



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D15/2025

BETWEEN: **NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LIMITED**
Plaintiff

and

NORTHERN TERRITORY OF AUSTRALIA
Defendant

**SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR
THE STATE OF QUEENSLAND (INTERVENING)**

Filed on behalf of the Attorney-General for the State of Queensland

6 August 2026

PART I: Internet publication

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

PART II: Basis of intervention

2. Pursuant to s 78A of the *Judiciary Act 1903* (Cth), the Attorney-General for the State of Queensland (**Queensland**) intervenes in these proceedings in support of the defendant.

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

PART IV: Submissions

SUMMARY OF ARGUMENT

4. Queensland adopts the submissions of the defendant and makes the following further submissions.
5. Further to the defendant's submissions (**DS**) at [16] and [75], the *Lim* principle does not apply to the States and Territories via the *Kable* principle for three reasons:
 - (a) the *Lim* principle and the *Kable* principle rest on different textual and structural foundations;
 - (b) extending the *Lim* principle to the States and Territories would be contrary to authority; and
 - (c) rather than create symmetry, extending one component of the *Lim* principle to the States and Territories via the *Kable* principle would give rise to a perverse asymmetry as between the Commonwealth and the States and Territories.
6. Further to DS [64], even if the *Lim* principle is relevant, there is no reason in principle why the Parliament must pursue the purpose of ensuring the accused is available for trial in isolation from other legitimate, non-punitive purposes.

STATEMENT OF ARGUMENT

A. The *Lim* principle does not apply to the States and Territories

7. The plaintiff invites this Court to take the ‘significant step’¹ of extending the *Lim* principle to the States and Territories, via the operation of the *Kable* principle.²
8. There is no warrant for that extension.

Different questions give different answers

9. First, the *Lim* and *Kable* principles have different rationales and pose different tests.
10. The *Lim* principle operates as a restraint on Commonwealth legislative power; it is an expression of the separation of federal judicial power from the executive and legislative powers of the Commonwealth inherent in the structure of the Constitution.³ According to the latest formulations of the *Lim* principle:⁴
 - (a) a prima facie punitive function cannot be conferred on a court unless part of the process of adjudging and punishing of criminal guilt,⁵ or unless the function is otherwise reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose;⁶
 - (b) a prima facie punitive function cannot be conferred on the executive unless the function is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose;⁷

¹ *Garlett v Western Australia* (2022) 277 CLR 1, 106 [293] (Gleeson J).

² PS [7]-[14].

³ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); *Garlett v Western Australia* (2022) 277 CLR 1, 90 [247] (Edelman J), 106 [294] (Gleeson J).

⁴ Compare the different approaches taken by Edelman and Steward JJ: *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, 160-2 [51]-[54]; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, 38-42 [149]-[161] (Edelman J), 44-47 [176]-[189] (Steward J); *EGH19 v Commonwealth* (2026) 100 ALJR 400, 442-4 [170]-[177] (Edelman J), 453 [224]-[226] (Steward J).

⁵ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, 153 [28] (the Court).

⁶ *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 97 [36] (Kiefel CJ, Bell, Keane and Steward JJ). Cf *EGH19 v Commonwealth* (2026) 100 ALJR 400, 446-7 [189]-[192] (Edelman J), 455 [237] (Steward J).

⁷ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, 157 [39] (the Court); *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, 12 [16], [18] (Gageler CJ, Gordon, Gleeson and Jagot JJ), 56 [237]-[239] (Beech-Jones J); *EGH19 v Commonwealth* (2026) 100 ALJR 400, 410 [14] (Gageler CJ and Gleeson J), 424 [83] (Gordon J), 466-7 [296] (Jagot J), 478 [348] (Beech-Jones J).

(c) a function cannot be conferred on any branch of government if it is prima facie punitive, not part of the process of adjudging and punishing of criminal guilt, and not reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose.

