutional integrity of a State court by laws that required the court to act in a manner that is incompatible with, or repugnant to, its institutional integrity[419].

242 The *Kable* doctrine is based upon a presupposition in Ch III of the *Constitution* that Australian courts, including federal and State courts recognised in Ch III of the *Constitution* and possessing, or capable of possessing, federal jurisdiction, remain institutions of justice. Australian parliaments cannot impair the institutional integrity of courts by requiring them to act in a manner that is repugnant to their institutional integrity. The notions of impairment of institutional integrity and repugnancy or incompatibility with that institutional integrity are "not readily susceptible of definition in terms which will dictate future outcomes"[420]. Nevertheless, the repugnancy must usually be in a "fundamental degree"[421]. The threshold for the impairment of such a vaguely stated constitutional presupposition must be very high.

243 The "defining characteristics"[422] of courts that are necessary to preserve substantially their institutional integrity exist in two dimensions. One dimension is formal. It concerns the form in which the power is generally exercised: fair rules of evidence and procedure; independence and impartiality of decision-making; open justice and public decision-making; and the provision of reasons for decision.

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417 See also *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316.

418 (1996) 189 CLR 51 at 127.

419 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15], 593 [23], 598-599 [37], 648 [198], 655-656 [219]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 88-89 [123]; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 424 [40]. See also *Kuczborski v Queensland* (2014) 254 CLR 51 at 98 [139]; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 245-246 [55].

420 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 89 [124].

421 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 132.

422 *South Australia v Totani* (2010) 242 CLR 1 at 43 [62].

These characteristics cannot always be treated as absolute requirements. For instance, without losing their character as courts: courts are sometimes closed; reasons are not given in every matter, however trivial; and procedures might in exceptional cases be unfair to one party. But the substantial impairment of a defining feature of a court can lead to it losing its character as judicial.

244 Under the *Kable* doctrine, it has been held that one defining formal characteristic of courts that cannot be substantially impaired is a court's independence or impartiality, or the appearance of such[423]. The court's institutional integrity might be substantially impaired by a requirement to exercise judicial power without important aspects of procedural fairness[424], without a duty to give reasons on important issues[425], or without an independent curial determination because the court is enlisted to give effect to executive or legislative policy[426].

245 The other dimension of judicial power concerns the substantive effect of the exercise of the power. This encompasses the persons over whom the power is exercised, the orders that can be made in the exercise of the power, and the conditions under which those orders can be made. Under the *Kable* doctrine, the institutional integrity of a court can be unjustifiably compromised where the substantive effect of the exercise of judicial power is such that power, which is judicial in its formal dimension, is exercised unjudicially. That was an essential basis for the conclusion of invalidity in *Kable* itself.

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423 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 116; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29]; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 425 [41].

424 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 470; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 354-355 [54]-[56], 379-380 [140]-[141]; *Wainohu v New South Wales* (2011) 243 CLR 181 at 208-209 [44]; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of Federal Court of Australia* (2013) 251 CLR 533 at 553 [26]-[27]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 72 [68], 99 [156], 106-108 [181]-[188]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 594 [39]; *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 222-223 [223]; 388 ALR 1 at 68.

425 *Wainohu v New South Wales* (2011) 243 CLR 181 at 213-215 [54]-[58], 228 [104]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 594 [39].

426 *South Australia v Totani* (2010) 242 CLR 1 at 52 [82], 66 [142], 67 [149], 92-93 [236], 160 [436], 173 [481].

246 One strand of the reasoning of McHugh and Gummow JJ in *Kable* concerned deficiencies in the formal dimension of judicial power. The legislation was ad hominem, directed only to Mr Kable[427]. This gave the impression that the Court would apply rules as though it were an instrument of government policy[428]. But the formal dimension was not the central focus of the majority. A significant strand of the reasoning of every member of the majority concerned the substantive exercise of the power. The majority all held that the substantive exercise of the power was repugnant to the institutional integrity of the Supreme Court of New South Wales because the Court was required to consider depriving a person of his liberty "in a process designed to bring about the detention of a person by reason of the Court's assessment of what that person might do, not what the person has done"[429]. This was described as imprisonment "not on the basis that they have breached any law, but on the basis that ... they may do so"[430], "not for what he has done but for what the executive government of the State and its Parliament fear that he might do"[431], and "punitive in nature ... not consequent upon any adjudgment by the Court of criminal guilt"[432].

The continuing detention powers in the HRSO Act are punitive

247 It is "fundamental for an understanding of *Kable*"[433] to appreciate that the *Kable* doctrine is distinct from the principles considered in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[434] which are based upon the separation of powers at the Commonwealth level. At the Commonwealth level, the principle of separation of powers divides the powers that can be exercised by the Commonwealth judiciary from those that can be exercised by the Commonwealth Parliament or the Commonwealth Executive. The relevant principle in *Lim*, relied upon by Mr Garlett, was that punishment is generally[435] the

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427 (1996) 189 CLR 51 at 121, 125. See also at 89.

428 (1996) 189 CLR 51 at 124, 134.

429 (1996) 189 CLR 51 at 97.

430 (1996) 189 CLR 51 at 107.

431 (1996) 189 CLR 51 at 120.

432 (1996) 189 CLR 51 at 132.

433 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 614 [86].

434 (1992) 176 CLR 1.

435 *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 211 [181]; 388 ALR 1 at 53.

exclusive province of the judiciary and that involuntary detention of a citizen in custody will often be punitive[436]. But that is a principle concerned with the separation of powers. It says nothing about when punishment will be so unjust that a power to impose it cannot even be exercised by the judiciary.

248 Mr Garlett did not dispute that the constitutional separation of powers considerations that arise at the Commonwealth level do not apply equally at the State level, so the *Lim* principle concerning the separation of powers does not arise in this case. Nevertheless, the character of continuing detention orders as undeserved punishment is relevant to a consideration of whether the HRSO Act in its application to robbery unjustifiably compromises the institutional integrity of the Supreme Court of Western Australia. The reasoning in *Lim* about the nature and character of punishment, expressed in relation to the separation of powers, can inform the answer to this different question, namely: when is power that is of a nature that is generally exclusively judicial so unjust in its operation that it cannot even be exercised by the judiciary?

249 There are passages in the joint judgment in *Benbrika* that appear to contain a premise that an order that is protective cannot also be punitive[437]. For instance, the joint judgment described the object of a continuing detention order as "community protection and not punishment" and as "protective and not punitive"[438]. If this is taken to mean that an order that is protective cannot be punitive then it is plainly wrong. It is a simple logical fallacy to reason that: (i) in some non-punitive instances, detention is imposed for public protection, such as for psychological illness, chemical, biological and radiological emergencies, contagious diseases, and drug treatment[439]; (ii) continuing detention orders are imposed for reasons including public protection; and therefore (iii) continuing detention orders are not punitive. The same logical fallacy would suggest that sentences of imprisonment for most criminal offences are not punitive because they involve community protection considerations of specific and general deterrence.

