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INNOCENT UNTIL PREDICTED GUILTY: *GARLETT V WESTERN AUSTRALIA* (2022) 404 ALR 182

'Liberty: Not the Daughter but the Mother of Order.'[1]

I Introduction

In *Garlett v Western Australia* ('*Garlett*'),[2] the High Court dismissed a challenge to the validity of item 34 of sub-div 3 of div 1 of sch 1 to the *High Risk Serious Offenders Act 2020* (WA) ('*HRSO Act*') on the basis of repugnancy with ch III of the *Constitution*. The challenged provision of the *HRSO Act* grants the Supreme Court of Western Australia the power to make restriction orders in respect of individuals previously convicted of robbery.[3] If satisfied an individual subject to a custodial sentence is a 'serious offender' posing a risk to the community the Supreme Court must order a supervision or continuing detention order.[4] Under a supervision order, the serious offender is subject to stated conditions, whereas a continuing detention order entails detaining the serious offender for an indefinite term.[5]

At the centre of this appeal lies a fundamental observation about the nature and role of courts established under the *Constitution* and diverse interpretations of what punishment means in the context of the decision in *Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim*').[6] For Gageler and Gordon JJ, investing power is curtailed by the substantive nature of courts and the proper administration of justice.[7] Detention guarding against future offending was considered punitive in the circumstances and impermissible to flow from anything other than a judicial determination of guilt.[8] However, for Kiefel CJ, Keane, Steward, Edelman and Gleeson JJ, judicial power can and was wielded to protect the community from the potential

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1 Pierre-Joseph Proudhon, *Liberty* (Boston, 6 August 1881).

2 (2022) 404 ALR 182 ('*Garlett*').

3 *High Risk Sexual Offenders Act 2020* (WA) s 48 ('*HRSO Act*').

4 Ibid ss 7, 48.

5 Ibid ss 26(1), 27(1).

6 (1992) 176 CLR 1 ('*Lim*').

7 *Garlett* (n 2) 213 [134]–[136], 214 [140] (Gageler J), 224–5 [179]–[180] (Gordon J).

8 Ibid 224–5 [179]–[180] (Gordon J).

harms posed by recidivism of individuals previously convicted of robbery.[9] When punishment is protective,[10] the Supreme Court's institutional integrity remains.[11]

This case note considers: (1) the constitutional background informing these views; (2) the facts and decision underlying *Garlett*; (3) the implications of and consequences for the *Lim* principle in the state and Commonwealth context; (4) the role of reasoning by analogy; and (5) policy and other considerations under international law concerning upholding continuing detention orders.

II Constitutional Background

In *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers*')[12] the High Court held that Australia's constitutional structure restricts the legislature's capacity to repose ch III power.[13] Consequently, federal judicial power shall only be vested in ch III courts, and ch III courts may only be invested with such power.[14] For the purposes of this discussion, the relevant prohibition is the legislative conferral of non-judicial power on ch III courts.

At the Commonwealth level, a result of the decision in *Boilermakers* was a challenge in *Lim* to div 4B of the *Migration Act 1958* (Cth). In *Lim*, the protective implication underlying *Boilermakers* was made explicit.[15] Justices Brennan, Deane and Dawson held that aside from

> exceptional cases … 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.[16]

This seminal observation, known as the '*Lim* principle', expounds the core constitutional limitation on detention arising from the federal separation of powers.

The doctrine recognised in *Boilermakers* also implicates state courts. The unified nature of federal and state jurisdiction established by the *Constitution* and *Judiciary*

9 Ibid 186 [8], 193 [45], 194 [49], 195–6 [54]–[56], 199 [69] (Kiefel CJ, Keane and Steward JJ), 246 [255]–[257], 253 [283]–[284] (Edelman J), 260–1 [312]–[314] (Gleeson J).

10 Ibid 246–7 [255]–[258] (Edelman J).

11 Ibid 207 [107]–[108] (Kiefel CJ, Keane and Steward JJ).

12 (1956) 94 CLR 254 ('*Boilermakers*').

13 Ibid 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

14 Ibid.

15 See, eg, Mary Gaudron, 'Some Reflections on the Boilermakers Case' (1995) 37(2) *Journal of Industrial Relations* 306, 309.

16 *Lim* (n 6) 27.

Act 1903 (Cth), contemplates the continued existence of a superior court capable of answering that description.[17] Accordingly, while state courts may not *only* be invested with federal judicial power, for a power to be validly invested in such a court its exercise must uphold the institutional integrity of ch III.[18] This is a lesser standard than the strict separation of powers that exists at the Commonwealth level pursuant to the *Boilermakers* doctrine.

