



HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY**

BETWEEN:

NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LIMITED

Plaintiff

and

NORTHERN TERRITORY OF AUSTRALIA

Defendant

10

SUBMISSIONS OF THE PLAINTIFF

PART I: CERTIFICATION

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

PART II: ISSUE

2 Section 7A(2AB) of the *Bail Act 1982* (NT) requires a court to refuse bail, and so
authorise the detention of the person, “unless the [] court has a high degree of confidence,
when considered in isolation from matters mentioned in sections 24 and 24A, that the
person will not, if released on bail” commit a prescribed offence or a serious violence
offence, or otherwise endanger the safety of the community. The North Australian
Aboriginal Justice Agency (NAAJA) contends that s 7A(2AB) substantially impairs the
10 institutional integrity of several courts of the Northern Territory and is therefore
inconsistent with Ch III of the Constitution.

PART III: SECTION 78B NOTICE

3 NAAJA has given notice under s 78B of the *Judiciary Act 1903* (Cth): **SCB 17**.

PART IV: FACTS

4 NAAJA was established in 2006 by the merger of three long-standing Aboriginal legal
services: **SCB 47 [8]**. The objects and purposes of NAAJA are to provide high quality
and culturally appropriate legal aid and related services for Aboriginal people in need of
benevolent relief, including providing legal representation for Aboriginal people
interacting with the legal system, and being involved in law reform and advocacy relevant
20 to its objects and purposes: **SCB 48 [11], 64**. NAAJA provides legal advice and
representation in criminal law matters to Aboriginal and Torres Strait Islander defendants
in all courts in the Northern Territory: **SCB 48 [12]**. Since the commencement of
amendments to s 7A of the Bail Act by the *Bail and Youth Justice Legislation Amendment
Act 2025* (NT) on 7 May 2025, NAAJA has represented adults and youths who have been
refused bail under that provision by the Supreme Court, Local Court and Youth Justice
Court, including the six individuals in the matters outlined at **SCB 49-54 [15]-[43]**.

PART V: ARGUMENT

A STANDING AND CONCRETENESS (QUESTIONS 1 AND 2)

5 NAAJA has standing to seek the relief sought in the Writ of Summons because it has a “real” or “sufficient” interest in obtaining that relief (**Question 1**).¹ NAAJA’s status and central role in criminal justice in the Northern Territory establish that it has an interest in the matter beyond that of the public generally.² In addition, NAAJA has the same interest in the validity of s 7A(2AB) as would any of its clients whose bail applications have been, or may in future be, refused under that provision. The relief sought is not “hypothetical” (**Question 2**). If s 7A(2AB) is declared invalid, that declaration will produce “foreseeable consequences” for NAAJA’s clients.³ NAAJA’s clients who have been refused bail under s 7A(2AB) and remain in custody will be entitled to seek their liberty on bail unaffected by that provision. That provision will also not operate to require refusal of bail in future applications by NAAJA’s many clients.⁴

6 The position of NAAJA is indistinguishable from that of one of its predecessors (**NAALAS**) in *North Australian Aboriginal Legal Aid Service Inc v Bradley*.⁵ NAALAS challenged the validity of Mr Bradley’s appointment as Chief Magistrate. Weinberg J held it had standing to do so, over the objection of the Northern Territory. That conclusion was not challenged on appeal to the Full Court or the High Court. The starting point was to consider NAALAS’s “status, and the functions it performs”.⁶ “The primary reason for its existence [was] to provide legal representation and advice” to its clients who were “among the most disadvantaged members of our community”, and it held an important role in protecting the rights of Aboriginal people.⁷ It had the “same interest” in the validity of Mr Bradley’s appointment “as would any of its clients appearing before Mr Bradley”.⁸

¹ See *Unions NSW v New South Wales* (2023) 277 CLR 627 at [16], [22] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ) (**Unions [No 3]**).

² See *Unions [No 3]* (2023) 277 CLR 627 at [22] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

³ *Unions [No 3]* (2023) 277 CLR 627 at [16] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

⁴ See *Unions [No 3]* (2023) 277 CLR 627 at [27] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

⁵ (2001) 192 ALR 625 (Weinberg J).

⁶ *Bradley* (2001) 192 ALR 625 at [51] (Weinberg J). See **SCB 47-48 [7]-[13]**.

⁷ *Bradley* (2001) 192 ALR 625 at [56] (Weinberg J).

⁸ *Bradley* (2001) 192 ALR 625 at [62] (Weinberg J), referring to *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 (where the union was regarded as having the same “special interest” in the subject matter of the dispute as that of its members).

If his appointment was invalid, “his decisions, many of which affect the liberty of NAALAS’ clients, [would] be void, and of no effect”.⁹

B THE “INSTITUTIONAL INTEGRITY” LIMIT AND *LIM*

7 “The Constitution is structured upon, and incorporates, the doctrine of the separation of judicial from executive and legislative powers”.¹⁰ That doctrine advances two objectives: “the guarantee of liberty and, to that end, the independence of Ch III judges”.¹¹ The provisions of Ch III give effect to that doctrine “in so far as the vesting of judicial power is concerned”, by constituting an “exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested”.¹² One aspect of that exhaustive statement is that the only “possible repositories” of Commonwealth judicial power are “courts”¹³ — being those “courts” created pursuant to s 71 of the Constitution and constituted in accordance with s 72, and those other “courts” brought into existence by a State or Territory.¹⁴ All such “courts”, once established, become part of the “integrated court system” established by Ch III.¹⁵

8 Following from the demarcation of “courts” as the exclusive repositories of the judicial power of the Commonwealth, it is beyond the competence of the Commonwealth Parliament to invest with any part of the judicial power of the Commonwealth any body or person, except a “court”.¹⁶ To ensure the effectiveness of that limit on power, Ch III carries with it an implicit requirement that all “courts” within the integrated court system exhibit the “essential characteristics” of a “court”.¹⁷ Because the Constitution does not permit of “different grades or qualities of justice”, those “essential characteristics” are the same irrespective of whether that “court” is established by the Commonwealth, a State or

⁹ *Bradley* (2001) 192 ALR 625 at [61] (Weinberg J).

¹⁰ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 26 (Brennan, Deane and Dawson JJ).

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

¹² *Lim* (1992) 176 CLR 1 at 26 (Brennan, Deane and Dawson JJ), quoting *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹³ *Leeth v Commonwealth* (1992) 174 CLR 455 at 486 (Deane and Toohey JJ).

¹⁴ See *Forge v ASIC* (2006) 228 CLR 45 at [56] (Gummow, Hayne and Crennan JJ).

¹⁵ See *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [152]-[153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *A-G (NT) v Emmerson* (2014) 253 CLR 393 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

¹⁶ *Forge* (2006) 228 CLR 45 at [56] (Gummow, Hayne and Crennan JJ).

