HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA P56/2021
PERTH REGISTRY

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

APPELLANT'S REPLY SUBMISSIONS

Part I: Suitability for publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Reply submissions

The analysis of judicial power is relevant in answering the *Kable* question

2. In answering the question as to whether the Act, in allowing a post-sentence detention regime for a person who has committed robbery, contravenes the requirements of Ch III of the *Constitution*, the appellant contends that the power is not judicial power. Contrary to the submissions of the Attorney General for Western Australia and some of the interveners,[1] the appellant is not submitting that the exercise of non-judicial power by a State Supreme Court is, *per se*, impermissible. Nothing in the appellant's submissions suggested otherwise.

3. Rather, the relevance of the power being non-judicial is that this is a significant factor to be taken into account in determining whether the impugned provisions substantially impair the Supreme Court's institutional integrity.

4. Even if it is unnecessary to characterise the impugned is power as judicial or otherwise, the road leads to the same terminus: what is the principled basis for expanding the

[1] AGWA [74]; New South Wales [19], [43]; Tasmania [6]; Queensland [8].

categories of offenders who can be validly the subject of post-sentence detention to include those convicted of robbery?

A mere protective purpose is not validating

5. The majority of the interveners, seeking to rely on *Benbrika*, contend that a post-sentence detention regime is valid if the purpose of the legislation empowering it is "protective". The contention is that the offence, from which the community will be protected, is irrelevant.[2] These interveners contend that this has been decided in *Benbrika*. The passage in *Benbrika* on which reliance is placed is [36].[3]

6. This passage in *Benbrika* must be read in its context. The passage is to the effect that it is valid to reason by analogy from the recognition in *Lim* that a Ch III court can validly order a mentally ill person to be detained in custody for the protection of the community, that a Ch III court can validly order a terrorist offender be detained in custody for the protection of the community.[4] Whether or not these are valid analogies, the statement that "[i]t is the protective purpose that qualifies a power as an exception" is not a statement of universal application. If it were then none of reasoning in [31]-[36] of the majority judgment was required.

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2 AGWA [61]-[62], [68]; Cth [52]-[63]; Victoria [24]; South Australia [17].

3 "Terrorism poses a singular threat to civil society. The contention that the exceptions to the *Lim* principle are confined by history and are insusceptible of analogical development cannot be accepted. There is no principled reason for distinguishing the power of a Ch III court to order that a mentally ill person be detained in custody for the protection of the community from harm and the power to order that a terrorist offender be detained in custody for the same purpose. It is the protective purpose that qualifies a power as an exception to a principle that is recognised under our system of government as a safeguard on liberty. Demonstration that Div 105A is non-punitive is essential to a conclusion that the regime that it establishes can validly be conferred on a Ch III court, but that conclusion does not suffice. As a matter of substance, the power must have as its object the protection of the community from harm." (citations omitted)

4 In the primary submissions at [49]-[50], the appellant contends that the characterisation of laws by which the mentally ill can be detained in custody is not protection of the community *from* the detainee. The Commonwealth at [51] of its submissions suggest otherwise.

7. More significantly, if all that is required for validity is a "protective purpose" then the opening sentence of [36], as to the singular threat of terrorism is irrelevant because it would not matter what the community was being protected from, just that it was being protected.

8. Further, the test of whether something is for a protective purpose must, in part, consider the offending which is sought to be prevented. If a "mere" protective purpose was sufficient then State Parliaments could nominate any offence as the triggering offence for the imposition of detention. The issue which this appeal throws up starkly is; accepting that protection of women and children from serious sexual offenders and protecting the community from terrorism are exceptional, what else is exceptional and why? It is for those asserting exceptionalism of robbery to explain why protection from it is analogous to protection from serious sexual offenders and terrorist offenders.

Fardon

9. Some interveners contend that the impugned legislation cannot be distinguished from that considered in *Fardon*.[5]

10. The reasoning in the different judgments in *Fardon* vary. This may be why the majority in *Benbrika*,[6] refer to the "conclusion" in *Fardon.* The characterisation by the majority in *Benbrika* of the conclusion in *Fardon* as being that continuing detention of a prisoner found to be a danger to society is a judicial power and does not engage the *Kable* principle is addressed in the appellant's primary submissions at [54]-[58]. The true question is whether the impugned legislation here is analogous to valid legislative schemes for post sentence detention, where "protective purpose" *per se* is not a valid analogy.

11. For the reasons developed in the appellant's primary submissions, there is no true analogy between the Queensland legislation considered in *Fardon* and that here. The purpose of the Queensland *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) was to protect adults (and in particular adult women) from violent sexual offending and children from sexual offending. Such crimes are of the utmost seriousness,

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5 Commonwealth [41]-[48]; Victoria [4], [13]-[14]; Queensland [4]-[5], [12], [17]-[33]. See also New South Wales [13]-[15], [17].

6 *Benbrika,* 181 [35].

involving the "worst class of offender".[7] Victims are invariably amongst the most vulnerable in society. The impact on victims is inevitably severe. These offences demean and brutalize the whole of society. Rape and any other form of sexual violence of comparable gravity are crimes against humanity under the Statute of the International Criminal Court and "rape" is a crime against humanity under the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda.[8] Offenders are often, if not invariably, psychologically or psychiatrically pre-disposed to re-offending. That is why they are subjected to psychological and psychiatric assessment.

10 12. The purpose of the legislative scheme considered in *Benbrika* is the protection of the community from the threat of further terrorism offences; where terrorism "poses a singular threat to civil society".

13. If schemes for post sentence detention to protect the community can only be valid if "exceptional", what is exceptional about robbery? "Exceptionalism" is not determined simply by legislatures attaching the word "serious" to descriptions of offences.

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7 See, for example, Western Australian Hansard, *Dangerous Sexual Offenders Bill 2005*, Second Reading, 15 November 2005, p. 7274-7276 (the Hon. Attorney General).

8 ICC Statute, Article 7(1)(g); ICTY Statute, Article 5(g); ICTR Statute, Article 3(g).