The decision which recognised that restriction regarding state courts, *Kable v Director of Public Prosecutions (NSW)*,[19] held that in granting the New South Wales Supreme Court the power to issue a continuing detention order, the *Community Protection Act 1994* (NSW) unlawfully imposed an ad hominem task on the Court, which was so significantly non-judicial to impair the Court's integrity as a potential repository of ch III power.[20] Accordingly, the legislation was invalid.[21]

Following the decisions in *Boilermakers* and *Kable*, a series of cases attempted to invoke these principles to challenge the validity of laws vesting courts with the power to make preventive detention orders. All but *South Australia v Totani* ('*Totani*')[22] have been unsuccessful.

In *Totani*, the power of South Australian courts to make control orders under s 14(1) of the *Serious and Organised Crime (Control) Act 2008* (SA) was found to be invalid.[23] The power impermissibly enlisted the judiciary to severely restrict an individual's liberty — regardless of their likelihood to offend and subject to the Attorney-General's declaration.[24]

However, in *Fardon v Attorney-General (Qld)* ('*Fardon*')[25] and *Minister for Home Affairs v Benbrika* ('*Benbrika*')[26] the Court dealt with laws pertaining to

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17 See *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 67–8 [39]–[43] (Gleeson CJ), 73–4 [56]–[57] (Gummow, Hayne and Crennan JJ).

18 *Kable v DPP (NSW)* (1996) 189 CLR 51, 100–3, 107 (Gaudron J), 109–10, 114–16 (McHugh J), 126, 136–8, 140 (Gummow J) ('*Kable*'). See also *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

19 *Kable* (n 18).

20 Ibid 103 (Gaudron J), 109 (McHugh J), 135, 143–4 (Gummow J). A narrower approach was adopted by Toohey J based on the Supreme Court exercising federal jurisdiction under the *Community Protection Act 1994* (NSW) and vested in it by s 39 of the *Judiciary Act 1903* (Cth): at 96–9. See also New South Wales, *Parliamentary Debates*, Legislative Council, 16 November 1994, 5091–4.

21 *Kable* (n 18) 98–9 (Toohey J), 108 (Gaudron J), 108–9, 124 (McHugh J), 135, 143–4 (Gummow J).

22 (2010) 242 CLR 1.

23 Ibid 21 [4] (French CJ), 67 [149] (Gummow J), 92–3 [236] (Hayne J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J).

24 Ibid.

25 (2004) 223 CLR 575 ('*Fardon*').

26 (2021) 272 CLR 68 ('*Benbrika*').

post-sentence continuing detention differently, finding each scheme to be valid. In *Fardon*, s 5 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('*DPSO Act*') granted the Supreme Court of Queensland power to order continuing detention. The validity of that power hinged on the detention's proportionality to protecting the community from the most serious and inherently harmful kind of criminal activity: sexual offending against minors.[27] In *Benbrika*, the validity of a continuing detention order pursuant to s 105A.7 of the *Criminal Code 1995* (Cth) rested on the tailored nature of the scheme, which required judicial satisfaction that no less restrictive measure could prevent the singular threat posed by terrorist criminal activity to the community.[28]

Challenges attempting to invoke *Kable* against schemes imposing restrictions on liberty falling short of detention in custody have been equally unsuccessful. The decisions in *Pollentine v Bleijie*[29] and *Vella v Commissioner of Police (NSW)*[30] are two such examples.

Against this backdrop, Peter Garlett mounted a challenge to the validity of the *HRSO Act* based on both the principle in *Lim* and *Kable*.

III Facts

A *The* HRSO Act

Under the *HRSO Act*, the State of Western Australia may apply to the Supreme Court for a restriction order in respect of a person who has been convicted of a defined 'serious offence', which includes robbery.[31] If the Court is satisfied that the person is a 'high risk serious offender' — that is, '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'[32] — the Court must make a restriction order.[33] This could be a continuing detention order for the offender's indefinite detention,[34] or a supervision order subjecting the offender to certain conditions considered appropriate by the Court.[35] However, the Court can

27 *Fardon* (n 25) 592 [19] (Gleeson CJ), 593–4 [25] (McHugh J), 620 [112] (Gummow J), 647–8 [196] (Hayne J), 658 [234] (Callinan and Heydon JJ).

28 *Benbrika* (n 26) 87 [11] (Kiefel CJ, Bell, Keane and Steward JJ).

29 (2014) 253 CLR 629.

30 (2019) 269 CLR 219.

31 *HRSO Act* (n 3) ss 5, 11, sch 1 div 1 sub-div 3 item 34.