11. In that way, *Lim* is concerned with ‘a division of power’ as between the branches of government, as well as ‘a limitation on power inherent in that division’.⁸
12. That concern has no application to the States and Territories because the separation of powers—whether based on some implication drawn from State Constitutions⁹ or by virtue of Ch III of the Commonwealth Constitution¹⁰—does not apply to the States and Territories. That was the understanding of the delegates to the constitutional conventions in the lead up to the federation.¹¹ It was also the position in the United States at the turn of the last century.¹² This Court has consistently reaffirmed that the

⁸ *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 111 [71] (Gageler J, albeit in dissent). Cf *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, 45 [176], 46 [185] (Steward J); *EGH19 v Commonwealth* (2026) 100 ALJR 400, 440-1 [164], 447 [190], [192], 450-1 [210] (Edelman J).

⁹ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 65 (Brennan CJ, 77-78 (Dawson J), 93-94 (Toohey J), 109 (McHugh J). See also *Medical Board of Victoria v Meyer* (1937) 58 CLR 62, 106 (Evatt J); *Kotsis v Kotsis* (1970) 122 CLR 69, 76 (Barwick CJ); *Mabo v Queensland* (1988) 166 CLR 186, 202 (Wilson J); *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 300 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 614 [86] (Gummow J); *South Australia v Totani* (2010) 242 CLR 1, 45 [66] (French CJ), 81 [201], 86 [221] (Hayne J); *Wainohu v New South Wales* (2011) 243 CLR 181, 192 [7], 197-198 [22] (French CJ and Kiefel J); *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 250 CLR 343, 362 [35] (French CJ).

¹⁰ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 66-67 (Brennan CJ), 80 (Dawson J), 96 (Toohey J), 103 (Gaudron J), 109-110, 118 (McHugh J), 132, 142 (Gummow J). See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 560 [63] (McHugh J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 598 [37] (McHugh J), 655-656 [219] (Callinan and Heydon JJ); *South Australia v Totani* (2010) 242 CLR 1, 45 [66] (French CJ); *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573 [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 250 CLR 343, 368 [57] (Hayne, Crennan, Kiefel and Bell JJ); *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 89-90 [124]-[125] (Hayne, Crennan, Kiefel and Bell JJ); *Pollentine v Bleijie* (2014) 253 CLR 629, 649 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 625 [146], 629 [159], 632 [168], 638-9 [187] (Keane J); *Burns v Corbett* (2018) 265 CLR 304, 386 [183] (Gordon J); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 131-2 [137] (Gordon J); *Garlett v Western Australia* (2022) 277 CLR 1, 67 [184] (Gordon J).

¹¹ The delegates understood the Commonwealth would be subject to restrictions that did not apply to the colonial legislatures and would not apply to the successor State legislatures: see, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 356 (Sir John Forrest), 358 (Henry Higgins), 364 (Josiah Symon).

¹² *Dreyer v Illinois*, 187 US 71, 84 (Harlan J, opinion of the Court) (1902). That has remained the position in the US since: see *Highland Farms Dairy Inc v Agnew*, 300 US 608, 612 (Cardozo J, opinion of the Court) (1936); *Sweezy v New Hampshire*, 354 US 234, 255 (Warren CJ), 256 (Frankfurter J, concurring) (1957).

States¹³ and Territories¹⁴ are not subject to the separation of powers.

13. The *Kable* principle operates as a restraint on the legislative power of the States and Territories, and is derived from the more specific requirement in Ch III that State and Territory courts remain courts capable of being invested with federal jurisdiction.¹⁵ According to the *Kable* principle, a function cannot be conferred on a State or Territory court if it would substantially impair the court's institutional integrity.¹⁶ The principle is not concerned with dividing functions between the branches of government; it is solely concerned with identifying (a) functions that cannot be given to a court and (b) the functions of a court that cannot be interfered with. It follows that where a complaint is made about a law which does not 'directly affect the actual functioning of the courts', it is 'not a complaint which engages the *Kable* principle'.¹⁷
14. Because the *Lim* and *Kable* principles have different rationales and pose different tests, it cannot be assumed they provide the same answers in their application to the functions that may be conferred on a court. The *Lim* principle may be used to identify whether a function is judicial, but the mere fact that a function is non-judicial cannot mean that the conferral of that function on a court would necessarily impair its institutional integrity.¹⁸ The conferral of non-judicial functions on a court is the very thing left open to the State

¹³ See footnotes 9 and 10 above.