250 There are also passages in the joint judgment in *Benbrika* that appear to draw analogies between, on the one hand, continuing detention of persons who, based upon their past conduct and the commission of past offences, it is anticipated might commit an offence and, on the other hand, detention of persons due to

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436 (1992) 176 CLR 1 at 27.

437 See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 654 [216]-[217].

438 *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 182-183 [38]-[41]; 388 ALR 1 at 15-16.

439 See, eg, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 654 [217].

psychological illness or infectious disease[440]. Such analogies are, at best, strained. The detention of a person for reasons of psychological illness or infectious disease is not a sanction for behaviour, actual or anticipated. It is not a response to any choices made by the person detained. A person chooses to commit an offence. A person does not choose to suffer from psychological illness or infectious disease.

251 Elsewhere, however, the joint judgment in *Benbrika* suggested that the term "punishment" was only being used in the narrow sense of sanctioning an offender "for the offence for which [they were] sentenced" or "for the offences of which [they] had been convicted"[441]. Only in this narrow, contrived sense of punishment could the legislation considered in *Benbrika* be said not to be punitive. The law should, however, avoid mealy-mouthed euphemisms. The relevant legal and constitutional sense of punishment does not require "extraordinarily narrow and formalistic reasoning"[442]. And, as explained above, preventive detention has historically been recognised for what it is. It is a form of punitive order[443]. As a matter of substance, and whether or not it is described as "coercive"[444], the continuing detention of an offender under a regime such as the HRSO Act applies a sanction to enforce a norm of behaviour[445]. It differs from traditional criminal punishment in that the sanction looks forward to future behaviour rather than backwards to past behaviour[446]. But the order is punitive.

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440 See, eg, *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 180 [32]; 388 ALR 1 at 13.

441 *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 182-183 [40]-[41]; 388 ALR 1 at 16.

442 Dyer, "*Minister for Home Affairs v Benbrika* and the Capacity of Chapter III of the *Commonwealth Constitution* to Protect Prisoners' Rights" (2022) 45 *University of New South Wales Law Journal* 209 at 238. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 589 [11], 612-613 [81]-[82]; *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 219-220 [212]-[214]; 388 ALR 1 at 63-65.

443 See also *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 254-255 [78]; *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 219 [212]; 388 ALR 1 at 63-64.

444 *Witham v Holloway* (1995) 183 CLR 525 at 534.

445 See *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 612-613 [241]-[246]; 401 ALR 438 at 498-500.

446 *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 216-217 [202]; 388 ALR 1 at 60.

252 In *Lim*[447], Brennan, Deane and Dawson JJ (with Gaudron J relevantly agreeing on this point) treated punishment as a matter of substance rather than form when they explained that the adjudication and punishment of criminal guilt has "become established as essentially and exclusively judicial in character". Their Honours went on to describe the concern as being "with substance and not mere form"; it was not open to the Parliament to "invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt".

253 This reasoning applies, a fortiori, to detention which continues the imprisonment of an offender after a sentence has been served. Thus, in *Chester v The Queen*[448] this Court spoke of the "stark and extraordinary nature of punishment by way of indeterminate detention" which "permit[s] the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender". As five members of this Court recognised when considering the Queensland preventive detention legislation in *Fardon v Attorney-General (Qld)*[449], the punitive character of the indefinite detention does not change according to whether it is imposed at the time of sentencing or later. That legislation was also rightly recognised as penal by both the majority and the minority of the United Nations Human Rights Committee in *Fardon v Australia*[450].

254 The fiction that continuing detention orders are not punitive is further evident in the requirement that the offender remain in a prison during the term of continuing detention. As Professor Radzinowicz observed, if preventive detention really were not punishment then "an institution for preventive detention ought to be so organized that it actually differs from [a] prison"[451]. Continuing detention orders are "enhanced repression, that is ... a punishment more severe than that envisaged by the code for the offence under trial just because of the previous,

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447 (1992) 176 CLR 1 at 27, 53.

448 (1988) 165 CLR 611 at 618-619. See also *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 217 [203]; 388 ALR 1 at 60-61.

449 (2004) 223 CLR 575. See the discussion in *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 219-220 [214]; 388 ALR 1 at 64-65, referring to *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 589 [11], 596-597 [34], 610 [74], 611 [77], 612-613 [81]-[82], 631 [147], 644 [185], 647-648 [196].

450 United Nations Human Rights Committee, Communication No 1629/2007 (*Fardon v Australia*), UN Doc CCPR/C/98/D/1629/2007 (2010).

451 Radzinowicz, "The Persistent Offender" (1939) 7 *Cambridge Law Journal* 68 at 72.

heavily marked criminal record of this category of offenders"[452]. As Winston Churchill observed, "it ought not to be imagined by the courts or by the public, that a period of prolonged confinement ... within the walls of a prison ... is not, whatever name it may be called by, a most serious addition to any other punishment"[453].

255 Continuing detention orders under the HRSO Act are appropriately described as "protective punishment"[454].

Unjust punishment, by itself, is insufficient to invalidate a law

256 Legislation can require, and historically has required, courts to act for what is perceived to be the public good despite injustice to the individual before the court. As explained above, there is a long history of courts participating in, and perpetuating, the injustice of punishment by a continuing detention order to protect the public from an objectively serious offence that has not been committed and might never be committed. In *Kable*, the existence of this injustice was not by itself a sufficient impairment of the institutional integrity of the Court. Nor was it sufficient in *Fardon* or in *Benbrika*. In *Fardon*[455], six members of this Court upheld the validity of continuing detention orders for serious sexual offenders under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). And in *Benbrika*[456], five members of this Court upheld the validity of continuing detention orders for terrorism-related offenders under s 105A.7 of the *Criminal Code* (Cth).

257 Nevertheless, as *Kable* demonstrates, although legislation that imposes unjust punishment for an objectively serious offence will not be invalid for that reason alone, there will come a point at which the goal of public protection cannot justify the extent of injustice and the consequent sacrifice of the court's institutional integrity. The issue, to adopt the words of the joint judgment in *Benbrika*[457], is whether the legislation is an "appropriately tailored scheme for the protection of the community from the harm that particular forms of criminal activity may pose". Although courts can be used as instruments of unjust punishment in order to protect

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452 Radzinowicz, "The Persistent Offender" (1939) 7 *Cambridge Law Journal* 68 at 68.

453 See Radzinowicz and Hood, *A History of English Criminal Law and its Administration from 1750* (1986), vol 5 at 279.

454 *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 216 [198]; 388 ALR 1 at 59.

455 (2004) 223 CLR 575.

456 (2021) 95 ALJR 166; 388 ALR 1.

457 (2021) 95 ALJR 166 at 180 [32]; 388 ALR 1 at 13.

the community from apprehended harm, a scheme that is not appropriately tailored will unjustifiably compromise the institutional integrity of a federal, State or Territory court by requiring the court to perpetuate individual injustice of a magnitude, and in a manner, that cannot be justified by the incremental social benefit of the law.