¹⁷ See *Leeth* (1992) 174 CLR 455 at 487 (Deane and Toohey JJ); *SDCV v Director-General of Security* (2022) 277 CLR 241 at [172], [175] (Gordon J), [225] (Edelman J).

a Territory.¹⁸ It is not possible to make a “single all-embracing statement” of those characteristics.¹⁹ Fundamentally, however, a “court” is an institution for the “administration of justice”.²⁰ It must have the “capacity to administer the common law system of adversarial trial” which, in turn, requires a court to be (and appear to be) an “independent and impartial tribunal”.²¹

9 Because of that implicit requirement, the legislative power of the Commonwealth does not extend to the making of a law which requires or authorises any “court” to exercise judicial power in a manner which is inconsistent with the “essential character” of a “court”.²² To the same effect, the legislative power of the States and Territories does not
10 extend to the making of a law that requires or authorises a State or Territory “court” to exercise a function or power that “substantially impairs” its “essential characteristics”.²³ In that way, the “institutional integrity” of all “courts” is protected by Ch III.

10 That “institutional integrity” limit on legislative power is significant where a law — Commonwealth, State or Territory — authorises a “court” to detain individuals. The “paradigm” case involves a “court” imposing detention, in the exercise of judicial power, “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”.²⁴ That paradigm expresses the principle expounded in *Lim* that “the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of
20 government, exists only as an incident of the exclusively judicial function of adjudging

¹⁸ See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103 (Gaudron J); *SDCV* (2022) 277 CLR 241 at [58] (Kiefel CJ, Keane and Gleeson JJ), [129] (Gageler J).

¹⁹ *Forge* (2006) 228 CLR 45 at [64] (Gummow, Hayne and Crennan JJ).

²⁰ *Harris v Caladine* (1991) 172 CLR 84 at 92 (Mason CJ and Deane J), cited in *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [120] (Gageler J) (*NAAJA*); *SDCV* (2022) 277 CLR 241 at [225] (Edelman J).

²¹ *Forge* (2006) 228 CLR 45 at [64] (Gummow, Hayne and Crennan JJ). See also *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Garlett v Western Australia* (2022) 277 CLR 1 at [117]-[118] (Gageler J).

²² *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ). See also *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 607 (Deane J), 689 (Toohey J); *SDCV* (2022) 277 CLR 241 at [50], [91] (Kiefel CJ, Keane and Gleeson JJ), [172] (Gordon J), [225], [267] (Edelman J); *EGH19 v Commonwealth* [2026] HCA 6 at [282] (Jagot J); *Deripaska v Minister for Foreign Affairs* [2026] HCA 14 at [227]-[228] (Beech-Jones J).

²³ See *Forge* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ); *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [55] (Bell, Keane, Nettle and Edelman JJ).

²⁴ *EGH19* [2026] HCA 7 at [16]-[17] (Gageler CJ and Gleeson J). See also *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at [68]-[73] (Gageler J), [103], [134] (Gordon J) (*Benbrika [No 1]*); *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1 at [36]-[38] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

and punishing criminal guilt”.²⁵ It reflects the compact between the individual and the state underpinning the Constitution, whereby an individual “may ... be punished for a breach of the law, but ... for nothing else”.²⁶ That compact is enforced and protected by the “courts”, who have the responsibility of determining the criminal liability of an individual through the administration of the “common law system of adversarial trial”.²⁷ A law that fits within that paradigm will be consistent with the court’s role as an institution for the “administration of justice” and, therefore, consistent with its “institutional integrity”.

- 11 In contrast, a law that authorises a “court” to detain an individual outside the paradigm
 10 involves the “court” in a process that risks undermining its role as the independent and impartial guardian of the compact between the individual and the State.²⁸ A law that involves a “court” in the detention of an individual outside the paradigm must therefore be “exceptional”.²⁹ That depends on whether it is “reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose”.³⁰ Unless the law meets that requirement, the departure from the paradigm will not be “justified”.³¹ The law will be “antithetical” to the character of that court as “an institution for the administration of justice” and to “the very conception of justice which it is the responsibility of courts to administer”.³² Such a law will “substantially impair” the court’s “institutional integrity”.³³
- 12 None of that analysis depends on implying a strict separation of judicial power at the State
 20 level.³⁴ Rather, it recognises that the limit on the functions which can be required of “courts” are “rooted in the text and structure of the Constitution informed by the common

²⁵ *Lim* (1992) 176 CLR 1 at 26 (Brennan, Deane and Dawson JJ).

²⁶ *Lim* (1992) 176 CLR 1 at 27-28 (Brennan, Deane and Dawson JJ); *EGH19* [2026] HCA 7 at [18] (Gageler CJ and Gleeson J), [77] (Gordon J). See also *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at [12]-[13] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

²⁷ See *Garlett* (2022) 277 CLR 1 at [130]-[133] (Gageler J).

²⁸ See *Benbrika [No 1]* (2021) 272 CLR 68 at [74] (Gageler J); *EGH19* [2026] HCA 7 at [62] (Gordon J).

²⁹ *EGH19* [2026] HCA 7 at [16]-[19] (Gageler CJ and Gleeson J), [62]-[63], [65], [84] (Gordon J), [285], [292], [313], [322], [329] (Jagot J). See also *Benbrika [No 1]* (2021) 272 CLR 68 at [17], [27], [36] (Kiefel CJ, Bell, Keane and Steward JJ), [71]-[73] (Gageler J), [134] (Gordon J), [207]-[209] (Edelman J).

³⁰ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at [39] (the Court).

³¹ See *YBFZ* (2024) 99 ALJR 1 at [8], [18], [64] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

³² *Garlett* (2022) 277 CLR 1 at [135] (Gageler J).

³³ See *Garlett* (2022) 277 CLR 1 at [181]-[184], [199] (Gordon J), [242]-[246], [257] (Edelman J).

³⁴ See *Fardon v A-G (Qld)* (2004) 223 CLR 575 at [86] (Gummow J); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [126] (Hayne, Crennan, Kiefel and Bell JJ).

law, which carries with it historically developed concepts of courts and the judicial function”³⁵ and the “fundamental assumptions, upon which Ch III of the Constitution is based, about the rule of law”.³⁶ Those concepts are grounded in “ancient principles of the common law”, which precede the federal structure established by the Constitution.³⁷

13 There are strands in the majority reasoning in *Kable* that support the above analysis.³⁸
 The reasoning in *Lim* was “applied as a step in” the reasoning of Toohey J and Gummow J.³⁹ For Toohey J, it was important that the detention authorised was “not an incident of the exclusively judicial function of adjudging and punishing criminal guilt”, not “part of a system of preventive detention with appropriate safeguards, consequent upon or
 10 ancillary to the adjudication of guilt”, and not within an “exceptional case”.⁴⁰ To the same end, Gummow J said that the “most significant” feature of the legislative scheme was that “whilst imprisonment pursuant to Supreme Court order is punitive in nature, it is not consequent upon any adjudgment by the Court of criminal guilt”.⁴¹ For that reason, the law required the “court” to act in a manner “repugnant to judicial process”.⁴² The reasoning of the other two judges in the majority “reflected” the reasoning in *Lim*.⁴³ For Gaudron J, the criteria for the exercise of the power were the “antithesis of the judicial process”.⁴⁴ For McHugh J, the law required the adoption of a process “far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person” and from the “ordinary incidents of the judicial process”.⁴⁵

20 14 Apart from *Kable*, aspects of the reasoning in *Lim* have often been invoked in cases concerning challenges to the validity of State schemes concerning court-ordered detention

³⁵ *Pompano* (2013) 252 CLR 38 at [68] (French CJ), see also at [2]-[3].

³⁶ *South Australia v Totani* (2010) 242 CLR 1 at [4] (French CJ).