¹⁴ *Kruger v Commonwealth* (1997) 190 CLR 1, 43-4 (Brennan CJ), 62 (Dawson J), 141-2 (McHugh J), 170, 176 (Gummow J); *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569, 617 [118] (Gageler J, albeit in dissent in the result), 628-37 [155]-[181] (Keane J).

¹⁵ Sections 71, 77(iii) and 122 of the Constitution.

¹⁶ *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 424 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 246 [55] (Bell, Keane, Nettle and Edelman JJ); *Garlett v Western Australia* (2022) 277 CLR 1, 14 [7] (Kiefel CJ, Keane and Steward JJ), 88 [241]-[242] (Edelman J), 103 [286] (Gleeson J).

¹⁷ *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569, 638-9 [185], [187] (Keane J). The plurality said in obiter that '[i]t might be possible to envisage a scheme in which power was conferred on the executive in such a way as effectively to deprive the courts of supervision of its exercise': at 596 [44] (French CJ, Kiefel and Bell JJ).

¹⁸ *Garlett v Western Australia* (2022) 277 CLR 1, 23 [40] (Kiefel CJ, Keane and Steward JJ), 90 [247] (Edelman J). Cf at 46-7 [122]-[123], 50 [135]-[136] (Gageler J). However, conversely, functions that would breach the *Kable* principle would necessarily breach the separation of powers: *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 562 [14] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181, 186 [10] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Baker v The Queen* (2004) 223 CLR 513, 526-7 [22]-[24] (McHugh, Gummow, Hayne and Heydon JJ); *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 90 [126] (Hayne, Crennan, Kiefel and Bell JJ); *CD v Commonwealth* (2025) 99 ALJR 1388, 1396 [20] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

and Territory Parliaments by the Constitution.¹⁹ What those Parliaments cannot do is impair the institutional integrity of their courts, which is a different thing. For that reason, as Hayne, Crennan, Kiefel and Bell JJ observed in *Condon v Pompano Pty Ltd*, ‘the notions of repugnancy to and incompatibility with the continued institutional integrity of the State courts are not to be treated as if they simply reflect what Ch III requires in relation to the exercise of the judicial power of the Commonwealth’.²⁰

15. Otherwise, if the *Lim* and *Kable* principles collapse in their application to courts, the consequence would be that State and Territory Parliaments would not be able to confer certain functions on courts *because* those functions are non-judicial. That would go a long way towards imposing one half of the separation of powers doctrine on the States and Territories—that ‘powers which are foreign to the judicial power’ cannot be given to courts.²¹ The plaintiff is therefore wrong to suggest that applying only the part of *Lim* concerned with the courts would avoid implying the separation of powers at the State and Territory level.²²

Contrary to authority

16. No majority of this Court has ever accepted that the *Lim* principle provides the measure of validity for State and Territory laws. Most recently, in *Garlett v Western Australia*, a majority of this court confirmed that the *Kable* and *Lim* principles cannot be conflated.²³ Rather than confront that authority, the plaintiff seeks to explain away previous authorities on the basis that majorities could have reasoned differently.²⁴ That is not a permissible mode of reasoning.²⁵
17. Beginning with *Kable*, the plaintiff notes that Toohey and Gummow JJ applied *Lim* as a

¹⁹ See, similarly, *Dreyer v Illinois*, 187 US 71, 84 (1902), where Harlan J made the point that compliance with a limit that applies to the States (the Fourteenth Amendment) cannot turn on whether the State has implemented a strict separation of powers that would apply at the federal level.

²⁰ (2013) 252 CLR 38, 90 [125]. See also *Pollentine v Bleijie* (2014) 253 CLR 629, 649 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Garlett v Western Australia* (2022) 277 CLR 1, 107 [296] (Gleeson J).

²¹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 289 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

²² PS [12].

²³ *Garlett v Western Australia* (2022) 277 CLR 1, 23 [40] (Kiefel CJ, Keane and Steward JJ), 90-91 [247]-[248] (Edelman J), 106 [294] (Gleeson J).

²⁴ PS [14].