258 In my reasons in *Benbrika*, I considered how the point might be identified at which legislation is no longer appropriately tailored because the social purposes, such as adequate protection of the community and treatment of offenders, no longer justify the individual injustice of continuing detention[458]. One circumstance is where, based on the legal operation or practical effect of the legislation, the purposes of the protective punishment could easily be met to the same extent by reasonable alternatives which are less invasive upon liberty. Another is where the purposes of the protective punishment, assessed primarily by reference to the importance placed upon those purposes by Parliament, are slight or trivial compared with the extent of the constraint upon liberty.

259 Like the legislation considered in *Kable*, the legislation considered in *Fardon* and *Benbrika* involved the individual injustice of preventive detention for very serious offences. But unlike the legislation considered in *Kable*, there were few obstacles to justifying the legislation considered in *Fardon* and *Benbrika* based on the formal dimension of judicial power. As Gleeson CJ said in *Fardon*[459], the legislation considered in that case "authorise[d] and empower[ed] the Supreme Court to act in a manner which is consistent with its judicial character". And as I said in *Benbrika*[460], there were many aspects of the legislation considered in that case that required that the power "be exercised in a judicial manner".

Can the individual injustice of the HRSO Act be justified?

The legal operation of the HRSO Act

260 The objects of the HRSO Act are to "ensure adequate protection of the community and of victims of serious offences" and also to "provide for the continuing control, care or treatment of high risk serious offenders"[461]. The legal operation of the HRSO Act is the starting point for assessing "reasonable necessity", namely the availability of any reasonable, less restrictive alternatives

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458 (2021) 95 ALJR 166 at 223-224 [226]-[227]; 388 ALR 1 at 69.

459 (2004) 223 CLR 575 at 592 [19].

460 (2021) 95 ALJR 166 at 226 [234]; 388 ALR 1 at 72.

461 HRSO Act, s 8.

that could achieve these purposes as effectively. It is also the starting point for assessing the adequacy of that legislation in the balance.

261 There are two aspects of the HRSO Act in its application to robbery that present significant issues for reasonable necessity and adequacy in the balance. Both aspects concern the substantive operation of the HRSO Act. In its formal dimension, the HRSO Act satisfies the key requirements for the exercise of judicial power. The HRSO Act requires the Court to hear admissible evidence given by or on behalf of the offender[462]. It provides that proceedings under the Act "are to be taken to be criminal proceedings for all purposes"[463], which incorporates protections under the *Criminal Procedure Act 2004* (WA) and the *Evidence Act 1906* (WA). The rules of evidence generally apply[464]. The HRSO Act also requires the Court making a restriction order to "give detailed reasons for the order"[465]. And, despite the detailed submissions of Mr Ryan, as amicus curiae in support of the contrary conclusion, the Supreme Court of Western Australia is not invalidly enlisted to give effect to legislative and executive policy. The real difficulties in justifying the HRSO Act in its application to robbery concern the substantive dimension of judicial power.

1. Continuing detention as a possible order for less serious robberies

262 If the HRSO Act permitted a continuing detention order for all robberies, then there would be two difficulties for justification which, at least in combination, would be likely to invalidate the Act in its application to robbery.

263 The first difficulty is the wide range of seriousness of robbery offences. In this respect, robbery differs from serious sexual offences and terrorism-related offences. The serious sexual offences to which the legislation considered in *Fardon* responded were sexual offences involving violence or against children. And the terrorism-related offences to which the legislation considered in *Benbrika* responded involved conduct "connected with action which strikes at the heart of a civilised society"[466] and which "poses a singular threat to civil society"[467]. No offence in the range of serious sexual offences or terrorism-related offences

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462 HRSO Act, s 84(3)(b).

463 HRSO Act, s 82(1).

464 HRSO Act, s 84(4).

465 HRSO Act, s 28.

466 (2021) 95 ALJR 166 at 224 [229]; 388 ALR 1 at 70.

467 (2021) 95 ALJR 166 at 181 [36]; 388 ALR 1 at 14.

covered by the *Fardon* and *Benbrika* legislation could be described other than as a serious offence.

264 By contrast, the offence of robbery, under s 392 of the *Criminal Code* (WA), involves stealing a thing with the use, or threatened use, of violence to a person or property in order to obtain the thing or overcome resistance to it being stolen. Although the maximum term of imprisonment for robbery in circumstances of aggravation is life imprisonment, the offence need not be serious. Towards the lowest level of seriousness, robbery could be committed in circumstances as trivial as an 18-year-old offender demanding possession of a $1 comic book known to be owned by his friend, by threatening to tear some of the pages if it is not permanently given by the friend to the offender. Whilst the triviality of this offence is such that it might never be charged, s 6(a) of the HRSO Act extends the application of the Act to robberies that might never be the subject of a charge.

265 It must be emphasised that the difficulty in justifying the application of the HRSO Act to less serious offences of robbery does not depend upon any distinction between "[p]revention of harm" and "prevention of commission of a criminal offence"[468]. The invidiousness of such a distinction is illustrated by the difficulty, perhaps absurdity, of attempting to identify which criminalised acts of assistance in the commission of terrorist offences do not involve "harm"[469]. The policy choice of the Parliament of Western Australia to treat robbery as a crime that always involves harm to the public must be respected. But, as the sentencing discretion rightly recognises, the harm might be very minimal.

266 The difficulty in justifying the potential application of the HRSO Act to all robberies arises because the Act could, as effectively, achieve its purposes without permitting continuing detention orders for anticipated robberies that are not objectively serious. This Court has said that the "extension of a sentence of imprisonment which would violate the principle of proportionality can scarcely be justified on the ground that it is necessary to protect society from crime which is serious but non-violent"[470]. That reasoning applies, a fortiori, when the crime is both non-serious and non-violent. It is hard to conceive of any circumstances where the adequate protection of the community (including potential victims) requires the continuing detention of a person solely on the basis that it is predicted,

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468 See *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 225 [231]; 388 ALR 1 at 71. Compare (2021) 95 ALJR 166 at 191 [79]; 388 ALR 1 at 27. Compare also Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 1 at 9.

469 Compare *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 195 [101]; 388 ALR 1 at 32.

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

by means of dubious validity, that the person is likely to commit a robbery at the lower end of seriousness. Further, it is at least arguable that an order for continuing detention of such a predicted offender might undermine, rather than advance, any care or treatment of that person.

267 A second difficulty in justifying the application of continuing detention to any offence of robbery is the apparent absence of balance between, on the one hand, the limited need to protect the community from the commission of robberies that are not objectively serious and, on the other hand, the extreme constraint upon liberty imposed by continuing detention orders.