³⁷ *YBFZ* (2024) 99 ALJR 1 at [6] (Gageler CJ, Gordon, Gleeson and Jagot JJ); *EGH19* [2026] HCA 7 at [67]-[69] (Gordon J).

³⁸ See *Totani* (2010) 242 CLR 1 at [202] (Hayne J); *EGH19* [2026] HCA 7 at [322]-[323] (Jagot J).

³⁹ *Garlett* (2022) 277 CLR 1 at [137] (Gageler J); cf at [306]-[307] (Gleeson J).

⁴⁰ *Kable* (1996) 189 CLR 51 at 28 (Toohey J).

⁴¹ *Kable* (1996) 189 CLR 51 at 132 (Gummow J).

⁴² *Kable* (1996) 189 CLR 51 at 134 (Gummow J).

⁴³ *Fardon* (2004) 223 CLR 575 at [77] (Gummow J); *Garlett* (2022) 277 CLR 1 at [137] (Gageler J).

⁴⁴ *Kable* (1996) 189 CLR 51 at 106 (Gaudron J).

⁴⁵ *Kable* (1996) 189 CLR 51 at 122 (McHugh J).

and restrictions on liberty.⁴⁶ Moreover, acknowledging the “risk of undue abbreviation, and consequent inaccuracy”,⁴⁷ the laws upheld in *Fardon*, *Benbrika [No 1]* and *Garlett* can be explained consistently with the analysis above.⁴⁸ Although each law authorised a “court” to detain an individual otherwise than as part of the adjudgment and punishment of criminal guilt, each departed from that paradigm in a way that was reasonably capable of being seen as necessary for a legitimate non-punitive purpose (the protection of the community from certain grave and serious harm). Each law involved a “judicial process of some refinement”.⁴⁹ As will be explained, s 7A(2AB) of the Bail Act does not.

C HISTORICAL CONTEXT OF PRE-TRIAL DETENTION AND BAIL

10 15 Bail has many centuries of common law history.⁵⁰ Its history has been described “[i]n its broadest sweep” as “a story of continual efforts to restrict the power of the state to lock a person up before trial”.⁵¹ It is entwined with the foundational common law principle that no person may be detained “except under and in accordance with some positive authority conferred by the law”.⁵² By the 17th century, bail denoted the process of release to sureties who would guarantee the accused person’s appearance at court, and “pre-trial release on bail was a fundamental part of English constitutionalism”.⁵³ Blackstone explained that a person arrested and brought before a justice:

20 must either be committed to prison, or give bail: that is, put in securities for his appearance, to answer the charge against him. This commitment therefore being only for safe custody, wherever bail will answer the same intention, it ought to be taken; as in most of the inferior crimes: but in felonies, and other offences of a capital nature, no bail can be a security equivalent to the actual custody of the person.⁵⁴

⁴⁶ See *Fardon* (2004) 223 CLR 575 at [126], [150]-[155], [174]-[175] (Kirby J), [214]-[217], [234] (Callinan and Heydon JJ); *Totani* (2010) 242 CLR 1 at [202], [208]-[212] (Hayne J); *NAAJA* (2015) 256 CLR 569 at [125], [128] (Gageler J), *Vella* (2019) 269 CLR 219 at [61], [71]-[72], [74]-[75], [84]-[85] (Bell, Keane, Nettle and Edelman JJ), [173] (Gageler J), [204] (Gordon J); *Garlett* (2022) 277 CLR 1 at [40], [45]-[56] (Kiefel CJ, Keane and Steward JJ), [121]-[123], [132]-[137] (Gageler J), [184], [198]-[200] (Gordon J), [248] (Edelman J).

⁴⁷ *Forge* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ).

⁴⁸ See *Garlett* (2022) 277 CLR 1 at [138]-[139] (Gageler J); *EGH19* [2026] HCA 7 at [24]-[27] (Gageler and Gleeson JJ), [126]-[128] (Gordon J), [323], [330]-[331] (Jagot J).

⁴⁹ *EGH19* [2026] HCA 7 at [27] (Gageler CJ and Gleeson J).

⁵⁰ See NSW Law Reform Commission, *Report 133: Bail* (April 2012) at 19-28; Duker, “The Right to Bail: A Historical Inquiry” (1977) 42 *Albany Law Review* 33, especially at 34-66.

⁵¹ Funk & Mayson, “Bail at the Founding” (2024) 137 *Harvard Law Review* 1816 at 1825.

⁵² *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 528-529 (Deane J); *Lim* (1992) 176 CLR 1 at 19 (Brennan, Deane and Dawson JJ).

⁵³ Funk & Mayson, “Bail at the Founding” (2024) 137 *Harvard Law Review* 1816 at 1828.

⁵⁴ Blackstone, *Commentaries on the Laws of England* (1830), Book 4 Chapter 22 at 296; see also 299.

16 While certain serious offences were not bailable, the rationale was not a person's risk to others, but their likelihood of absconding: "[f]or what is there that a man may not be induced to forfeit, to save his own life?"⁵⁵ Dicey identified the function of pre-trial detention in the same way: "[t]hat anybody should suffer physical restraint is in England prima facie illegal, and can be justified (speaking in very general terms) on two grounds only, that is to say, either because the prisoner or person suffering restraint *is accused of some offence and must be brought before the Courts to stand his trial*, or because he has been duly convicted of some offence and must suffer punishment for it".⁵⁶ In the former case, "the object of his detention is to ensure his being brought to trial".⁵⁷

10 17 That purpose was reflected in the common law governing bail immediately before and after Federation. In 1892, by reference to the English case of *In re Robinson*, the Supreme Court of New South Wales recognised that the "test" for granting bail was "whether it was probable the party will appear to take his trial".⁵⁸ That question involved consideration of the gravity of the offence, the probability of conviction and the punishment to which the person was liable.⁵⁹ Similarly, in a 1900 decision the Supreme Court of Victoria recognised that "[a]n accused person is presumed to be innocent until the verdict at trial, and the only ground for locking up an accused person is to make sure that he will appear at trial".⁶⁰ That is why "upon an application for bail the paramount consideration is whether the accused person is likely to abscond or whether he will attend at the trial without the necessity of keeping him in gaol".⁶¹ As the Court asked rhetorically: "Why should this person be kept in prison for a crime other than the one with which she is already charged?"⁶² That the common law carefully limited the grounds on which a person could be detained before trial can be understood in light of the fundamental status of the presumption of innocence.⁶³

⁵⁵ Blackstone, *Commentaries on the Laws of England* (1830), Book 4 Chapter 22 at 296-298.

⁵⁶ Dicey, *Introduction to the Study of the Law of the Constitution* (1897) at 199 (emphasis added).

⁵⁷ Dicey, *Introduction to the Study of the Law of the Constitution* (1897) at 208.

⁵⁸ *R v Fraser* (1892) 13 LR (NSW) 150 at 154 (Chief Justice), quoting *In re Robinson* (1854) 23 LJ QB 286 (Justice Coleridge). See also *R v Malone* [1903] St R Qd 140 at 142 (Griffiths CJ).

⁵⁹ *R v Fraser* (1892) 13 LR (NSW) 150 at 154 (Chief Justice). See also *R v Watson* (1947) 64 WN (NSW) 100 (Herron J).