²⁵ *Victoria v Commonwealth* (1996) 187 CLR 416, 484-5 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (*‘Industrial Relations Act Case’*). See also *EGH19 v Commonwealth* (2026) 100 ALJR 400, 442 [171] (Edelman J).

step in their reasoning.²⁶ However, Toohey J took a ‘distinctly different approach’ from the other members of the majority.²⁷ It was critical to his Honour’s reasoning that the State court was exercising federal jurisdiction.²⁸ That explains his Honour’s reliance on *Lim*, given that State courts cannot exercise non-judicial powers in federal jurisdiction.²⁹ Among the other judges in the majority, Gummow J was ‘alone’³⁰ in treating the infliction of punishment outside the judicial paradigm as a sufficient basis for concluding that the impugned Act was incompatible with the institutional integrity of a State court.³¹ *Kable* therefore offers little support for the plaintiff’s argument.

18. The plaintiff points to later judgments in *Kable* cases that invoked aspects of *Lim*.³² However, most of those judgments were dissenting judgments.³³ The remaining judgments relied on by the plaintiff in *Fardon*,³⁴ *Totani*,³⁵ *Vella*³⁶ and *Garlett*³⁷ did not

²⁶ PS [13]; *Garlett v Western Australia* (2022) 277 CLR 1, 50 [137] (Gageler J).

²⁷ *Garlett v Western Australia* (2022) 277 CLR 1, 87 [239] (Edelman J). See also at 110-1 [307] (Gleeson J).

²⁸ (1996) 189 CLR 51, 96.

²⁹ *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144, 151-2 (the Court).

³⁰ *Garlett v Western Australia* (2022) 277 CLR 1, 110 [306] (Gleeson J).

³¹ (1996) 189 CLR 51, 134 (Gummow J). Cf at 106-7 (Gaudron J), 121-2 (McHugh J). See also *Garlett v Western Australia* (2022) 277 CLR 1, 110-1 [306]-[309] (Gleeson J).

³² PS [14].

³³ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 623-4 [126], 632-4 [150]-[155], 641 [174]-[175] (Kirby J); *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569, 619 [125], 620 [128] (Gageler J); *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 279-80 [152], 287 [173] (Gageler J), 293 [191], 296-7 [204] (Gordon J); *Garlett v Western Australia* (2022) 277 CLR 1, 46-7 [121]-[123], 49-50 [132]-[137] (Gageler J), 67-8 [184], 74-5 [198]-[200] (Gordon J).

³⁴ In *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, Callinan and Heydon JJ referred to aspects of *Lim* at 653-4 [214]-[217], 658 [234]. However, their Honours also held that the impugned Act had ‘due regard to a full and conventional judicial process’: at 656-8 [220]-[234].

³⁵ In *South Australia v Totani* (2010) 242 CLR 1, Hayne J referred at 81 [202] to *Lim* in the context of summarising the judgments in *Kable* and *Fardon*, but for the reasons given by Gleeson J in *Garlett v Western Australia* (2022) 277 CLR 1, 106-11 [295]-[309], the significance of *Lim* in *Kable* and *Fardon* may be doubted. In any event, the critical part of Hayne J’s reasons was his Honour’s conclusion that the impugned Act ‘permit[ted] the Executive to enlist the Magistrates Court to create new norms of behaviour for those particular members who are identified by the Executive as meriting application for a control order’: at 92-3 [236].

³⁶ The plaintiff refers to *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 248 [61], 252 [71]-[72], 253-4 [74]-[75], 258-9 [84]-[85] (Bell, Keane, Nettle and Edelman JJ). In those paragraphs the joint judgment merely noted that reasoning deployed in *Thomas v Mowbray* (2007) 233 CLR 307 would apply to State legislation.

³⁷ In *Garlett v Western Australia* (2022) 277 CLR 1, the plurality’s consideration of *Lim* at 24-28 [45]-[56] must be understood in light of their Honours’ prefatory comment that ‘the *Lim* principle has no application to establish the invalidity of the HRSO Act’, but that ‘[e]ven if the HRSO Act were a law of the Commonwealth, it would not contravene the *Lim* principle’: at 23 [40] (Kiefel CJ, Keane and Steward JJ). It is well accepted that a *Kable* challenge may be dismissed by considering whether the State law would survive stricter scrutiny against the separation of powers, had the law been enacted by the Commonwealth Parliament: see authorities collected in fn 18 above. That is all the plurality did in this case. The plaintiff also

treat breach of the *Lim* principle as a sufficient basis for concluding that the impugned State law was invalid.