32 Ibid s 7(1).

33 Ibid s 48(1).

34 Ibid s 26(1).

35 Ibid s 27(1).

only make a supervision order if satisfied that the person will substantially comply with the relevant conditions.[36]

B *Peter Garlett*

Garlett is an Indigenous man from Western Australia. He had a history of using alcohol and drugs, dating from when he was 12 years old, and he also had a history of offending.[37] In November 2017, pretending to be armed with a handgun and in company, Garlett broke into a dwelling and stole a pendant necklace and $20 in cash, for which he was convicted of robbery and assault with intent to rob.[38] At 23 years of age, it was his first adult offence.[39]

In 2021, the State of Western Australia sought a continuing detention order against Garlett; in response, he challenged the validity of the *HRSO Act*.[40] By the time it reached the High Court, his challenge was confined to whether the application of the *HRSO Act* to individuals convicted of robbery, by the designation in the *HRSO Act* of robbery as a 'serious offence', was contrary to ch III of the *Constitution*.[41] Interestingly, the State of Western Australia ultimately sought only a supervision order in respect of Garlett, and their application was refused.[42]

IV The Decision

The majority of the High Court, comprising Kiefel CJ, Keane, Steward, Gleeson and Edelman JJ, found that in its application to robbery, the *HRSO Act* was consistent with ch III of the *Constitution*, and was therefore valid.[43] Justices Gageler and Gordon disagreed.[44]

A *Chief Justice Kiefel, Keane and Steward JJ*

Chief Justice Kiefel, Keane and Steward JJ held that sch 1 of the *HRSO Act* was valid, primarily because of material indistinguishability between the impugned provisions of the *HRSO Act* in *Garlett* and those permitted by *Kable* in *Fardon*.[45]

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36 Ibid s 29(1).

37 *Garlett* (n 2) 185 [3].

38 Ibid 185 [1]–[2].

39 Ibid 232 [200].

40 Ibid 186 [6].

41 Ibid 186 [6]–[7].

42 Ibid 254 [289].

43 Ibid 186 [8] (Kiefel CJ, Keane and Steward JJ), 233–4 [207] (Edelman J), 254–5 [291] (Gleeson J).

44 Ibid 217–18 [155]–[160] (Gageler J), 228–9 [190]–[192], 230–2 [195]–[201] (Gordon J).

45 Ibid 186 [8], 196–7 [57], 197–8 [61]–[64], 199 [69].

Their Honours held that *Fardon* is not limited to the proposition that courts are empowered to make detention orders for individuals serving sentences of serious sexual offences.[46] A conviction of robbery was capable of being sufficiently serious to find the basis for a restriction order.[47] That conclusion was based in equal parts on the forward looking nature of an order protecting the community[48] and the need to respect legislative judgment regarding which *kinds* of offences the community requires protection from.[49] The plurality also considered that the *HRSO Act* and *DPSO Act* permit comparable judicial discretion.[50] For their Honours, prescribing the Supreme Court 'must' make a restriction order if satisfied the offender is captured by the definition of 'high risk serious offender', did not materially distinguish the power under s 48 of the *HRSO Act* from that considered in *Fardon*.[51] As the court exercises judgment as to the nature, extent of and appropriate restrictive response to prospective future harm, judicial discretion is not impermissibly fettered by prescribing that the court make the order.[52]

Indeed, while the plurality considered that characterising the power under the *HRSO Act* as non-judicial would not necessarily violate the *Kable* principle, they ultimately reasoned a power being recognisable as a conventional exercise of judicial power *may* be seen as 'a positive indicator of validity' in the *Kable* sense.[53] Their Honours resolved that despite the complexity of the 'open-textured' task in s 7 of the *HRSO Act*, its imposition to assess future risk for the purpose of protection necessitates engaging in evaluative, independent judicial determination.[54]

Additional considerations concerning institutional integrity supported the plurality finding the law valid pursuant to *Kable*.[55] First, the *HRSO Act* maintains the independence of the Supreme Court of Western Australia from the legislature and executive government.[56] Second, and again similarly to the treatment of the *DPSO Act* in *Fardon*,[57] the *HRSO Act* incorporates processes that bear 'the "hallmarks of traditional judicial forms and procedure"'.[58] Third, the defendant is able to engage in the process.[59] Finally, upholding preventive detention is less likely to damage

46 Ibid 200–1 [76]–[77].

47 Ibid 201 [78]–[80], 202 [84]–[85].

48 Ibid 201 [78].

49 Ibid 201 [79].

50 Ibid 199–200 [70]–[75].

51 Ibid.

52 Ibid 200 [73].

53 Ibid 193 [41].

54 Ibid 199 [66]–[67], 204–5 [97].

55 Ibid 203 [89], 204 [93], 205 [100], 205 [102].

56 Ibid 207 [107].

57 *Fardon* (n 25) 592 [19] (Gleeson CJ).

58 *Garlett* (n 2) 198 [64], quoting ibid 656 [220] (Callinan and Heydon JJ).