⁶⁰ *R v Fraser* (1900) 25 VLR 365 at 366-367 (Hood J). See also *R v Sefton* [1917] VR 259 at 261-262 (Cussen J).

⁶¹ *R v Fraser* (1900) 25 VLR 365 at 367 (Hood J).

⁶² *R v Fraser* (1900) 25 VLR 365 at 367 (Hood J).

⁶³ See *Nikollaj v R* [2025] NSWCCA 31 at [24(4)] (Yehia J, Price AJA and Dhanji J agreeing), referring to *M v R* [2015] NSWSC 138 at [4], [16] (McCallum J). See also *R. v Myers* [2019] 2 SCR 105 at [1] (the Court).

18 By around the middle of the 20th century, a number of cases identified further permissible considerations informing the discretion whether to grant bail — including the risk of the accused interfering with witnesses or committing other offences while on bail.⁶⁴ It continued to be recognised, however, that “[t]he object of bail is to ensure and secure the attendance of the accused at his trial and it recognizes that the liberty of the subject should only be restricted in such way as will achieve this result”.⁶⁵

19 This common law history was recognised in *Lim*, by reference to Blackstone, in the identification of an “exceptional case” of:⁶⁶

10 the arrest and detention in custody, pursuant to executive warrant, of a person accused of crime **to ensure that he or she is available to be dealt with by the courts**. Such committal to custody awaiting trial is not seen by the law as punitive or as appertaining exclusively to judicial power. Even where exercisable by the Executive, however, the power to detain a person in custody pending trial is ordinarily subject to the supervisory jurisdiction of the courts, including the “ancient common law” jurisdiction, “before and since the conquest”, to order that a person committed to prison while awaiting trial be admitted to bail.

20 As Wilson and Dawson JJ explained in *Williams v the Queen*:⁶⁷

20 A person who is arrested may be detained only for the purpose of bringing him before a justice (or nowadays before some other person with power to deal with him) to be dealt with according to law. For arrest is the beginning of imprisonment and, whilst it is recognized that **imprisonment before trial may be necessary in the administration of criminal justice, it must be justified in accordance with the law**. There must be a charge and if the person charged can establish his entitlement to bail and can furnish it, the law requires that he be released subject to any conditions which might be imposed upon him. **The function of the justice in granting or withholding bail is an ancient one: 1, 2 Philip and Mary c. 13; Holdsworth, History of English Law, 5th ed. (1931), vol. I, p. 296. The point at which an arrested person is brought before a justice upon a charge is the point at which the machinery of the law leading to trial is put into operation. It is the point from which the judicial process commences** and purely ministerial functions cease. ... A person is not to be imprisoned otherwise than upon the authority of a justice or a court except to the extent reasonably necessary to bring him before the justice to be dealt with according to law. That, as we conceive it, is one of the foundations of the common law.

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⁶⁴ *R v Light* [1954] VLR 152 at 158 (Scholl J); *R v Appleby* (1966) 83 WN (Pt 1) (NSW) 300 at 301 (Isaacs J); *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325 at 332 (Cross Ch QS).

⁶⁵ *R v Appleby* (1966) 83 WN (Pt 1) (NSW) 300 at 301 (Isaacs J). See also McDonald, McAlister & Bricknell, *Bail and remand across Australia* (Australian Institute of Criminology, 2026) at 8.

⁶⁶ *Lim* (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ) (emphasis added).

⁶⁷ *Williams v the Queen* (1986) 161 CLR 278 at 305-306 (Wilson and Dawson JJ) (emphasis added).

21 In short, “custody awaiting trial” may be justified for the purpose of ensuring that an
 accused person “is available to be dealt with by the courts” (**availability purpose**). That
 purpose is both non-punitive and “legitimate”, in the sense of being “compatible with the
 constitutionally prescribed system of government”.⁶⁸ That is because detention for that
 purpose is “necessary for the effective functioning of criminal justice”.⁶⁹ More
 specifically, detention for that purpose is “necessary to enable vindication of judicial
 power”⁷⁰ — namely, the exercise of judicial power by a “court” to determine whether a
 person is criminally liable for the offence with which they have been charged and, if so,
 impose punishment on the person accordingly. So long as a bail law only authorises
 10 detention that pursues the availability purpose (or another purpose regarding the
 vindication of judicial power for the charged offence) in a way that is reasonably capable
 of being seen as necessary for that purpose, it will not contravene the “institutional
 integrity” limit. Indeed, it might be appropriate to characterise a law that is limited in that
 way as one that authorises detention as an “incident” of the function of adjudging and
 punishing criminal guilt.⁷¹

D THE BAIL ACT

22 The Bail Act regulates the grant of bail in the Northern Territory. It applies to a person
 whether they are an adult or a youth⁷² (unless expressly provided otherwise): s 4(1). Part 2
 of the Bail Act contains “general provisions relating to bail”. Bail may be granted in
 20 accordance with the Bail Act in respect of one or more periods “so far as they relate to
 the offence of which the person is accused”, including “the period between the accused
 person being charged with the offence and the accused person’s first appearance before a
 court in or in connection with proceedings for the offence”, “the period between
 committal for trial or sentence and the accused person’s appearance before the Supreme
 Court consequent upon the committal”, and the period of any adjournment during the
 course of a trial: s 6(a)-(c)(i). When “bail is granted to an accused person in respect of an
 offence” and the accused person enters into the bail undertaking and any conditions, the

⁶⁸ *NZYQ* (2023) 280 CLR 137 at [40] (the Court).

⁶⁹ *Chau v Director of Public Prosecutions* (1995) 37 NSWLR 639 at 658 (Kirby P).

⁷⁰ *EGH19* [2026] HCA 7 at [318(1)] (Jagot J).

⁷¹ See *Lim* (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ); *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [29] (Kiefel CJ, Bell, Keane and Edelman JJ). See also *Spence v Queensland* (2019) 268 CLR 355 at [59]-[63] (Kiefel CJ, Bell, Gageler and Keane JJ).

⁷² Meaning a person under 18 years of age; in the absence of proof apparently under 18 years of age; and if the context requires, a person who committed an offence as a youth who has since turned 18: Bail Act s 3 (“youth”); *Youth Justice Act 2005* (NT) s 6.

person is “entitled” “to be released from custody and to remain at liberty in respect of the offence”, until required to appear before a court in accordance with the bail undertaking: s 7(1).

23 For the purposes of the Bail Act, a “court” includes the Supreme Court, the Local Court and the Youth Justice Court: ss 3(1), 3AA. Each of those courts is a “court” within the meaning of Ch III of the Constitution, and is invested with federal jurisdiction under s 68(2) of the Judiciary Act: **SCB 45-46 [1]-[2]**. Part 4 of the Bail Act deals with “court bail”. Section 20(1) of the Bail Act confers on the Local Court the power to “grant bail to a person brought or appearing before the Local Court accused of an offence”, subject to
10 limitations in s 21. The Youth Justice Court is likewise empowered to grant bail to a person brought or appearing before it by s 20(1): s 3AA. Section 23(1) empowers the Supreme Court to grant bail “in accordance with this Act to a person accused of an offence, whether or not the accused person has appeared before the Supreme Court in connection with the offence”. Each of those powers is taken to include a power to refuse bail, which “may only be exercised in conformity with” the Act: s 13. Common law powers to grant bail are abolished by the Bail Act: s 49.