Eschewing ‘a priori assumptions’ and ‘pleasing symmetry’

19. It is a mistake to reason from some notion of symmetry to conclude that State and Territory Parliaments should not be allowed to confer on their courts anything the Commonwealth Parliament cannot confer.³⁸ The scope of any constitutional implication depends on the text and structure of the Constitution.³⁹ ‘To impose upon the text and structure that was adopted a priori assumptions about what is now thought to be a desirable form of government or would conform to a pleasingly symmetrical theory of government’ is to do no more than assert the desirability of adopting one constitution over another.⁴⁰
20. Further, to adapt what Laurence Tribe said in an American context, ‘it is important not to leap over’ the actual text and structure of Ch III ‘in favor of abstract principles that one might wish to see embodied in our regime of separated powers, but that might not in fact have found their way into our Constitution’s structure’.⁴¹ One abstract principle said to underpin the separation of powers and the *Lim* principle is the protection of liberty.⁴² But as Professor Stellios (as his Honour then was) has pointed out, the federal nature of the Constitution means it allows for more than one way to protect and enhance that value.⁴³ The strict separation of powers at the federal level gives a greater role to

relies on Edelman J at 90-91 [248]. While his Honour accepted that the reasoning in *Lim* may be relevant, his Honour was clear that it is not determinative: at 90 [247]-[248].

³⁸ As it was in *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569, 631-2 [166]-[167] (Keane J). See also *New South Wales v Commonwealth* (2006) 229 CLR 1, 119-121 [194]-[196] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) (*‘Work Choices Case’*).

³⁹ Upon which any implication must be ‘securely based’: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 134-5 (Mason CJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 453 [389] (Hayne J); *McCloy v New South Wales* (2015) 257 CLR 178, 283 [318] (Gordon J); *Burns v Corbett* (2018) 265 CLR 304, 383 [175] (Gordon J).

⁴⁰ *Roach v Electoral Commissioner* (2007) 233 CLR 162, 215 [142] (Hayne J, albeit in dissent).

⁴¹ Laurence Tribe, *American Constitutional Law* (Foundation Press, 3rd ed, 2000) vol 1, 127.

⁴² *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 108-9 [67], 111 [72] (Gageler J), 132-3 [138]-[140] (Gordon J); *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1, 21 [52] (Gordon J); *Garlett v Western Australia* (2022) 277 CLR 1, 57 [163], 63 [175] (Gordon J); *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, 11 [12]-[15] (Gageler CJ, Gordon, Gleeson and Jagot JJ); *EGH19 v Commonwealth* (2026) 100 ALJR 400, 418 [62], 420-1 [71]-[72] (Gordon J), 438 [153] (Edelman J), 462 [279] (Jagot J).

⁴³ James Stellios, ‘Liberty as a Constitutional Value: The Difficulty of Differing Conceptions of “The Relationship of the Individual to the State”’, in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 177, 178-9.

the judiciary, and the absence of a strict separation of powers at the State and Territory level gives a greater role to Parliament to protect and enhance liberty.⁴⁴ Both conceptions of the relationship between the individual and the state are countenanced by our Constitution.