59 Ibid 205 [99].

public confidence in the 'courts than judicial refusal to implement the provisions of a statute upon the ground of an objection to legislative policy'.[60]

The plurality did not consider the *Lim* principle to be relevant to the validity of laws investing power in state courts.[61] Nonetheless, their Honours stated that given the *HRSO Act*'s protective purpose, its powers do not involve the adjudgment or punishment of criminal guilt.[62] Therefore, '[e]ven if the *HRSO Act* were a law of the Commonwealth, it would not contravene the *Lim* principle'.[63] The *HRSO Act's* protective purpose was evidenced by the evaluation conducted under s 7, which — similarly to the law in *Benbrika* — takes into account and imposes detention for the purpose of safeguarding against future risk rather than penal considerations of retribution and deterrence.[64] The inclusion of periodic reviews and the requirement under s 48 for courts to order the least restrictive means capable of protecting the community, further demonstrated a purpose distinct from punishment in the view of the plurality.[65]

B *Justice Gleeson*

Justice Gleeson generally agreed with the plurality, concluding that the *HRSO Act* was 'materially indistinguishable' from the impugned legislation in *Fardon* and therefore was not repugnant to the institutional integrity of the Supreme Court of Western Australia.[66] However, her Honour made some additional observations.

Overall, Gleeson J contended that the *Lim* principle is only applicable to Commonwealth laws, and has no bearing on the validity of a state law, the latter of which relevantly depends on compliance with the *Kable* doctrine.[67] This was because *Lim*, in her Honour's view, was a statement about the separation of judicial power at the Commonwealth level, rather than about the nature or characteristics of ch III courts or the scope of state legislative power.[68] Her Honour further explained that the judgments in neither *Fardon* nor *Kable* treated the *Lim* principle as relevant to the institutional integrity of a state court.[69]

Justice Gleeson also concluded that in any event, the *HRSO Act* did not breach the *Lim* principle: given the legislature's decision to impose a maximum sentence of

60 Ibid 203 [90], quoting *Fardon* (n 25) 593 [23] (Gleeson CJ). See also *Benbrika* (n 26) 169 [226] (Edelman J).

61 *Garlett* (n 2) 192–3 [40].

62 Ibid 192 [38], 196 [55].

63 Ibid 192–3 [40].

64 Ibid 196 [55]–[56].

65 Ibid.

66 Ibid 254–5 [291].

67 Ibid 255 [293].

68 Ibid 255–6 [294].

69 Ibid 256 [295], 258–9 [306]–[309].

life imprisonment for robbery, the offence had a sufficiently grave harm such that it could fall within an exception to the principle.[70]

C *Justice Edelman*

Justice Edelman adopted a 'strict and narrow'[71] interpretation of the *HRSO Act*, under which continuing detention orders for robbery would be made only 'as a matter of last resort' for 'anticipated robberies with a sufficiently high degree of seriousness and a sufficiently high magnitude of harm'.[72] This was because, on his Honour's interpretation, the *HRSO Act* required the Court to balance the probability of the person committing a serious offence and the magnitude of the harm, against the burden on liberty.[73] In addition, it would be 'rare' for a restriction order to be a continuing detention order, given the range of potential conditions that could be imposed as part of a supervision order.[74]

Given this interpretation, Edelman J found the *HRSO Act* to be valid: the serious robberies for which a continuing detention order can be made could not be 'meaningfully distinguished' from serious sexual or terrorism offences, preventive detention regimes for which were approved by the High Court in *Fardon* and *Benbrika* respectively.[75] Crucially, his Honour found that in its application to these serious robberies, the *HRSO Act* did not 'create such individual injustice as to unjustifiably compromise the institutional integrity of a court',[76] although it came 'perilously close'.[77] However, Edelman J emphasised that absent this narrow interpretation, and if, for example, the *HRSO Act* allowed continuing detention orders for all robberies, the *HRSO Act* would not have been valid.[78] Furthermore, regardless of whether the interpretation was correct, the *HRSO Act* would have to be read down in this way, pursuant to s 7 of the *Interpretation Act 1984* (WA).[79]

D *Justice Gageler (Dissenting)*

Justice Gageler found that in its application to robberies, the *HRSO Act* infringed the *Kable* doctrine and was invalid. His Honour arrived at this conclusion by finding the *Lim* principle to have a 'deeper and broader import' than merely protecting

70 Ibid 259–60 [310]–[313].

71 Ibid 236 [217].

72 Ibid 252–3 [282].

73 Ibid 238 [225]–[226].

74 Ibid 240 [233].

75 Ibid 233–4 [207].

76 Ibid 233 [206].

77 Ibid 233–4 [207].

78 Ibid 233–4 [207], 247 [262].

79 Ibid 236 [218].

the constitutional immunity against detention otherwise than as a result of a court order.[80]

Fundamentally, Gageler J considered that the *Lim* principle was relevant to determining whether the *Kable* doctrine was breached, because it had a substantive implication regarding when courts themselves could validly impose detention. In particular, his Honour found that aside from an exceptional case, the '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' would breach both the *Kable* and *Boilermakers* doctrines.[81] That is, detention in custody is only permitted where it 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'.[82] Crucially, his Honour said that this would be the case 'irrespective of whether the function can be performed in accordance with a judicial process'.[83] This was because, in his Honour's view, conferral of such a function was 'not simply antithetical to the character of that court as an institution for the administration of justice', but was 'antithetical to the very conception of justice which it is the responsibility of courts to administer'.[84]