24 Section 7A of the Bail Act (within Part 2) applies where a person has been accused of one or more of the offences listed in s 7A(1). Those offences are numerous, encompassing both summary and indictable offences.⁷³ They include:

- 20 24.1 offences both against specific laws of the Territory (paras (a), (c), (db), (dc), (dd)), and against laws of the Commonwealth (paras (d), (da));
- 24.2 a “**serious violence offence**” (para (e)), further defined in s 3(1) to mean an offence against certain provisions of Sch 1 to the *Criminal Code Act 1983* (NT) (**Criminal Code**) punishable by imprisonment for 5 or more years. This captures a large and broad range of offences;⁷⁴
- 24.3 a “serious sexual offence” (para (f)), defined in s 3A, to include a “Territory sexual offence” or a “Commonwealth sexual offence” (each defined in s 3(1)) punishable by imprisonment for 7 or more years, and certain offences involving children with

⁷³ Most offences are indictable on the basis that they are punishable by a period of more than 2 years imprisonment: Criminal Code s 3(2). Some are not: see, eg, *Serious Crime Control Act 2009* (NT) s 38; (para (db)); *Domestic and Family Violence Act 2007* (NT) s 120 (para (dd), (dh)).

⁷⁴ The provisions are Part V, Division 2; Part VI, Divisions 3 to 6A; Part VIA; s 218; another provision prescribed by regulation; and certain former provisions.

a lesser maximum penalty;

24.4 a “serious offence” (being any offence punishable by imprisonment of 5 or more years: s 3(1)) or “**prescribed offence**”⁷⁵ that a person is charged with committing in specific circumstances, including where the person was on bail for the commission of a previous serious offence (para (de)), subject to a suspended sentence (para (dg)) or has been previously convicted of other specific offences within certain time periods (paras (dea), (df)).

25 Where a person has been charged with one or more offences listed in s 7A(1), the bail consideration proceeds as follows:

- 10 25.1 there is no presumption in favour of bail (s 8(1));
- 25.2 there is no residual discretion in the court to grant bail to a person not entitled to bail (because the power to do so in s 12 applies only where s 8 applies);
- 25.3 bail cannot be dispensed with (ss 7A(3) and 9);
- 25.4 a court must not grant bail “unless the person satisfies the [] court that bail should be granted” (s 7(2));
- 25.5 in determining whether bail should be granted to the person, the court must consider the matters in s 24, and the matters in s 24A in bail applications for youths, but the matter in s 24(1)(aa) “is the paramount consideration”. That matter is “the risk (if any) to the safety of the community that would result from the accused person’s
- 20 release on bail”.

26 After that assessment is conducted, s 7A(2AB) then provides an “additional test”⁷⁶ that (emphasis added):

Even if [a] court is satisfied, as mentioned in subsection (2), that bail should be granted, the [] court must not grant bail to the person unless the [] court has a high degree of confidence, when considered in isolation from matters mentioned in sections 24 and 24A, that the person will not, if released on bail:

- (a) commit a prescribed offence or a serious violence offence; or
- (b) otherwise endanger the safety of the community.

⁷⁵ Defined in s 3B to mean an offence prescribed by regulations or a substantially corresponding offence. Regulation 2A of the *Bail Regulations 1983* (NT) prescribes offences against various provisions of the Criminal Code, and s 120 of the *Domestic and Family Violence Act* (contravention of a domestic violence order).

⁷⁶ Explanatory Statement, *Bail and Youth Legislation Amendment Bill 2025*, 1. See also *R v EM* [2025] NTSC 31 at [12]-[15] (Reeves J).

27 Part 3 of the Bail Act concerns “police bail”, which may be granted by an “authorised member” (ss 3(1), 16(3), (5)). Section 7A also governs the grant of bail by an authorised member, as do the criteria to be considered in ss 24 and 24A. A person taken into custody by police⁷⁷ must be brought before a court as soon as practicable, unless he or she is granted bail or is released from custody.⁷⁸ Alternatively (in the case of an adult), a police officer may inform the person charged of the person’s right to apply for bail and, as far as practicable, ensure the person is able to communicate with a legal practitioner or someone of their choosing in connection with an application for bail: Bail Act s 16(2). Section 7A also applies where a court conducts a review of a bail decision as provided for by ss 33-35: s 36(2).

E INVALIDITY OF SECTION 7A(2AB) (QUESTIONS 3 AND 4)

E.1 Section 7A(2AB) requires a court to authorise detention

28 It is not in dispute that the legal and practical effect of a court’s decision to refuse to grant bail to a person under ss 7A(2) or (2AB) is to require and authorise the future detention in custody of that person: **SCB 46-47 [6]**. The starting point bears repeating that any detention requires “some positive authority conferred by the law”.⁷⁹ From the time that a court determines whether to grant bail to a person, and refuses bail, that authority for detention flows from the provision of the Bail Act under which bail is refused. That is so either because a necessary corollary of the court exercising the power to refuse bail is that the court will exercise an express power to remand the person into custody;⁸⁰ or to the extent the court does not have such an express power, because a necessary incident of the court’s power to refuse bail under s 7A is an implied power to remand the person into custody: **SCB 47 [6.1]-[6.2]**.

29 In that way, s 7A(2AB) of the Bail Act authorises a “court” to detain a person in custody. Because it is the “involuntary deprivation of liberty itself that ordinarily constitutes punishment”,⁸¹ the provision is prima facie punitive by “default”.⁸² In circumstances

⁷⁷ See *Police Administration Act* 1978 (NT) ss 123, 124.

⁷⁸ *Police Administration Act* s 137(1); *Youth Justice Act* s 27. See also, as to the procedure by which a person may come before the court, *Local Court (Criminal Procedure) Act* 1928 (NT) ss 49, 57, 58-60, 101, 103-105.

⁷⁹ *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 528-529 (Deane J).

⁸⁰ In the Local Court, under ss 60 and 113 of the *Local Court (Criminal Procedure) Act*; in the Supreme Court, during adjournment of a trial, under s 334 of the Criminal Code; for a youth, under ss 24 or 65 of the *Youth Justice Act*.

⁸¹ *NZYQ* (2023) 280 CLR 137 at [28] (the Court).

⁸² *YBFZ* (2024) 99 ALJR 1 at [16] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

where that detention is being imposed by a “court” outside of the paradigm (because it is being imposed *not* “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”⁸³), the question then is whether it falls within an exceptional case.

E.2 Section 7A(2AB) does not have a non-punitive purpose

30 The purpose of a law is “what the law is designed to achieve in fact”,⁸⁴ focusing on the “mischief” to which the law is directed.⁸⁵ It is to be ascertained by reference to the text and context of the law.⁸⁶ On that analysis, the purpose of s 7A(2AB) does not reflect the availability purpose that has long been recognised as non-punitive, nor any wider purpose
10 designed to ensure the proper administration of the criminal trial for the charged offence.