2. The lack of discretion as to whether to make a restriction order

268 Another notable feature of the HRSO Act which raises issues for the substantive dimension of judicial power is the lack of judicial discretion in s 48 as to whether to make a restriction order. This contrasts with the discretion contained in the sexual offender legislation considered in *Fardon*, which provided that if the court is satisfied that there is an unacceptable risk that the prisoner will commit a serious sexual offence, the court "*may* order" continuing detention or supervision[471]. It also contrasts with the discretion contained in the terrorism legislation considered in *Benbrika*, which provided that a court "*may* make a written order under this subsection"[472].

269 The absence of judicial discretion as to whether to make a restriction order could be very significant in the absence of an appropriately narrow interpretation of the HRSO Act. For instance, on an interpretation of the HRSO Act which neglected the third and fourth stages set out above, if the Court were to conclude that a person is a high risk serious offender on the basis of a high risk that the person will commit a robbery at the lower end of seriousness, then the combination of s 29(1) and the lack of judicial discretion in the making of a restriction order in s 48 could have a perverse effect. An offender who was thought to be at high risk of committing a very minor robbery – threatened damage to a cheap comic book – would be subject to the grossly disproportionate order of continuing detention if the offender could not prove that a supervision order would make the offender unlikely to commit any anticipated minor offending falling within Sch 1.

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471 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s 13(5) (emphasis added). See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592 [19], 597 [34], 602 [44]. Compare at 619 [109].

472 *Criminal Code* (Cth), s 105A.7(1) (emphasis added). See *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 175 [11], 186-187 [58], 199 [123], 213 [189]; 388 ALR 1 at 6-7, 21, 37-38, 55. See also *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 245 [54].

The practical operation of the HRSO Act

270 Since the HRSO Act was very recently enacted, Mr Garlett was not in a position to make submissions about the practical operation of the HRSO Act. Nevertheless, it is necessary to observe that the practical operation of the Act may, in future, raise significant difficulties in justifying continuing detention orders, particularly as the level of objective seriousness of the "serious offences", or the level of objective seriousness of the circumstances of those offences, diminishes.

271 Although this Court had no legislative facts before it on the subject, one potentially significant issue in the practical operation of the HRSO Act was referred to in the written submissions for Mr Ryan. That issue is what Quinlan CJ, referring to the predecessor legislation to the HRSO Act, described as a "Catch-22"[473]. The Catch-22 arises where a continuing detention order must be made before the State will provide an offender with treatment, which is in turn necessary to prevent them from being subject to an order for continuing detention. That Catch-22 would show a practical operation of the HRSO Act that is contrary to its expressed purposes. It would provide a strong foundation for a submission that the significant individual injustice manifested by the HRSO Act is unjustified by its purposes. As Quinlan CJ rightly said, it is "in the interests of the community, and its protection from offending, that an offender with known treatment needs have those treatment needs addressed *before* consideration is given to their release under supervision not, as is the case, afterwards"[474].

272 The same concern has been reiterated in proceedings under the HRSO Act. This suggests that its practical operation might, not uncommonly, be subject to the same issues[475]. In this matter, however, probably due to the recent nature of the HRSO Act, there was no evidence about these issues before Corboy J and there is insufficient information before this Court for any legislative fact to be found concerning the extent to which the Catch-22 arises under the HRSO Act.

273 Another significant issue may be the disproportionate effect that the HRSO Act has on Indigenous Australians for reasons that do not bear upon any of the purposes of the HRSO Act. That effect might be manifest in relation to Indigenous Australians who do not have permanent or fixed accommodation. As the Australian Law Reform Commission has observed, "Aboriginal and Torres Strait Islander peoples are ... disproportionately represented in the homeless population

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473 *Western Australia v Rao* [2019] WASC 93 at [135]-[136].

474 *Western Australia v Rao* [2019] WASC 93 at [137] (emphasis in original).

475 *Western Australia v ACW [No 2]* [2020] WASC 480 at [136]-[137]; *Western Australia v Mackay [No 2]* [2020] WASC 474 at [122]; *Western Australia v ACJ* [2021] WASC 219 at [268]-[270].

... accounting for 28% of homeless people [in 2011]"[476]. Those persons might be deprived of the possibility of a supervision order, and subjected to a continuing detention order, only because they are unable to prove, as required by ss 29(1), 30(2)(a), and 30(2)(c), that they will advise a community corrections officer of their address and every change in their place of residence during the period of the order[477].

274 Any disproportionate effect of the HRSO Act upon Indigenous Australians might be exacerbated by psychological or psychiatric reports to which the Court must have regard[478]. In 2019, it was observed that Australian practitioners in this field "do not have access to risk assessment instruments that have been developed and validated for Australian populations and therefore use instruments that were developed for North American and European populations". The authors continued[479]:

> "Practitioners' use of non-validated instruments to assess Indigenous Australians is particularly problematic because people from this population group are significantly over-represented in the criminal justice system. ...
>
> Scholars have been writing about the role of ethnicity in the assessment of offenders for many years. There has specifically been an ongoing debate regarding the use of risk assessment instruments developed in North America to assess Indigenous people since the beginning of this decade to the present. The few Australian authors who write about this topic are mostly sceptical about the propriety of using non-validated instruments to assess Indigenous Australian offenders."

275 Such practical effects cannot be assessed without sufficient material before this Court from which inferences concerning these matters can be drawn. Nevertheless, the disproportionate application of continuing detention orders to Indigenous Australians has been noticed under the Queensland preventive detention legislation considered by this Court in *Fardon*. During the debate on that proposed legislation in Parliament, it was said that it would apply only to

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476 Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2017) at 71 [2.61].

477 See also *Western Australia v ACW [No 2]* [2020] WASC 480 at [132]-[133].

478 HRSO Act, ss 7(3)(a), 7(3)(b), 46(2)(a). Above at [223].

479 Allan et al, "Assessing the Risk of Australian Indigenous Sexual Offenders Reoffending: A Review of the Research Literature and Court Decisions" (2019) 26 *Psychiatry, Psychology and Law* 274 at 275 (footnotes and in-text citations omitted).

"approximately a dozen or so very, very serious offenders, most of whom have been in prison for a long time"[480]. In 2021, in *Attorney-General for the State of Queensland v Thaiday*[481], Applegarth J said:

> "Over time, however, it has swept up scores of Indigenous men who are not paedophiles, but who pose a risk of committing a serious sexual offence when they are intoxicated by alcohol or drugs. The Act is a blunt instrument for these offenders. It is poorly-designed to address the long tail of Indigenous disadvantage in this State. It also is a very expensive way to address the risk of reoffending by individuals whose problems are associated with prejudiced upbringings in places like Palm Island, histories of alcohol and substance abuse, entrenched anti-social attitudes, distorted senses of entitlement towards women, homelessness and poverty."