With regards to the exceptions to the *Lim* principle, Gageler J found that such an exception would only arise if the law was 'reasonably capable of being seen as necessary for a legitimate non-punitive objective'.[85] Notably, the 'mere prevention of the commission of a criminal offence' was not a legitimate non-punitive objective, but prevention of a 'grave and specific' harm arising from such an offence would be.[86] Furthermore, it was not the legislature's role to deem a harm sufficiently grave and specific.[87] His Honour found that the impugned laws in *Fardon* and *Benbrika* were held valid on the basis that they fell within the exceptions to the *Lim* principle.[88]

Ultimately, Gageler J did not consider robbery to cause a sufficiently grave and specific harm to be a valid exception to the *Lim* principle. In terms of the harm caused, neither robbery nor assault with intent to rob were comparable to the offences considered in *Fardon* or *Benbrika*.[89] Indeed, Gageler J posited that if robbery is considered to cause a sufficiently grave and specific harm, 'it needs to be asked:

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80 Ibid 212–13 [132]. See also ibid 213 [133].

81 Ibid 213 [136].

82 Ibid 213 [134].

83 Ibid 213 [136].

84 Ibid 213 [135].

85 Ibid 215 [143], quoting *Fardon* (n 25) 653–4 [215] (Callinan and Heydon JJ).

86 *Garlett* (n 2) 215 [145].

87 Ibid 216 [148].

88 Ibid 213–14 [138]–[139].

89 Ibid 217 [157].

what offence is not?'[90] This is in stark contrast to the plurality's position, considering robbery sufficiently serious to justify an individual to continuing detention. Therefore, his Honour concluded that the *HRSO Act* breached the *Kable* doctrine, just as an equivalent Commonwealth law would breach the *Boilermakers* doctrine.[91]

E *Justice Gordon (Dissenting)*

Similar to Gageler J, Gordon J determined that the *HRSO Act*, specifically in its application to robbery, contravenes ch III of the *Constitution*.[92] Her Honour's judgment was based on two fundamental principles underpinning ch III: (1) the historical protection of personal liberty from encroachments by the legislature and executive; and (2) the preservation of judicial independence and impartiality, allowing effective oversight and balance of the legislative and executive branches.[93] Traditional considerations regarding the impact on public confidence and defining characteristics of courts were relevant to assessing if legislation undermines the integrity of state courts.[94] However, like Gageler J, Gordon J considered the historically significant principle established in *Lim* as 'not irrelevant to the assessment of whether *State* legislation is compatible with Ch III of the *Constitution*'.[95]

Consequently, her Honour held that pursuant to the *Lim* principle, laws resulting in detention are presumed punitive,[96] requiring the judiciary 'hear and authoritatively determine a controversy about an existing liability of the individual which … arise[s] solely from the operation of some positive law on some past event or conduct'.[97] As *Lim* does not imply an exceptional category of case arises whenever detention is ordered for reasons other than punishment of a legal violation, any 'protective' purpose of the *HRSO Act* would not salvage its validity in her Honour's view.[98] Importantly, the *HRSO Act* would apply to large groups of individuals, and did not aim to protect the community from behaviour that was exceptional.[99] Justice Gordon was not convinced the regime was sufficiently similar to the preventive detention regimes in *Fardon* and *Benbrika* to be saved by the *Lim* exception.[100]

90 Ibid 218 [158].

91 Ibid 218 [159].

92 Ibid 218 [163].

93 Ibid.

94 Ibid 225–6 [182].

95 Ibid 226 [184] (emphasis in original).

96 Ibid 223 [176].

97 Ibid 222 [173], quoting *Benbrika* (n 26) 109–10 [69] (Gageler J).

98 *Gartlett* (n 2) 223–5 [175]–[180].

99 Ibid 231 [197].

100 Ibid 227–8 [188].

V Comment

A *Justice Gageler's Interpretation of the* Lim *Principle*

At the heart of *Garlett* is a significant judicial disagreement as to the meaning and import of the *Lim* principle. On one view, most explicitly articulated by Gleeson J but seemingly also shared by the plurality, the *Lim* principle is a limited observation about the separation of powers at the Commonwealth level; it thus has no application to state laws.[101] In contrast, Gageler J would have the *Lim* principle understood as an observation about the fundamental nature and role of courts in our system of government. Under this broader interpretation, a court can *only* impose detention in custody as a result of the adjudgment and punishment of criminal guilt with respect to past conduct, unless an exception applies; the principle would therefore limit laws at both the state and Commonwealth level. For the following reasons, and with respect, this view is far preferable.