31 A court’s consideration of whether bail should be granted under s 7A(2) is undertaken by reference to the factors in s 24, which include in s 24(1)(a) “the probability of whether or not the person will appear in court in respect of the offence for which bail is being considered”, having regard to the matters in that paragraph. Section 7A(2AB) arises for consideration only if, and *after*, a person has satisfied the court that bail should be granted under s 7A(2). It requires the court to refuse bail unless the court is satisfied to a high degree of confidence that the person will not commit a prescribed offence or a serious violence offence, or otherwise endanger the safety of the community. Critically, that assessment is to be made “*in isolation* from matters mentioned in sections 24 and 24A”.
20 As such, the provision is expressly divorced from the matter of whether a person will appear to stand trial. Its operation is entirely disconnected from the availability purpose.

32 The legislative context supports that conclusion. There is nothing in the extrinsic materials to the Amendment Act that refers to whether a person will appear in court. Section 7A(2AB) is described as an “additional test”, a “standalone consideration”⁸⁷ and as providing “a further hurdle to an alleged offender being granted bail”.⁸⁸ The

⁸³ *EGH19* [2026] HCA 7 at [16]-[17] (Gageler CJ and Gleeson J); see also *Benbrika [No 1]* (2021) 272 CLR 68 at [103], [134] (Gordon J).

⁸⁴ *NZYQ* (2023) 280 CLR 137 at [40] (the Court), see also at [53] (Edelman J).

⁸⁵ *Hopper v Victoria* [2026] HCA 11 at [45] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

⁸⁶ *YBFZ* (2024) 99 ALJR 1 at [67] (Gageler CJ, Gordon, Gleeson and Jagot JJ); *EGH19* [2026] HCA 7 at [121] (Gordon J).

⁸⁷ Explanatory Statement, Bail and Youth Legislation Amendment Bill 2025 at 2.

⁸⁸ Legislative Assembly of the NT, Debates and Questions (**Debates**), 30 April 2025 at 1603 (Chief Minister Finocchiaro), see also 1609 (Minister for Corrections). See *Interpretation Act 1978* (NT) s 62B(2)(f), (h).

amendments were responsive to the commission of “serious offences by people on bail”,⁸⁹ and were repeatedly said to be directed to “community safety” and to “protect Territorians”.⁹⁰ The provision was described as an “overriding instruction by the parliament to consider community safety”.⁹¹

33 The purpose of s 7A(2AB) may be identified as protecting the safety of the community from a risk that that may eventuate if the person is released on bail. The Defendant frames that purpose with slightly more particularity, as being to protect the community from the risk that an accused person *may engage in the conduct in s 7A(2AB)(a)-(b)* if the person is released on bail: Defence [22.3]. While specific forms of harmful conduct might be identified from the kinds of “serious violence offence” in para (a),⁹² it cannot be said that para (b) identifies any form of conduct: the risk is that the person may “otherwise endanger the safety of the community”. The intended breadth of s 7A(2AB) is threefold. *First*, “serious violence offence” is defined to contain offences that are very numerous (approximately 90) and disparate in nature. *Second*, that is further extended by the inclusion of “prescribed offences”, where the offences that may be prescribed are not limited in their nature or otherwise. *Third*, para (b) expands the focus to ensure that *any* form of risk to the safety of the community will be captured. Reading the provision as a whole, the risk with which s 7A(2AB) is concerned “must be taken to be designedly unparticularised and indeterminate”.⁹³ The provision operates as a package directed not to particular conduct, but to the protection of the safety of the community in the broadest sense. Like the provision in *YBFZ*, s 7A(2AB) does “not identify the nature, degree, or extent of the harm sought to be protected against”.⁹⁴

34 The difficulty with a provision of that kind is that “protecting the safety of the community” is “a concept of such elasticity that it is not necessarily inconsistent with the imposition ... of a criminal punishment following an adjudication of criminal guilt — a

⁸⁹ Debates, 30 April 2025 at 1602 (Chief Minister).

⁹⁰ See Debates, 30 April 2025 at 1602-1604 (Chief Minister), 1608-1609 (Minister for Corrections), 1612-1614 (Attorney-General).

⁹¹ Debates, 30 April 2025 at 1645 (Chief Minister) (“we have not done it once; we have done it twice in this iteration of the Bill today”).

⁹² See *EGH19* [2026] HCA 7 at [45]-[46] (Gageler CJ and Gleeson J), [63] (Gordon J), [122] (Edelman J).

⁹³ *YBFZ* (2024) 99 ALJR 1 at [76] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

⁹⁴ *YBFZ* (2024) 99 ALJR 1 at [65], see also at [79] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

function which lies in the heartland of judicial power”.⁹⁵ Such a purpose cannot safely be described as “non-punitive”. That point is reinforced by the legislative history, which is replete with statements that reflect the purposes of punishment, of retribution, incapacitation and deterrence of “offenders”.⁹⁶ For example, the amendments were to “mak[e] it clear there will be consequences; we say, ‘We will find a bed for you in our prison system’”.⁹⁷ As put by the Chief Minister, “cramped prison facilities will never be a reason this government does not hold someone accountable under the law ... [i]f you do not want to live in a hot cramped cell, here is a newsflash for you – do not perpetrate crime on innocent people”.⁹⁸

10 **E.3 If s 7A(2AB) has a non-punitive purpose, it is not legitimate**

35 The “legitimacy” requirement recognises that detention imposed other than as part of the adjudgment and punishment of criminal guilt must be regarded as exceptional.⁹⁹ Here, the inquiry must be informed by the history¹⁰⁰ of the function of courts in administering the common law system of trial to determine a person’s criminal guilt and associated punishment (**Part B** above) and the role of pre-trial detention as a means of ensuring the proper functioning of that system (**Part C** above).

36 The purpose of s 7A(2AB) is disconnected from the administration of that system of criminal justice. It does not permit an evaluation of the type familiar to the “ancient” function of granting or withholding bail. Rather, it is expressly divorced from the
20 evaluation of whether bail should be granted, by the command that the provision be “considered in isolation” from the matters in ss 24 and 24A — where matters of the risk of commission of offences and risk to community safety have *already* been brought into the bail evaluation for s 7A(2). Section 7A(2AB) requires the court to exercise a power under a legislative command to insulate the assessment from ordinary bail considerations, and focus solely on the asserted protective end.

⁹⁵ *YBFZ* (2024) 99 ALJR 1 at [81] (Gageler CJ, Gordon, Gleeson and Jagot JJ); *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at [111] (Gageler J). See also *EGH19* [2026] HCA 7 at [168] (Edelman J).

⁹⁶ See Debates, 30 April 2025 at 1609 (Minister for Corrections), 1612-1613 (Attorney General), 1642, 1644 (Chief Minister).

⁹⁷ Debates, 30 April 2025 at 1609 (Minister for Corrections).

⁹⁸ Debates, 30 April 2025 at 1644 (Chief Minister).

⁹⁹ *NZYQ* (2023) 280 CLR 137 at [40] (the Court).