276 Issues of this nature were not unnoticed in Parliament at the time that the HRSO Act was passed. In relation to the inclusion of the offence of burglary, if committed in specified circumstances, as a serious offence in Sch 1 to the HRSO Act – that being the only provision which has not yet come into operation – the Attorney-General cogently observed[482]:

> "The Legislative Council decided in its wisdom that aggravated burglary should be included. I have to say, this was of some concern to the State Solicitor and the Director of Public Prosecutions, because that can bring in so many people who have not committed an actual violent offence ... I thought that all members of the chamber contributed to the third reading speech in a most positive way on the reduction of Indigenous prisoner rates. We know that a lot of burglaries are committed by young Indigenous people who have fled their home because it is too violent at night. They wander the streets of some of our regional towns like Kununurra, Halls Creek, Fitzroy, Kalgoorlie and other towns, enter homes and steal for food. We did not want to capture all these people in this; we would never reduce the Indigenous prisoner rate. Do not forget that these people have served the actual term for their offence. So, aggravated burglary was eventually included, but not if the only circumstance of aggravation was being in company."

277 The inclusion of burglary as a serious offence in the HRSO Act may have significant and separate problems of justification. But an assessment of the impact

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480 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 June 2003 at 2581.

481 [2021] QSC 227 at [17].

482 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 25 June 2020 at 4482.

of such practical effects upon the validity of continuing detention orders under the HRSO Act for robbery, or possibly burglary, must await a case which raises those legislative facts.

On the material before this Court, the HRSO Act is justified in relation to robbery

278 Since the only substantial concerns in justifying the HRSO Act in its application to robbery, on the facts of this case, relate to the legal operation of the HRSO Act, it is essential to assess those concerns in light of the proper interpretation of the HRSO Act. The five interpretive stages set out above adopt a narrow interpretation that answers these concerns. That narrow interpretation is the best understanding of the HRSO Act, which has a broad premise of depriving persons of liberty only where it is necessary to ensure adequate protection of the community. Even if the narrow interpretation were not the proper interpretation, s 7 of the *Interpretation Act* would require the relevant provisions to be read down in this manner in order to prevent the invalidity of the HRSO Act in its application to robbery.

279 Both of the issues considered above, concerning justification of the legal operation of the HRSO Act, relate to the possibility of a continuing detention order being imposed for the anticipated commission of a robbery that is not objectively serious and involves little individual or social harm. On the proper interpretation of the HRSO Act, no restriction order can be made unless, by the third stage in the interpretive process, the probability of the specified serious offence being committed, together with the magnitude or seriousness of the harm that would result, outweighs the burden placed upon the liberty of the offender by a restriction order for an offence that they have not committed.

280 Applied correctly, therefore, even a judicial assessment of a high probability of an offender committing a robbery would not be sufficient for a restriction order if the anticipated robbery is of a low level of seriousness. Even where an anticipated robbery is sufficiently serious to engage s 7 of the HRSO Act, any concerns arising from the lack of judicial discretion to refuse a restriction order are resolved by the fourth stage of the interpretive process. Given the vast range of possible supervision orders, including even home detention, it should not require more than a modicum of ingenuity to devise supervision orders that will suffice for an offender to establish that they will satisfy the conditions of a supervision order, including not committing the specified serious offence. A continuing detention order would not then be made.

281 Mr Garlett's challenge on this appeal was concerned only with continuing detention orders; supervision orders for anticipated offences of robbery would be invalid only if inseverable in the legislative scheme from continuing detention orders. An important part of the scheme is the discretion to make a supervision order rather than a continuing detention order. That discretion would almost invariably be exercised, other than in the most extreme cases which involve

offenders who cannot be the subject of a supervision order. The existence of this "internal" discretion is a reasonable alternative to a discretion as to whether any restriction order should be made. And, in light of the extreme circumstances necessary for a continuing detention order, it cannot be said that the purposes of the protective punishment are slight or trivial compared with the extent of the constraint upon a person's liberty for an anticipated offence.

Conclusion

282 It is of paramount importance to these reasons to emphasise that, on its proper interpretation, the HRSO Act does not permit the imposition of continuing detention orders for any robbery. In its application to robberies, the HRSO Act permits restriction orders only for anticipated robberies with a sufficiently high degree of seriousness and a sufficiently high magnitude of harm to justify a restriction order that deprives a person of their liberty for an offence that they have not committed. Even then, the restriction order will only be a continuing detention order as a matter of last resort.

283 The real question on this appeal, in the absence of any particular legislative facts, is therefore whether the HRSO Act is invalid in its application to robbery in those extreme cases in which continuing detention orders would be imposed. On its proper interpretation, which involves a very narrow application of continuing detention orders, and in light of the decisions of this Court in *Fardon*[483] and *Benbrika*[484], that question must be answered in the negative. As explained at the outset of these reasons, any attempt to distinguish the seriousness of extreme cases of robbery from the sexual offences that were the subject of the legislation considered in *Fardon* is a futile enterprise because the categories are not independent[485].

284 Whether or not a continuing detention order for an offence that has not been committed can ever be morally justified, the *Constitution* does not prohibit the Parliament of Western Australia from empowering a court to impose that injustice in the extreme circumstances of an anticipated robbery as permitted by the proper interpretation of the HRSO Act.

285 I agree with the orders proposed by Kiefel CJ, Keane and Steward JJ.

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483 (2004) 223 CLR 575.

484 (2021) 95 ALJR 166; 388 ALR 1.

485 See, eg, *Western Australia v Hussian* [2020] WASCA 186.

286 GLEESON J. Legislation providing for a court to order the detention of an offender following completion of (or otherwise in excess of) a sentence of imprisonment was found to be valid in *Fardon v Attorney-General (Qld)*[486], *Pollentine v Bleijie*[487] and *Minister for Home Affairs v Benbrika*[488]. In *Fardon* and *Pollentine*, which concerned State legislation, the standard of constitutional validity engaged was that identified in the decision of *Kable v Director of Public Prosecutions (NSW)*[489], and which has been stated in terms that State (or Territory[490]) legislation may not validly confer upon a court that is a potential repository of federal jurisdiction a function that substantially impairs that court's institutional integrity, such an impairment being incompatible with the court's constitutional position as a potential repository of federal judicial power[491]. In *Benbrika*, which concerned Commonwealth legislation, the standard of validity engaged was instead supplied by the principle of separation of federal judicial power from the executive and legislative powers of the Commonwealth[492].

287 Of these decisions, *Fardon* is most relevant to this case. *Fardon* concerned the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ("the DPSO Act"). The appellant did not challenge the correctness of *Fardon* (or any other decision in which this Court has found legislation providing for preventive orders to be valid). Instead, the appellant contends that, unlike the DPSO Act, the *High Risk Serious Offenders Act 2020* (WA) ("the HRSO Act") offends the *Kable* principle insofar as the HRSO Act applies to a person who has been convicted of robbery.

288 It was recognised in *Fardon* that the DPSO Act raised "[s]ubstantial questions of civil liberty" and "difficult questions involving the reconciliation of

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486 (2004) 223 CLR 575.