21. Eschewing any a priori assumptions, the actual text and structure of Ch III give rise to asymmetrical limits on State and Commonwealth legislative power. That is an inherent aspect of the constitutional scheme.
22. Moreover, applying only part of the *Lim* principle to the States and Territories would only accentuate that asymmetry and undercut the supposed rationale for the principle.
23. As it applies to the Commonwealth, the *Lim* principle encourages the Commonwealth Parliament to confer prima facie punitive functions on a court. As Gageler CJ and Gleeson J explained in *EGH19 v Commonwealth*, the ‘constitutional paradigm’ is that prima facie punitive detriments are to be imposed by ‘(1) a court; (2) in the exercise of judicial power; and (3) in the performance of the exclusively judicial function of adjudging and punishing criminal guilt’.⁴⁵ Because departure from each of those elements requires justification, a function of imposing a prima facie penal or punitive detriment will more likely pass constitutional muster if it is conferred on a court. As their Honours said, such a function, ‘if it is to be conferred at all, is best conferred on a court’.⁴⁶
24. By contrast, if the States and Territories are now to be subject to the *Lim* principle as it pertains to courts, the result will be to guide the States and Territories towards conferring the function on the executive. That is because the States and Territories can avoid a constitutional limit related to the functioning of courts by conferring prima facie punitive functions on the executive instead. There can be no basis in the text and structure of the Constitution for subjecting the States and Territories to the other aspect of the *Lim* principle, which prevents the Commonwealth Parliament from conferring punitive functions on the executive. In this way partial application of the *Lim* principle

⁴⁴ James Stellios, ‘Liberty as a Constitutional Value: The Difficulty of Differing Conceptions of “The Relationship of the Individual to the State”’, in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 177, 180-4.

⁴⁵ *EGH19 v Commonwealth* (2026) 100 ALJR 400, 410 [16] (Gageler CJ and Gleeson J).

⁴⁶ *EGH19 v Commonwealth* (2026) 100 ALJR 400, 412 [26] (Gageler CJ and Gleeson J). See also *Thomas v Mowbray* (2007) 233 CLR 307, 329 [17] (Gleeson CJ); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 113 [77] (Gageler J).

to the States and Territories may even encourage executive detention, an odd outworking of *Lim* if its rationale is to enhance liberty.⁴⁷

25. For these reasons, the Court should reject the plaintiff's attempt to extend the *Lim* principle to Territory courts via the *Kable* principle.

B. Even if *Lim* is relevant, the legitimate aims are not confined to availability purpose

26. Even if (contrary to the submissions above) the *Lim* principle were relevant, there is no reason in principle why the legislature must pursue the purpose of ensuring the accused is available for trial in isolation from other legitimate, non-punitive purposes,⁴⁸ such as preventing 'interference with evidence or the recurrence of crime'.⁴⁹
27. To justify a burden on the *Lim* principle, it has been said that the purpose must be 'both legitimate *and* non-punitive'.⁵⁰ It is doubtful, however, that 'non-punitive' adds anything to 'legitimate' in this context. 'Here, as elsewhere in constitutional law, the legitimacy of the legislative objective falls to be determined by reference to the compatibility of what the impugned law is designed to achieve in fact with values protected by the constitutional principle to be applied'.⁵¹ Here, as elsewhere, *any* purpose will be legitimate provided it is not a purpose of harming the relevant constitutional principle as an end in itself.⁵² The reason is that, when used to

⁴⁷ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 586 [2] (Gleeson CJ) ('it might be thought surprising that there would be an objection to having detention decided upon by a court, whose proceedings are in public, and whose decisions are subject to appeal, rather than by executive decision'). See also *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 260-1 [90] (Bell, Keane, Nettle and Edelman JJ).

⁴⁸ DS [64]. Cf PS [16]-[21].

⁴⁹ Recognised as legitimate aims of remand, in eg, UN Human Rights Committee, *General comment No. 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 12 [38]. Even in the United States, where the Eighth Amendment protects against excessive bail, the Supreme Court has held that Congress may regulate availability of bail for reasons other than ensuring the accused's availability for trial, such as the compelling interests of public safety: *United States v Salerno*, 481 US 739, 752-5 (Rehnquist CJ, opinion of the Court) (1987). See also *Carlson v Landon*, 342 US 524, 544-6 (Reed, opinion of the Court) (1952).

⁵⁰ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, 157 [40] (the Court) (emphasis in original). See also *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, 12 [18] (Gageler CJ, Gordon, Gleeson and Jagot JJ) (but compare at 23 [82]-[83], where their Honours referred to a 'legitimate non-punitive purpose' omitting any conjunction), 56 [238]-[239] (Beech-Jones J); *EGH19 v Commonwealth* (2026) 100 ALJR 400, 410 [14], 411 [19] (Gageler CJ and Gleeson J), 424 [83] (Gordon J) (but compare at 424 [84] where her Honour referred to a 'legitimate, non-punitive purpose'), 466-7 [296] (Jagot J), 478 [348] (Beech-Jones J).