¹⁰⁰ See *Jones v Commonwealth* (2023) 280 CLR 62 at [45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *YBFZ* (2024) 99 ALJR 1 at [14] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

37 The legitimacy of the protective purpose of s 7A(2AB) accordingly falls to be determined in the same way as other regimes authorising preventive detention.¹⁰¹ There, the purposes recognised to be legitimate have involved protection from a “grave and specific” form of harm.¹⁰² That is lacking from s 7A(2AB). The purpose does not identify protection from particular harm; and it is intentionally expansive as to the conduct within its purview (see paragraph 33 above). The concept of “endangering the safety of the community” does not require harm to be a sufficient degree of seriousness to involve the commission of a serious criminal offence;¹⁰³ the offences that may be “prescribed offences” are not limited by any requirement of harm;¹⁰⁴ and the label of “serious violence offence” involves a very wide range of conduct.¹⁰⁵ “If protection from any harm of any nature, degree, or extent were a legitimate non-punitive purpose, the very point of the legitimacy requirement would be undermined”.¹⁰⁶

38 Further, the purpose is not legitimate because it identifies no threshold of risk to be protected against.¹⁰⁷ In contrast to protective purposes previously recognised as legitimate, there is no evaluation of whether a risk of commission of an offence (or of endangering the community) is “unacceptable”,¹⁰⁸ or is a “substantial risk”.¹⁰⁹ It may be noted that tests of “unacceptable risk” feature in the bail legislation of many States;¹¹⁰ that is an evaluation which it has been recognised is “made in the context of the fact that the presumption of innocence and the right to be at liberty remain fundamental common law principles”.¹¹¹ The purpose here is to protect against “risk” of an unspecified degree.

¹⁰¹ See *Garlett* (2022) 277 CLR 1 at [165]-[168] (Gordon J).

¹⁰² *EGH19* [2026] HCA 7 at [47] (Gageler CJ, Gleeson J), [63] (Gordon J); *Garlett* (2022) 96 ALJR 888 at [139], [148]-[152], [154] (Gageler J), [189]-[190] (Gordon J), see also at [46] (Kiefel CJ, Keane and Steward JJ), [207], [263]-[266], [270], [282]-[283] (Edelman J), [310]-[313] (Gleeson J).

¹⁰³ As was the case in *YBFZ* (2024) 99 ALJR 1 at [82] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

¹⁰⁴ As illustrated by the prescribed offence of s 120 of the *Domestic and Family Violence Act* (contravention of a domestic violence order), where the conduct need not involve any harm or threat to commit harm (s 121(3)(a)).

¹⁰⁵ It includes, for example, common assault if the person suffers harm or is threatened with an offensive weapon (Criminal Code s 188(2)); theft (Criminal Code s 217); driving a motor vehicle without consent (Criminal Code s 228AB) (see **SCB 51 [27]**).

¹⁰⁶ *YBFZ* (2024) 99 ALJR 1 at [82] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

¹⁰⁷ See *YBFZ* (2024) 99 ALJR 1 at [65], [79] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

¹⁰⁸ See *Fardon* (2004) 223 CLR 575 at [44] (McHugh J), [216], [223]-[225] (Callinan and Heydon JJ); *Benbrika [No 1]* (2021) 272 CLR 68 at [46] (Kiefel CJ, Bell, Keane and Steward JJ); *Garlett* (2022) 277 CLR 1 at [46], [64] (Kiefel CJ, Keane and Steward JJ), [219]-[228] (Edelman J); *EGH19* [2026] HCA 7 at [63] (Gordon J).

¹⁰⁹ See *EGH19* [2026] HCA 7 at [45]-[46] (Gageler CJ and Gleeson J), cf [94] (Gordon J).

¹¹⁰ See *Bail Act 2013* (NSW) s 19; *Bail Act 1977* (Vic) s 4E; *Bail Act 1980* (Qld) s 16.

¹¹¹ *Simpson v R* [2021] NSWCCA 264 at [69]. See also *Clumpoint v DPP (Qld)* [2005] QCA 43 at [17], [31] (McMurdo P, Jerrard JA and Douglas J).

Detention for such a purpose — whether as part of a bail assessment or divorced from it — cannot be considered legitimate, or the exception becomes the norm.

E.4 Not reasonably capable of being seen as necessary

39 If the protective purpose of s 7A(2AB) is a legitimate and non-punitive purpose, the provision is not reasonably capable of being seen as necessary for that purpose. The concept of “necessity” in this context means “reasonably appropriate and adapted”.¹¹² The inquiry “requires an assessment of both means and ends, and the relationship between the two”.¹¹³ The requisite relationship is lacking for one or more of the following reasons.

40 *First*, there is nothing in s 7A(2AB) that requires there to be any degree of proportionality
 10 between the means (detention) and the ends (protection of the community). Again, the comparison with a test of “unacceptable risk” is instructive. “Unacceptable risk” is an “open-textured expression”.¹¹⁴ The judicial evaluation of whether a risk of commission of an offence is “unacceptable” requires a judgment “as to the nature and extent of the harm said to be in prospect”.¹¹⁵ It requires balancing not only of the likelihood of occurrence of the conduct, but also the magnitude of harm and the burden on the liberty of the person.¹¹⁶ Section 7A(2AB) admits of no such balancing. To the contrary, it is expressly forbidden: while s 24(1)(b) requires consideration of “the interests of the person” in a bail determination (and s 24A identifies additional interests for youths),¹¹⁷ s 7A(2AB) requires the court to consider the provision *in isolation* from those matters.

20 41 *Second*, the test requires a court to have a “high degree of confidence” as to a broad negative state of affairs (that the person will *not* commit a serious violence offence, will *not* commit a prescribed offence, and will *not* otherwise endanger the safety of the community). The test of a “high degree of confidence” is one that, until very recently,

¹¹² *Jones* (2023) 280 CLR 62 at [42]-[43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

¹¹³ *NZYQ* (2023) 280 CLR 137 at [44] (the Court).

¹¹⁴ *Benbrika [No 1]* (2021) 272 CLR 68 at [192] (Edelman J); *Garlett* (2022) 277 CLR 1 at [220] (Edelman J).

¹¹⁵ *Garlett* (2022) 277 CLR 1 at [73] (Kiefel CJ, Keane and Steward JJ).

¹¹⁶ See *Benbrika [No 1]* (2021) 272 CLR 68 at [192]-[193] (Edelman J); *Garlett* (2022) 277 CLR 1 at [55], [73] (Kiefel CJ, Keane and Steward JJ), [226]-[227] (Edelman J).

¹¹⁷ Assessment of the interests of the person requires the court to have regard to matters in s 24(1)(b) including the person’s needs to be free to prepare for appearance in court and obtain legal advice, or for any lawful purpose; needs relating to their cultural background; needs relating to cognitive or mental impairment; and the period they may be obliged to spend in custody if bail is refused. Further, in the case of a youth, the matters in s 24A(2) including preservation of the youth’s relationship with family; the desirability of continuity of living arrangements, education or employment; the youth’s prior exposure to, experience of and reaction to, trauma; their cognitive capacity, health and developmental needs; and any issues arising due to a youth’s Aboriginality.

was “a test unknown to the criminal law”.¹¹⁸ It has been said that the test is a “high bar”; made more so because it is addressed to what “will not” happen, which is “inherently more certain in nature” than whether an event “would” occur.¹¹⁹ When it is appreciated that “no grant of bail is risk free”,¹²⁰ that test can readily be seen to require the court to authorise detention in very broad circumstances. While the accused person bears no onus to prove they have not committed the offence with which they are charged, they must satisfy the court that they will not commit any range of unspecified future offences if released on bail.