First, Gageler J's interpretation adopts a more substantive view of the nature of courts, judicial power, and the 'conception of justice which it is the responsibility of courts to administer'.[102] In contrast, the majority view focuses on the *process* by which this judicial power is administered.[103] This is in keeping with the High Court's repeated insistence that ch III of the *Constitution* is concerned with 'substance and not mere form', an assertion that was made in *Lim* itself,[104] and more recently affirmed by the majority of the High Court in *Alexander v Minister for Home Affairs*.[105]

Second, this interpretation is more consistent with the reasoning of the majority in *Lim* itself. Admittedly, the seminal observation of Brennan, Deane and Dawson JJ, which has come to be known as the *Lim* principle, was made in the context of considering a Commonwealth law providing for executive detention (rather than a state law providing for detention following a court order, as in *Garlett*). However, their Honours justified their declaration of this principle by reference to propositions about the fundamental structure of our legal system, citing Albert Venn Dicey for the claim that every citizen 'is "ruled by the law, and by the law alone" [and] "may with us be punished for a breach of law, but [he can be punished] for nothing else"'.[106] As Gageler J notes, this suggests that the *Lim* principle goes further than merely

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101 Ibid 192–3 [40] (Kiefel CJ, Keane and Steward JJ), 255–6 [294] (Gleeson J).

102 Ibid 213 [135] (Gageler J).

103 See, eg, ibid 204–5 [97] (Kiefel CJ, Keane and Steward JJ).

104 *Lim* (n 6) 27 (Brennan, Deane and Dawson JJ).

105 (2022) 401 ALR 438, 454 [72] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 461 [98]).

106 *Garlett* (n 2) 212 [129] (Gageler J), quoting AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan, 1885) 215. See also *Ex parte Walsh; Re Yates* (1925) 37 CLR 36, 79 (Isaacs J).

limiting Commonwealth executive detention, and rather has a broader import as to the power of state institutions (including courts) to impose punitive detention.[107]

Third, Gageler J's interpretation best accords with the significant role of courts in protecting individual liberty, and thus the relationship between individual and state, under our 'inherited constitutional tradition', by limiting detention in custody otherwise than as a consequence of a criminal trial.[108] A conception of the *Lim* principle that endorses these fundamental tenets of our constitutional system is not merely preferable — it is essential to the legitimacy of the principle itself.

B *Would the* HRSO Act *be Valid as a Commonwealth Law?*

A key consequence of the differing interpretations of *Lim* discussed above — regardless of the applicability of *Lim* at the *Kable* level — is a further disagreement between the majority and minority judgments as to whether as 'a law of the Commonwealth, [the *HRSO Act*] would not contravene the *Lim* principle'.[109] The plurality and Gleeson J conclude the law would not be valid as a Commonwealth law.[110] For Gageler and Gordon JJ, the principle in *Lim* is breached by the *HRSO Act* whether it reposes Commonwealth or state power.[111]

From the majority's approach we discern that laws which prevent future conduct will fall within the exceptional cases of the *Lim* principle where they are permissibly protective. A law will be permissibly protective when its purposes and effects are isolated from the deterrent or retributive elements of the criminal law, the latter of which are punitive.[112] The minority approaches *Lim* as recognising the inherently punitive nature of detention.[113] Therefore, only an exceptionally narrow scheme, targeting offending which by its nature demonstrates enduring motivation to offend,[114] will be protective in the sense capable of being exercised by a ch III court.

There is good reason to accept the latter view, which accords with the reality that '[l]oss of liberty as a punishment is ordinarily one of the hallmarks reserved to

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107 *Garlett* (n 2) 212–13 [132].

108 Ibid 211 [125], quoting *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 610 [94] (Gageler J). For further discussion see generally: *Williams v The Queen* (1986) 161 CLR 278, 292 (Mason and Brennan JJ), quoting *Trobridge v Hardy* (1955) 94 CLR 147, 152 (Fullagar J); *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11 (Jacobs J); Andrew Foster, 'The Judiciary and Liberty: Assessing the Competing Rationales for the Lim Principle' (2022) 33(3) *Public Law Review* 226.

109 *Garlett* (n 2) 192–3 [40] (Kiefel CJ, Keane and Steward JJ).