487 (2014) 253 CLR 629.

488 (2021) 95 ALJR 166; 388 ALR 1.

489 (1996) 189 CLR 51. In *Kable*, legislation of that general kind, but which had the exceptional feature of being *ad hominem*, was held invalid.

490 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 425 [42].

491 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 246 [55] (quoting *Emmerson* (2014) 253 CLR 393 at 424 [40]), 274-275 [138].

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

rights to liberty and concerns for the protection of the community"[493]. Those questions are magnified in relation to the HRSO Act to the extent that the Act has the potential to apply to more offenders and may operate to protect the community from a wider array of harms.

289 The present case may demonstrate the harsh potential of the HRSO Act: the State of Western Australia sought a continuing detention order from the Supreme Court of Western Australia ("WASC")[494] in respect of a young offender who has spent little of his adolescent and adult life outside of prison. His most recent imprisonment followed a conviction for aggravated armed robbery involving threats of violence but no physical violence, and no weapon but a pretence of being armed with a handgun. However, as it turned out, no continuing detention order was made. Prior to the hearing of the application, the State advised the Court that the State would seek only a supervision order[495], and, ultimately, the State's application was refused. The appellant was not considered to have a propensity to commit any particular "serious offence" as defined in the HRSO Act. Rather, the Court's conclusion was that the appellant had a tendency to commit offences more generally, particularly when in antisocial company and when under the influence of illicit substances.

290 In any event, and as in *Fardon*, this case may not be decided upon the basis of concerns about the legislative policy of preventive detention as provided for in the State legislation under challenge. The appellant argued that the case raises for consideration whether the regime in the HRSO Act, designed to protect the community, might render preventive detention so commonplace that its application by the WASC is offensive to the Court's institutional integrity. Put another way, does the HRSO Act provide for so much preventive detention that its application should be impugned as a "grossly unjudicial chore"[496]? The Court's capacity to address broad questions of this kind meaningfully is limited: its task is confined to

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493 (2004) 223 CLR 575 at 586 [3], 592 [20]. In *Fardon v Australia*, the United Nations Human Rights Committee found that the DPSO Act violated Mr Fardon's rights under Art 9 para 1 of the International Covenant on Civil and Political Rights: Communication No 1629/2007, UN Doc CCPR/C/98/D/1629/2007 (2010) at [7.4].

494 As provided for in ss 3 and 26(1) of the HRSO Act, a continuing detention order is "an order that the offender be detained in custody for an indefinite term for control, care, or treatment".

495 As provided for in ss 3 and 27(1) of the HRSO Act, a supervision order is "an order that the offender, when not in custody, is to be subject to stated conditions that the court considers appropriate", where the imposition of those conditions is governed by s 30.

496 See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 133.

determining the narrow issue of the validity of the HRSO Act in its application to a person who is under a custodial sentence for robbery.

291 I agree with the plurality that the function of the WASC under the HRSO Act in its application to the offence of robbery is materially indistinguishable from the function conferred upon the Supreme Court of Queensland ("QSC") by the DPSO Act. Accordingly, the appellant's challenge to the validity of the HRSO Act must fail. I generally agree with their Honours' reasons that the Act is not offensive to the institutional integrity of the WASC but add the following observations.

State power to make laws for involuntary detention by the state

292 Despite early criticisms[497], the statement referred to in *Benbrika* by the plurality as the "*Lim* principle"[498] and by Gageler J in the present proceeding as the "*Lim* observation"[499], namely that, exceptional cases aside, "the involuntary detention of a citizen in custody by the [s]tate 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"[500], is now well accepted as a statement of a constitutional limit upon Commonwealth legislative power[501]. In *Benbrika*, the plurality considered that a preventive detention regime imposed by Commonwealth legislation was valid as an exception to the "*Lim* principle"[502]. Noting that the decision in *Lim* itself illustrated that the categories of exceptional cases of legal non-punitive detention are not closed, the plurality in *Benbrika* did not accept that the exceptions were either confined by history or insusceptible of analogical development. For their Honours, it was the protective purpose of the relevant legislation that qualified the judicial power conferred by

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497 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 109-110; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 24 [57]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 648-649 [258].

498 *Benbrika* (2021) 95 ALJR 166 at 177 [15]; 388 ALR 1 at 8-9.

499 Reasons of Gageler J at [110]-[111].

500 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27.

501 *Benbrika* (2021) 95 ALJR 166 at 177-178 [19], 187-188 [65], 200-201 [134], 211 [181], 212 [185]; 388 ALR 1 at 10, 22, 39-40, 53, 54; *The Commonwealth v AJL20* (2021) 95 ALJR 567 at 576 [22]-[23], 587 [78], 599 [128]; 391 ALR 562 at 569-570, 584, 598.

502 *Benbrika* (2021) 95 ALJR 166 at 181 [36], 185 [47], 185-186 [53]; 388 ALR 1 at 14, 19, 20.

the legislation as "an exception to a principle that is recognised under our system of government as a safeguard on liberty"[503].

293 It has been suggested that the *Lim* principle operates as a limit upon the legislative power of the States, as a principle that identifies functions that are incompatible with the institutional integrity of a State court that is the concern of the *Kable* principle. In the absence of a challenge to *Fardon*, the question was not fully argued. It would be a significant step to conclude that the *Lim* principle operates as an additional constraint on State (and Territory) legislative power, over and above the *Kable* principle.

294 There can be no doubt that the generally penal or punitive character of involuntary detention of a citizen (or any person) in custody does not depend upon whether "the [s]tate"[504] effecting the detention is the Commonwealth, or an Australian State or Territory. Further, at least as a matter of empirical fact, it is the norm throughout Australia that involuntary detention exists only as an incident of the exercise of judicial power to adjudge and punish criminal guilt. However, the *Lim* principle was articulated as a constitutive part of the doctrine of the separation of Commonwealth judicial power[505], not as a doctrine about the nature of Ch III courts or the characteristics of Ch III courts that are essential to the institutional integrity of those courts, and not in answer to a question about the scope of State legislative power.

295 This Court in *Fardon* did not treat the *Lim* principle as relevant to the constitutional validity of the DPSO Act, despite an argument (made by the Attorney-General for the Commonwealth) that the DPSO Act would have been valid if enacted as Commonwealth legislation (thereby testing the Act against the *Lim* principle) and despite an argument (made by the appellant in that case) that the Act was invalid as a Bill of Pains and Penalties, because it inflicted punishment without a judicial trial[506].

296 Rather, the majority Justices focussed squarely on whether the DPSO Act impaired the institutional integrity of the QSC in terms of its independence and impartiality. In this regard, the judgments are consistent with the well-established separation between the *Kable* principle (which relevantly defines limits upon State

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503 *Benbrika* (2021) 95 ALJR 166 at 181 [36]; 388 ALR 1 at 14.

504 In the sense of that phrase as used in *Lim* (1992) 176 CLR 1 at 27.

505 *Lim* (1992) 176 CLR 1 at 27-29.