- 42 *Third*, as in *YBFZ*, because the court *must* authorise detention *unless* satisfied of a
 10 negative, the “default position” is detention.¹²¹ That is compounded by the lack of procedural protections. In the absence of sufficient material — which an accused person applying bail may be unable to proffer — the court may be unable to form the requisite state of satisfaction. There is no onus on the Territory,¹²² nor any requirement for particular forms of evidence to be presented.¹²³ As has been observed, “[i]t is difficult in the absence of expert evidence on risk to understand how anyone could ever come to a view to a high degree of confidence”.¹²⁴ In that circumstance, a person may be detained notwithstanding that it is not reasonably necessary for community safety.
- 43 *Fourth*, the provision is applied very broadly by the expansive list of offences and
 20 circumstances in s 7A(1) which engage the section.¹²⁵ There need not be any connection between the offence of which a person is accused, and any future risk of offending to which s 7A(2AB) is addressed. With the addition of the limb that the person may “otherwise endanger the safety of the community”, it may even be that no future offence

¹¹⁸ *R v RB* [2024] NSWSC 471 at [6] (Lonergan J), in respect of s 22C of the *Bail Act 2013* (NSW), on which s 7A(2AB) was modelled.

¹¹⁹ *The King v Abuelheish (aka Jorban)* (2025) 396 FLR 73 at [25], [28]-[29] (Reeves J).

¹²⁰ *Williamson v DPP (Qld)* [2001] 1 Qd R 99 at [21] (Thomas JA, McPherson JA agreeing); *Simpson v The Queen* [2021] NSWCCA 264 at [69] (Dhanji J, Harrison and Davies JJ agreeing).

¹²¹ *YBFZ* (2024) 99 ALJR 1 at [85] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

¹²² Cf *Garlett* (2022) 277 CLR 1 at [31]-[32] (Kiefel CJ, Keane and Steward JJ), [225] (Edelman J); *Benbrika [No 1]* (2021) 272 CLR 68 at [11] (Kiefel CJ, Bell, Keane and Steward JJ); *Fardon* (2004) 223 CLR 575 at [6], [19] (Gleeson CJ), [34] (McHugh J), [220] (Callinan and Heydon JJ).

¹²³ Cf *Garlett* (2022) 277 CLR 1 at [56], [97]-[99] (Kiefel CJ, Keane and Steward JJ); *Benbrika [No 1]* (2021) 272 CLR 68 at [12], [40] (Kiefel CJ, Bell, Keane and Steward JJ); *Fardon* (2004) 223 CLR 575 at [6], [19] (Gleeson CJ), [94]-[99] (Gummow J), [221]-[224], [229] (Callinan and Heydon JJ).

¹²⁴ *The King v TW* [2024] NSWSC 1504 at [15] (Rothman J), see also at [12]; *R v BH* [2024] NSWSC 1577 at [15]-[16] (Yehia J). See also *Garlett* (2022) 277 CLR 1 at [223] (Edelman J).

¹²⁵ See *EGH19* [2026] HCA 7 at [139] (Gordon J).

is involved at all. Viewing those matters together, the description resonates that the provision is a “device to keep people in jail upon mere accusation”.¹²⁶

44 *Fifth*, the court retains no discretion to grant bail where it is not satisfied of s 7A(2AB).¹²⁷ That matter is of particular significance when viewed against the historical “supervisory jurisdiction of the courts ... to order that a person committed to prison while awaiting trial be admitted to bail”.¹²⁸ It highlights again that the provision is divorced from the objective of protecting the administration of criminal justice and the court’s supervision of its own processes.

F CONCLUSION

10 45 Section 7A(2AB) requires the Supreme Court, Local Court and Youth Justice Court to impose punishment otherwise than in the adjudgment or punishment of criminal guilt, and that is not justified as being in an exceptional case. It impairs the institutional integrity of those courts as institutions for the administration of justice, is inconsistent with Ch III of the Constitution and is accordingly invalid.

PART VI: ORDERS SOUGHT

46 The questions in the Special Case should be answered: (1) yes; (2) no; (3) yes, at least in its applications to courts; (4) does not arise (alternatively yes, at least in its applications to courts); (5) the declaration at **SCB 15 [25]**; (6) the Defendant.

PART VII: ESTIMATE OF TIME

20 47 It is estimated that 2.5 hours (including reply) will be required for the Plaintiff’s oral argument.

Dated: 25 June 2026



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¹²⁶ *Stack v Boyle* (1951) 342 US 1 at 8-9 (Jackson J).

¹²⁷ Cf *Benbrika [No 1]* (2021) 272 CLR 68 at [11], [47] (Kiefel CJ, Bell, Keane and Steward JJ); *Vella* (2019) 269 CLR 219 at [54], [79] (Bell, Keane, Nettle and Edelman JJ); *Fardon* (2004) 223 CLR 575 at [19] (Gleeson CJ), [34], [44] (McHugh J), cf [109] (Gummow J). See also *Garlett* (2022) 277 CLR 1 at [70]-[73] (Kiefel CJ, Keane and Steward JJ), [229], [237], [269], [280] (Edelman J).

¹²⁸ *Lim* (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ).

ANNEXURE TO THE SUBMISSIONS OF THE PLAINTIFF

Pursuant to paragraph 1 of Practice Direction No 1 of 2024, this annexure sets out the constitutional provisions, statutes and statutory instruments referred to in the submissions.

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	The Constitution	Current	Ch III	Currently in force	All relevant times
<i>Northern Territory statutes and statutory instruments</i>					
2.	<i>Bail Act 1982 (NT)</i>	Current	ss 3, 3AA, 3A, 3B, 4, Parts 2-4, ss 24, 24A, 33-36, 49	Currently in force	All relevant times
3.	<i>Bail and Youth Justice Legislation Amendment Act 2025 (NT)</i>	As made	Entire Act	Amending Act	N/A
4.	<i>Bail Regulations 1983 (NT)</i>	Current	Reg 2A	Currently in force	All relevant times
5.	<i>Criminal Code Act 1983 (NT)</i>	Current	Sch 1 s 3, Part V Division 2, Part VI Divisions 3 to 6A, Part VIA, ss 217, 218, 228AB, 334	Currently in force	All relevant times
6.	<i>Domestic and Family Violence Act 2007 (NT)</i>	Current	ss 120, 121	Currently in force	All relevant times

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
7.	<i>Interpretation Act 1978 (NT)</i>	Current	s 62B	Currently in force	N/A
8.	<i>Local Court (Criminal Procedure) Act 1928 (NT)</i>	Current	ss 49, 57, 58-60, 101, 103-105, 113	Currently in force	All relevant times
9.	<i>Police Administration Act 1978 (NT)</i>	Current	ss 123, 124, 137	Currently in force	All relevant times
10.	<i>Serious Crime Control Act 2009 (NT)</i>	Current	s 38	Currently in force	All relevant times
11.	<i>Youth Justice Act 2005 (NT)</i>	Current	ss 6, 24, 27, 65	Currently in force	All relevant times
<i>Other statutes</i>					
12.	<i>Bail Act 1977 (Vic)</i>	Current	s 4E	Illustrative purposes	N/A
13.	<i>Bail Act 1980 (Qld)</i>	Current	s 16	Illustrative purposes	N/A

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
14.	<i>Bail Act 2013</i> (NSW)	Current	ss 19, 22C	Illustrative purposes	N/A
15.	<i>Judiciary Act 1903</i> (Cth)	Current	ss 68, 78B	Currently in force	All relevant times