⁵¹ *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 113 [78] (Gageler J).

⁵² Eg, in the context of the implied freedom, see: *Unions NSW v New South Wales* (2019) 264 CLR 595, 658 [175], 674 [222] (Edelman J). In the context of s 92 of the Constitution, see: *Palmer v Western Australia* (2021) 272 CLR 505, 530 [62] (Kiefel CJ and Keane J), 538 [97]-[98] (Gageler J), 575 [205] (Gordon J), 599 [269] (Edelman J).

characterise a law,⁵³ means-ends testing serves to identify the true purpose of the law. Put differently, it identifies whether the harm caused by the law to a protected constitutional principle is in fact the true purpose of the law, or whether the true purpose is some other aim and the harm caused to the constitutional principle is merely incidental.⁵⁴ Accordingly, in any means-ends testing, there are only two kinds of purposes: the illegitimate purpose of harming the relevant constitutional principle or any other purpose.⁵⁵ In the context of the *Lim* principle, a punitive purpose will be illegitimate, and any other non-punitive purpose will be legitimate.⁵⁶

28. Protection of the community from harm is a legitimate aim.⁵⁷ There are statements to the effect that the harm must be ‘grave and specific’ in order for the aim to qualify as legitimate.⁵⁸ Even if that heightened requirement for a legitimate aim applies to the Commonwealth, it cannot apply to the States and Territories. In *Garlett v Western Australia*, the majority did not require the law to address a grave and specific harm. In fact, the plurality noted that determining the relative seriousness of potential harm was a matter for the legislature.⁵⁹ In *EGH19 v Commonwealth*, Gordon J suggested that the

⁵³ As it is in the context of the *Lim* principle: *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, 158 [44] (the Court); *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, 12 [16] (Gageler CJ, Gordon, Gleeson and Jagot JJ), 55-6 [237]-[239] (Beech-Jones J); *EGH19 v Commonwealth* (2026) 100 ALJR 400, 424 [82]-[83] (Gordon J), 466-7 [296] (Jagot J), 478 [348] (Beech-Jones J).

⁵⁴ Jeremy Kirk, ‘Constitutional Guarantees, Characterisation and the Concept of Proportionality’ (1997) 21(1) *Melbourne University Law Review* 1, 25; Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020) 121-4. In *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, at 344 [31]-[32], Kiefel CJ, Bell, Keane and Edelman JJ, said that a test of characterisation directed to identifying a law’s ‘true purpose’ does not involve proportionality, but see *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, 38 [147] (Edelman J), 59 [252]-[253] (Beech-Jones J).

⁵⁵ Because the whole point of characterisation is to identify which of the two purposes is the true purpose, it is not possible for a law to have both a legitimate and an illegitimate aim. One characterisation necessarily excludes the other: *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 99-100 [40] (Kiefel CJ, Bell, Keane and Steward JJ). Cf *EGH19 v Commonwealth* (2026) 100 ALJR 400, 443 [172] (Edelman J).

⁵⁶ That is consistent with *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, 159-60 [49] (the Court). The reason why the aim in that case was not legitimate was that the aim of the detention was to detain as an end in itself, rather than ‘something distinct from detention itself’. Such an aim is necessarily punitive.

⁵⁷ *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 97 [36] (Kiefel CJ, Bell, Keane and Steward JJ); *Garlett v Western Australia* (2022) 277 CLR 1, 24-25 [46] (Kiefel CJ, Keane and Steward JJ).

⁵⁸ PS [37]. See *YBFZ v Minister for Immigration* (2024) 99 ALJR 1, 23 [81]-[82] (Gageler CJ, Gordon, Gleeson and Jagot JJ); *EGH19 v Commonwealth* (2026) 100 ALJR 400, 415-6 [47] (Gageler CJ and Gleeson J), 418 [63], 425 [85] (Gordon J). Cf at 456 [238] (Steward J), 481 [361] (Beech-Jones J).