110 Ibid 192–3 [40] (Kiefel CJ, Keane and Steward JJ), 259 [310], 260 [313] (Gleeson J).

111 Ibid 218 [159] (Gageler J), 232 [200] (Gordon J).

112 Ibid 194 [50], 196 [55] (Kiefel CJ, Keane and Steward JJ).

113 Ibid 223 [175] (Gordon J).

114 Ibid.

criminal proceedings conducted in courts'.[115] Conversely, the majority's conclusion is, with respect, based on an illusory division of the criminal law. To justify that preventive detention is non-punitive their Honours noted that '[n]one of the means of prevention of crime mentioned by Blackstone [are] now available' under the Australian criminal law.[116] This, however, stands at odds with their Honours': (a) acknowledgement that the removal of preventive criminal law mechanisms is 'to mitigate the extreme harshness of the criminal law';[117] and (b) concession there is no 'apparent difference of approach in terms of principle' between the decision in *Veen v The Queen*[118] and *Veen v The Queen [No 2]*,[119] wherein Mr Veen was sentenced to life 'on the ground that he was a danger to society, and was likely to kill again when released'.[120] As the criminal law *is* able to consider preventive justice, to the extent it does not, the answer lies in restricting an unduly punitive result. That implication is not ameliorated by labelling a post sentence order protective and removing its tie to adjudgment of criminal liability. Instead, as the approach of Gageler and Gordon JJ suggests, only in certain exceptional cases can prevention truly evince a protective purpose which justifies removing the requirements of the traditional operations of the criminal law.

As this disagreement — which, at its heart is a hypothetical exercise — turns on differing interpretations of *Lim*, if the majority of the High Court were to adopt a more substantive interpretation of the principle, the approach advanced in dissent is likely to be persuasive. The reasons above for preferring this interpretation of the *Lim* principle support the conclusion the *HRSO Act* considered in *Garlett* would (or should) be invalid at the Commonwealth level.

C *Reasoning by Analogy: Comparison to* Fardon *and* Benbrika

The majority's reliance on analogies with *Fardon* and *Benbrika* is, with respect, misplaced. This is because the kinds of offences for which continuing detention orders were upheld in those cases — serious sexual offences involving violence or against a child, and terrorism offences, respectively — cannot reasonably be compared to the offence of robbery or assault with intent to rob, even under Edelman J's reading down of the *HRSO Act* to apply only to serious robberies. As Gordon J reasons, serious sexual offences may be driven by psychological factors and are 'almost universally given special significance',[121] and terrorism is driven

115 Ibid 231 [198].

116 Ibid 195 [51] (Kiefel CJ, Keane and Steward JJ).

117 Ibid.

118 (1979) 143 CLR 458.

119 (1988) 164 CLR 465.

120 *Garlett* (n 2) 195 [53]–[54] (Kiefel CJ, Keane and Steward JJ).

121 Ibid 227–8 [188], quoting Jean Floud and Warren Young, *Dangerousness and Criminal Justice* (Heinemann, 1981) 50.

by particular motives that pose a '*singular threat* to civil society';[122] such unique factors are absent in the case of robbery or assault with intent to rob.[123] As such, Gageler J is undoubtedly correct in finding that although neither crime is victimless, neither is analogous in terms of the 'gravity of the harm it has potential to cause' to those in *Fardon* or *Benbrika*.[124]

Despite the plurality's insistence that it is not the court's place to question Parliament's designation of an offence as serious,[125] it seems to be the inescapable role of the court in making constitutional decisions to decide whether an offence is sufficiently serious such that ch III will not preclude a continuing detention scheme in respect of it. Otherwise, Parliament could, within the bounds of the *Constitution*, characterise failure to wear a bicycle helmet as a serious offence warranting a continuing detention scheme; this was a submission made on behalf of Garlett that the plurality dismissed as mere rhetoric,[126] but that appears to be the natural conclusion of their Honours' reasoning.

D *Policy Implications of the* HRSO Act

There are substantive political and policy issues arising in relation to preventive restriction orders.

As recognised by Edelman J, the *HRSO Act* disproportionately impacts Indigenous Australians.[127] Although not considered to be a feature of design, his Honour did acknowledge the *HRSO Act's* operation would necessarily have that outcome. The over-representation of Indigenous Australians in homeless populations is likely to increase orders for continuing detention rather than less restrictive supervision orders within the population.[128] Requiring the court to consider psychological or psychiatrist reports will equally harm Indigenous Australians whose community is not appropriately served by practices of psychology developed by and in the colonial world.[129] At best, this impact warns against the utility any preventive role restrictive orders under the *HRSO Act* can provide. At worst, it indicates the overwhelmingly punitive nature of the regime at hand (particularly given how central judicial evaluation between ordering supervision or detention lay to the *HRSO Act's* validity).[130]

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122 *Garlett* (n 2) 228 [189] (emphasis in original), quoting *Benbrika* (n 26) 97 [36] (Kiefel CJ, Bell, Keane and Steward JJ).

123 *Garlett* (n 2) 229 [191].