506 *Fardon* (2004) 223 CLR 575 at 578, 580.

legislative power) and the doctrine of the separation of Commonwealth judicial power (which relevantly limits Commonwealth legislative power)[507].

297 The common conclusion of the majority Justices in *Fardon* was that the DPSO Act did not impair the institutional integrity of the QSC, and so did not transgress limits imposed by Ch III of the *Constitution*. Further, while it is true to say that the legislation in *Fardon* was directed to a particular class of sexual offender, none of the majority Justices in *Fardon* reasoned by reference to the special nature of sexual offences, or the exceptional character of the DPSO Act as a scheme tailored to address specific community fears about sexual crimes, or its limited operation, because the legislation was directed to what might be thought to be a very small number of offenders. Nor did their Honours focus attention upon the nature of the risk assessment that the QSC was required to undertake, beyond observing that it involved an evaluative exercise that the Court was well equipped to undertake[508]. Their Honours did not express concerns about the "borrowing of judicial services to do the work of the legislature or the executive"[509], or about the potential "blur[ring]" of institutional boundaries[510].

298 Although not explicitly addressed to the application of the *Lim* principle, there are several passages in the majority judgments in *Fardon* that are inconsistent with the *Lim* principle as a test for whether State legislation offends the institutional integrity of a State court.

299 Gleeson CJ perceived "the case of the prisoner who represents a serious danger to the community upon release" as an "almost intractable problem" for the criminal justice system, but one which may warrant a legislative response which considers "the protection of the safety of citizens in light of the rights and freedoms accepted as fundamental in our society"[511]. The Chief Justice cited, with apparent approval, Deane J's observation in *Veen v The Queen [No 2]* that[512]:

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507 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 53 [22], 90 [125]; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 529 [84]; *Fardon* (2004) 223 CLR 575 at 598 [36], 614 [86], 655-656 [219].

508 *Fardon* (2004) 223 CLR 575 at 592 [19], 593 [22], 597 [34], 657 [225].

509 cf *Vella* (2019) 269 CLR 219 at 277 [145].

510 cf *Vella* (2019) 269 CLR 219 at 290-291 [180].

511 *Fardon* (2004) 223 CLR 575 at 589 [12], 590 [14].

512 *Fardon* (2004) 223 CLR 575 at 588 [9], quoting *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 495.

> "[T]he protection of the community obviously warrants the introduction of some acceptable statutory system of 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".

300 After referring to various aspects of the legislation, including that it did not confer functions which were "incompatible" with the proper discharge of judicial responsibilities or with the exercise of judicial power[513], the Chief Justice suggested that, by conferring the relevant powers upon the QSC, "the Queensland Parliament was attempting to ensure that the powers would be exercised independently, impartially and judicially"[514].

301 McHugh J, who considered the functions conferred upon the QSC to involve the exercise of judicial power[515], stated that it would be a "serious constitutional mistake" to think that either *Kable* or the *Constitution* assimilates State courts or their judges and officers with federal courts or their judges and officers. Rather, his Honour said: "Chapter III of the *Constitution*, which provides for the exercise of federal judicial power, invalidates State legislation that purports to invest jurisdiction and powers in State courts only in very limited circumstances"[516]. Subject to the *Kable* principle, "when the federal Parliament invests State courts with federal jurisdiction, it must take them as it finds them"[517]. Further, McHugh J considered, State legislative power to make laws "for the peace welfare and good government" of the State is "as plenary as that of the Imperial Parliament" and would authorise a law requiring "breaches of the criminal law to be determined by non-judicial tribunals", that is, in a manner inconsistent with the *Lim* principle[518]. His Honour concluded that[519]:

> "The bare fact that particular State legislation invests a State court with powers that are or jurisdiction that is repugnant to the traditional judicial process will seldom, if ever, compromise the institutional integrity of that

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513 *Fardon* (2004) 223 CLR 575 at 592 [19].

514 *Fardon* (2004) 223 CLR 575 at 592 [20].

515 *Fardon* (2004) 223 CLR 575 at 596 [34].

516 *Fardon* (2004) 223 CLR 575 at 598 [37].

517 *Fardon* (2004) 223 CLR 575 at 599 [37].

518 *Fardon* (2004) 223 CLR 575 at 600 [40].

519 *Fardon* (2004) 223 CLR 575 at 600-601 [41].

> court to the extent that it affects that court's capacity to exercise federal jurisdiction impartially and according to federal law. ... State legislation may require State courts to exercise powers and take away substantive rights on grounds that judges think are foolish, unwise or even patently unjust. Nevertheless, it does not follow that, because State legislation requires State courts to make orders that could not be countenanced in a society with a Bill of Rights, the institutional integrity of those courts is compromised."

302 Gummow J was the only Justice to address the argument that the DPSO Act could have been validly enacted as Commonwealth law. His Honour rejected that argument but, in doing so, reformulated the *Lim* principle in terms that, "the 'exceptional cases' aside, the involuntary detention of a citizen in custody by the [s]tate is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts"[520]. As his Honour put it, "[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"[521].

303 Notably, Gummow J did not extrapolate from this reformulation to a conclusion that the DPSO Act was invalid. His Honour (with Hayne J here agreeing) considered that the application of the *Kable* principle focussed attention on the judicial process under the impugned legislation and whether elements of that process "may ameliorate what otherwise would be the sapping of the institutional integrity of the Supreme Court"[522]. Gummow J did not express any doubt about the impact of the DPSO Act upon either the independence or the impartiality of the QSC. Ultimately, his Honour considered that the nature of the "factum" selected for the attraction of the Act (being a "prisoner"), the subjection of orders to annual "review", the judicial nature of the process with respect to applications, and the Court's independence in the performance of its functions under the Act, combined to support the conclusion that invalidity was not established[523].

304 Hayne J (who otherwise agreed with Gummow J) reserved his opinion about whether federal legislation along the lines of the DPSO Act would be invalid[524]. His Honour explicitly adverted to the problem that preventive detention "is at odds with identifying the central constitutional conception of detention as a

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520 *Fardon* (2004) 223 CLR 575 at 612 [80].

521 *Fardon* (2004) 223 CLR 575 at 614 [85].

522 *Fardon* (2004) 223 CLR 575 at 614 [90].

523 *Fardon* (2004) 223 CLR 575 at 621 [114]-[117].

524 *Fardon* (2004) 223 CLR 575 at 647 [196].

consequence of judicial determination of engagement in past conduct"[525]. However, his Honour saw this as an issue about judicial power for the reason that legislation requiring a federal court to make an order for preventive detention "would purport to confer a non-judicial function on that court"[526].

305 For their part, Callinan and Heydon JJ stated[527]:

> "Not everything by way of decision-making denied to a federal judge is denied to a judge of a State. So long as the State court, in applying legislation, is not called upon to act and decide, effectively as the alter ego of the legislature or the executive, so long as it is to undertake a genuine adjudicative process and so long as its integrity and independence as a court are not compromised, then the legislation in question will not infringe Ch III of the *Constitution*."