⁵⁹ *Garlett v Western Australia* (2022) 277 CLR 1, 34 [79] (Kiefel CJ, Keane and Steward JJ). At 112 [310], Gleeson J addressed alternative arguments ‘[i]f it were necessary to test the inclusion of robbery in the HRSO Act against the *Lim* principle, and if that required demonstration that the relevant law was directed to a grave

reason why the majority did not require a ‘grave and specific’ harm was that ‘[t]he *Kable* principle is less strict than the limitations on Commonwealth legislative power derived from Ch III’.⁶⁰

29. More fundamentally, requiring a ‘grave and specific’ harm would distort the means-ends enquiry. Questions of weight and degree are relevant to the means, not the ends.⁶¹ Otherwise, a purpose may be treated as illegitimate even though it is not a purpose of harming the constitutional principle. That would allow for the possibility that a law will be ruled out as unconstitutional even though it is appropriate and adapted to some purpose other than a purpose of harming the constitutional value.⁶² Here, that would mean that a purpose of protecting the community from a small or general harm would necessarily be punitive in all cases, regardless of the circumstances. That would mean that remand for an accused would be punitive even though he or she presents a real prospect of committing a series of offences, none of which individually rise to the level of a grave or specific harm. In a different context, it would also mean that directions to stay at home during an epidemic may be automatically deemed to be punitive if the risk presented by the epidemic is not judged to be sufficiently grave or specific.⁶³ Given the breadth of detriments that may be *prima facie* punitive, a requirement for a grave and specific harm would have startling consequences for the validity of legislation across State and Territory statute books.
30. Rather than foreclose means-ends testing at the outset, it should be recognised that protecting the community from harm is a legitimate aim at the level of principle, but that in some circumstances the aim of addressing that harm may be outweighed by the

and specific harm’. That suggests that even if the *Lim* principle applied, for her Honour, that did not necessarily mean the legitimate aim had to address a ‘grave and specific’ harm.

⁶⁰ *EGH19 v Commonwealth* (2026) 100 ALJR 400, 433 [128] (Gordon J), quoting *Garlett v Western Australia* (2022) 277 CLR 1, 67 [184] (Gordon J).

⁶¹ Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 246-9.

⁶² Further, making those questions of weight and degree relevant to whether there is a legitimate aim rather than whether the means to achieve that aim are ‘reasonably capable of being seen as necessary’ bypasses the considerable degree of latitude to Parliament intended to be conveyed by that formulation of the means-ends test at the second stage: see *Cunliffe v Commonwealth* (1994) 182 CLR 272, 387-8 (Gaudron J); *YBFZ v Minister for Immigration* (2024) 99 ALJR 1, 37-8 [144] (Edelman J), 73 [325] (Beech-Jones J).

⁶³ Cf *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 164 [216] (Edelman J); *Gerner v Victoria* (2020) 270 CLR 412, 420-1 [10], 422-3 [15]-[16] (the Court).

importance of adhering to the ‘constitutional paradigm’.⁶⁴ Ultimately, while there may be ‘scope for debate about the types of harm against which a law can protect and the degree of precision by which the harm must be identified’,⁶⁵ protection of the community from harm is capable of justifying prima facie punitive detriments. To the extent that the plaintiff submits otherwise, it is mistaken.

C. Answers to questions of law

31. The questions of law in special case should be answered in the way proposed by the defendant: (1) No, (2) Yes, (3) No, (4) No, (5) None, (6) The plaintiff.

PART V: Time estimate

32. It is estimated that Queensland will require 20 minutes for oral argument.

Dated 6 August 2026.



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⁶⁴ Eg, as the plurality effectively found in the alternative in *YBFZ v Minister for Immigration* (2024) 99 ALJR 1, 23 [84] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

⁶⁵ *EGH19 v Commonwealth* (2026) 100 ALJR 400, 481 [361] (Beech-Jones J).

**ANNEXURE TO SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR
THE STATE OF QUEENSLAND (INTERVENING)**

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

No.	Description	Version	Provisions	Reason for providing version	Applicable date or dates
1.	<i>Commonwealth Constitution</i>	Current	Ch III, s 122	In force at all relevant times	All relevant times
2.	<i>Judiciary Act 1903 (Cth)</i>	Current	s 78A	In force at all relevant times	All relevant times