124 Ibid 217 [157].

125 See ibid 201 [79] (Kiefel CJ, Keane and Steward JJ).

126 Ibid 203 [87]–[88].

127 See ibid 250 [273].

128 Ibid.

129 Ibid 250–1 [274].

130 Ibid 191–2 [36] (Kiefel CJ, Keane and Steward JJ). See also *DPP (WA) v Dal [No 2]* [2016] WASC 212, [34].

Furthermore, the lack of 'correlation required by the *HRSO Act* between the nature or character of the prior offending … and the nature or character of the offence that a person is found to be at risk of committing' problematically criminalises existence.[131] Expanding 'serious offences' beyond sexual misconduct or terrorism and including robbery, which by its nature is no more likely to lead to recidivism,[132] consigns certain individuals to a position with heightened vulnerability to executive power, merely for having committed a crime which they have already been punished for. This criticism is not that 'legislative power may be misused' against these individuals but rather that its predictive nature constitutes current misuse and a 'sufficient reason to deny its existence'.[133] Further, judicial backstopping against this legislative expansion of protecting through detention does not advance a 'jaundiced view of the integrity or wisdom or practical competence of the representatives chosen by the people' when it represents the reality of legislative action from *Fardon* until now.[134]

E *International Law*

As a matter of policy or constitutional interpretation, rejecting the role of restrictive detention orders for preventive justice accords with Australia's obligations under international law. In *Fardon v Australia*, the Human Rights Committee ('HRC') determined that legislation deemed valid by the High Court in *Fardon* violated arts 14(7) and 9(1) of the *International Covenant on Civil and Political Rights* ('*ICCPR*').[135] Article 9(1) safeguards the 'right to liberty and security of a person', while art 14(7) protects individuals from being punished for offences which they have already been finally convicted or acquitted.[136]

The HRC found that the *DPSO Act* was excessively arbitrary stemming from the inherently punitive nature of the scheme and practical difficulties with its purported protective application.[137] Orders subjecting individuals to continuing detention under the same prison regime as their initial penal term, without a direct connection to prior offending or the inclusion of preventive reasons during the sentencing for those offences, were considered necessarily punitive.[138] Resultingly,

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131 *Garlett* (n 2) 228–9 [190] (Gordon J).

132 Ibid 228 [189], 229 [191].

133 *Gerner v Victoria* (2020) 270 CLR 412, 423–4 [18], citing *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 151–2 (Knox CJ, Isaacs, Rich and Starke JJ).

134 *Gerner v Victoria* (2020) 270 CLR 412, 423–4 [18].

135 Human Rights Committee, *Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (10 May 2010) 8 [7.4] ('*Fardon v Australia*'); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

136 *ICCPR* (n 135) art 9(1), 14(7).

137 *Fardon v Australia* (n 135) 8 [7.4].

138 Ibid.

the continuing 'preventive' order amounted to double punishment without further determining criminal guilt.[139] Granting courts the power to issue these orders after the commission of a criminal offence also rendered their application retroactive and therefore arbitrary.[140] This harm was further exacerbated by the inherently problematic task of predicting future offending, which is based on opinion as distinct from factual evidence.[141]

Similar issues will arise for any preventive detention order angled at protecting the community from the failed rehabilitation of offenders. The interpretation by the HRC regarding penal versus protective measures, and therefore permissible and impermissible detention under international law, is persuasive given the parallels between the exceptions recognised by the HRC to art 9 of the *ICCPR* and those deemed exceptional by Australian courts under the *Lim* principle. In their eyes 'immigration control or the institutionalised care of persons suffering from mental illness or other conditions harmful to themselves or society'[142] are considered appropriate limitations on detention under international law. But 'limitations [on liberty] … consequent upon, punishment for criminal offences may give rise to particular difficulties'.[143]

VI Conclusion

On one reading, *Garlett* is simply an application of constitutional principles regarding preventive or continuing detention that have previously been elucidated by the High Court in *Fardon* and *Benbrika*. However, the significance of *Garlett* extends far beyond this.

The majority's rejection of Gageler J's interpretation of the *Lim* principle, and their Honours' finding that the principle does not preclude a regime such as the *HRSO Act* even at the Commonwealth level, represents a narrowing of a principle that should instead be regarded as encapsulating the very essence of our judicial system. Similarly, the plurality's refusal to question Parliament's decision to designate an offence as serious reflects a significant abdication of the Court's role in assessing the constitutional validity of preventive detention schemes. Unfortunately, *Garlett* is therefore another example of judicial acquiescence to the phenomenon noted by Gordon J, whereby '[r]egimes which once were seen as exceptional measures … now risk becoming the norm'.[144]

139 Ibid.

140 Ibid.

141 Ibid.

142 Ibid 8 [7.3].

143 Ibid.

144 *Garlett* (n 2) 220 [167].

The plurality in *Garlett* cautions us against '[t]he rhetorical deployment of extreme and distorting examples'.[145] However, it is the warning of Gageler J, that the relationship between individual and state under our constitutional system of government 'cannot be taken for granted',[146] and of Gordon J, against the 'potential normalisation of regimes that override individuals' liberty on the grounds of legislatively asserted "preventive" or "protective" imperatives',[147] that reflect the true significance of the majority's decision in *Garlett*: an encroachment into the fundamental principles of individual liberty and freedom from detention guaranteed by ch III of the *Constitution*.

145 Ibid 203 [88].

146 Ibid 211 [127].

147 Ibid 220 [168].