Significance of the *Lim* principle for the *Kable* principle

306 Although in *Fardon* Gummow J noted that the *Lim* principle had informed several of the judgments in *Kable* (including his own)[528], there is reason to doubt its significance for the principle stated in *Kable*, at least for the purpose of a conclusion that the *Lim* principle is germane to the institutional integrity of a State court. In *Kable*, his Honour considered that the requirement of the *Community Protection Act 1994* (NSW) ("the NSW Act") that the Supreme Court of New South Wales ("NSWSC") "inflict punishment without any anterior finding of criminal guilt by application of the law to past events, being the facts as found" was "repugnant to judicial process"[529]. However, his Honour was alone in apparently treating that feature of the NSW Act as a sufficient basis for the challenged legislation's incompatibility with the institutional integrity of the NSWSC[530].

307 The other Justice who referred explicitly to the *Lim* principle in *Kable* was Toohey J, but his Honour reasoned materially differently by rejecting the NSW Act, including because preventive detention under the Act: was not an incident of the exclusively judicial function of adjudging and punishing criminal guilt; was

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525 *Fardon* (2004) 223 CLR 575 at 648 [197].

526 *Fardon* (2004) 223 CLR 575 at 648 [197].

527 *Fardon* (2004) 223 CLR 575 at 656 [219].

528 *Fardon* (2004) 223 CLR 575 at 611 [77].

529 *Kable* (1996) 189 CLR 51 at 134.

530 Compare *Kable* (1996) 189 CLR 51 at 106-107, 121-122.

not part of a system of preventive detention with appropriate safeguards, consequent upon or ancillary to the adjudication of guilt; and did not fall within the "exceptional cases" mentioned in *Lim*, directly or by analogy[531]. These reasons, and in particular his Honour's evident acceptance of the possibility of "appropriate safeguards", do not indicate that Toohey J would have accepted Gummow J's reformulation of the *Lim* principle without qualification.

308 Gummow J also noted that the *Lim* principle was "reflected" in the reasons of Gaudron J and McHugh J in *Kable*[532]. But neither Justice can be taken to have expressed any general view that State legislation providing for court-ordered preventive detention after sentence, directed to a class of offenders and for a purpose of community protection, was likely to be invalid for repugnancy to the judicial process. While Gaudron J considered that the process provided for by the NSW Act was the "antithesis of the judicial process", her Honour emphasised the Act's provision for formation of an opinion as to the probability of future offending "on the basis of material which does not necessarily constitute evidence admissible in legal proceedings"[533], and concluded that public confidence could not be maintained in a judicial system not predicated on equal justice – an observation directed to the *ad hominem* nature of the NSW Act[534].

309 In *Kable,* McHugh J had stated that "there is no reason to doubt the authority of the State to make general laws for preventive detention when those laws operate in accordance with the ordinary judicial processes of the State courts"[535]. In *Fardon*, McHugh J explicitly deprecated the phrase "repugnant to the judicial process" as tending to invite error[536]. McHugh J concluded that repugnancy to the traditional judicial process "will seldom, if ever, compromise the institutional integrity of [a State court] to the extent that it affects that court's capacity to exercise federal jurisdiction impartially and according to federal law"[537].

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531 *Kable* (1996) 189 CLR 51 at 98.

532 *Fardon* (2004) 223 CLR 575 at 611 [77].

533 *Kable* (1996) 189 CLR 51 at 106.

534 *Kable* (1996) 189 CLR 51 at 107.

535 *Kable* (1996) 189 CLR 51 at 121.

536 *Fardon* (2004) 223 CLR 575 at 601 [42].

537 *Fardon* (2004) 223 CLR 575 at 601 [41].

Preventive detention for robbery

310 If it were necessary to test the inclusion of robbery in the HRSO Act against the *Lim* principle, and if that required demonstration that the relevant law was directed to a grave and specific harm, I would consider that law passes both hurdles.

311 Section 392 of the *Criminal Code* (WA) creates an offence of robbery in the following terms:

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

312 The terms of s 392 cover a wide range of offending including conduct that may not cause significant harm to any individual. Potential harms that may be inflicted by an offence against s 392 will necessarily vary according to the particular circumstances of the offence. However, it is reasonable to assume that, by fixing a maximum penalty of life imprisonment in some circumstances, the legislature apprehended that the harm inflicted by a robbery may be very grave. A court is not well placed to compare the gravity of potential harms resulting from categories of offences beyond noting the maximum penalties fixed by the legislature. If the institutional integrity of a court may be compromised by applying a law such as the HRSO Act on the basis that the harm sought to be addressed by the law is not sufficiently grave, then, having regard to the availability of life imprisonment as a maximum penalty, I am not persuaded that the institutional integrity of the WASC may be compromised by the inclusion of robbery as a "serious offence" in the HRSO Act on that account.

313 The HRSO Act as it applies to the Western Australian offence of robbery seeks to balance the liberty interests of both a "high risk serious offender" and those members of the community who may be harmed as a result of an "unacceptable risk that the offender will commit a serious offence"[538], particularly, although not necessarily, the offence of robbery. I respectfully agree with the observation of the plurality in *Benbrika* that Gummow J's analysis in *Fardon* did not explain why an appropriately tailored scheme for protection of the community from harm resulting from particular forms of criminal activity is incapable of coming within an "exceptional case" to be identified by analogy to those "exceptional cases" identified in *Lim*[539]. To my mind, such detention is capable of being seen as analogous to involuntary detention in cases of infectious disease which is necessarily directed to community protection[540]. Involuntary detention in cases of mental illness may also afford an analogy where the detention is not solely for the protection of the detainee.

Judicial independence and impartiality under the HRSO Act

314 On its face, there is no aspect of the HRSO Act that compromises the independence of the WASC from either the legislative or executive branches of the Western Australian government, or that compromises the Court's impartiality. To the contrary, and similarly to the DPSO Act, the HRSO Act requires the Western Australian executive to make an application to the Court, in accordance with the legislation. The application is then assessed by the Court in accordance with the legislation. As is illustrative of the independent functions of executive and judiciary under the HRSO Act, in this case the State of Western Australia applied ultimately for a supervision order. That application was rejected by the Court, which was not satisfied that it was necessary to make a restriction order in relation to the appellant to ensure adequate protection of the community against an unacceptable risk that the appellant would commit a serious offence.

Conclusion

315 The appeal should be dismissed.

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538 HRSO Act, s 7(1).

539 *Benbrika* (2021) 95 ALJR 166 at 180-181 [32]-[33]; 388 ALR 1 at 13-14.

540 *Benbrika* (2021) 95 ALJR 166 at 180 [32]; 388 ALR 1 at 13; see also *Kruger* (1997) 190 CLR 1 at 110.