HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY B11 of 2024

BETWEEN

RODNEY MICHAEL CHERRY

Plaintiff

STATE OF QUEENSLAND

Defendant

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I Form of Submissions

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

Part II Basis of Intervention

2. The Attorney General for the State of New South Wales ("NSW Attorney") intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the defendant.

Part III Argument

3. In summary, the NSW Attorney submits as follows:

   (a) s 175L of the Corrective Services Act 2006 (Qld) ("CS Act") does not infringe the principle identified in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 ("Kable") by impermissibly interfering with the exercise of judicial power by the Supreme Court of Queensland ("Supreme Court"). Section 175L does not empower the Parole Board Queensland ("Parole Board") to alter a sentence

imposed by the Supreme Court through the making of a "no cooperation declaration", either by depriving the prisoner to whom it applies the opportunity to be considered for parole, or due to having a punitive purpose. There is no persuasive basis for distinguishing the "no body-no parole prisoner" scheme from the statutory schemes that were found to be valid in Crump v State of New South Wales (2012) 147 CLR 1 ("Crump"), Knight v Victoria (2017) 261 CLR 306 ("Knight") and Minogue v Victoria (2019) 268 CLR 1 ("Minogue"); and

(b) s 175E of the CS Act does not impermissibly interfere with the exercise of judicial power by the Supreme Court by enabling the President of the Parole Board to make a "restricted prisoner declaration". Such a declaration has, in substance, the same legal and practical operation as the provisions considered in Crump, Knight and Minogue. Section 175E does not empower the executive to alter or set aside the punishment imposed by the Supreme Court or have a punitive purpose. No breach of the Kable principle has been established.

4. Having regard to these matters, questions (a) and (b) of the Special Case ("SC") should be answered "no".

Section 175L of the CS Act does not empower the executive to alter the plaintiff's sentence

5. Section 175L of the CS Act confers power on the Parole Board to make a "no cooperation declaration" in relation to a "no body-no parole prisoner". That term is defined in s 175C of the CS Act to mean a prisoner serving a period of imprisonment for a homicide offence, where either the body or remains of the victim of the offence have not been located or, because of an act or omission of the prisoner or another person, part of the body or remains of the victim has not been located. Section 175L requires the Parole Board to make a no cooperation declaration if it is not satisfied that the no body-no parole prisoner has given satisfactory "cooperation", which is defined in s 175B to mean cooperation given by the prisoner "in the investigation of the homicide offence to identify the victim's location … before or after the prisoner was sentenced to imprisonment for the offence".

6. The effect of a no cooperation declaration is that the Parole Board must refuse any application for parole, and the prisoner may not make any applications for a parole order or an exceptional circumstances parole order whilst the declaration is in force: ss 176B, 180(2)(d) and 193A. However, a prisoner who is subject to a no cooperation declaration

may apply to the President or a Deputy President of the Parole Board for it to be reconsidered at any time, and the President and Deputy President have a discretion to call a meeting of the Parole Board to reconsider the making of the declaration at any time: ss 175R and 175T. If the Parole Board is satisfied that a no body-no parole prisoner has given satisfactory cooperation, the no cooperation declaration comes to an end: ss 175Q(c) and 175U(2)(a).

7. The plaintiff is serving life sentences for two counts of murder, which were imposed by Dutney J on 8 November 2002 following a trial in the Supreme Court (SC [2] and [4]). The body of one of those victims has not been located (SC [6]). The Parole Board made a no cooperation declaration on 12 July 2023 in respect of the plaintiff, who had previously made an application for parole (SC [15]-[16]). His application for parole was refused on 7 May 2024 (SC [18]).

8. The plaintiff submits that s 175L of the CS Act is invalid because, by conferring power on the Parole Board to make a "no cooperation declaration", it impermissibly grants judicial power to the Queensland executive to alter the sentence imposed upon him by the Supreme Court (plaintiff's submissions ("PS") at [7] and [48]). The plaintiff asserts that the effect of a no cooperation declaration is to "nullify" the non-parole period imposed by the sentencing judge because it withdraws a jurisdictional fact – the non-parole period – that has to be satisfied in order for the Parole Board to grant parole (PS [41]).

9. These submissions do not withstand scrutiny. This Court has repeatedly rejected arguments that legislative changes to the conditions that must be met before parole may be granted alter the sentences of those to whom the legislative changes apply.

10. In Crump, the plaintiff challenged the validity of s 154A of the Crimes (Administration of Sentences) Act 1999 (NSW), which prevented a serious offender the subject of a "non-release recommendation" from being released on parole unless the offender was in imminent danger of dying or was so incapacitated that the offender lacked the physical capacity to harm any person; the offender did not pose a risk to the community; and because of those circumstances, the making of a parole order was justified. The plaintiff argued that the provision constituted a legislative alteration of an order made by McInerney J resentencing him to a minimum term of thirty years' imprisonment. In rejecting that argument, French CJ stated at 18-19 [34]:

> [T]he plaintiff's major premise in this case depends upon an acceptance of his characterisation of s 154A as a law which alters the "effect" of the decision made by McInerney J. That characterisation should be rejected. On any view, s 154A did not alter or vary the sentence imposed by McInerney J in 1997. Even though directed at a small population of prisoners … s 154A had no effect upon the legal operation of the resentencing order. The exercise of judicial power by McInerney J was complete when the order was made.

11. Justices Gummow, Hayne, Crennan, Kiefel and Bell also considered that the provision "did not impeach, set aside, alter or vary the sentence under which the plaintiff suffers his deprivation of liberty" (at 27 [60]).

12. In Knight, this Court upheld the validity of s 74AA of the Corrections Act 1986 (Vic) ("Corrections Act"), which was in similar terms to the legislation considered in Crump, although it was expressed to apply specifically to Mr Knight rather than applying generally to offenders who were the subject of a non-release recommendation. In a unanimous judgment, the Court stated that the minimum term of the life sentences imposed by the sentencing judge "did no more than to set a period during which Mr Knight was not to be eligible to be released on parole", and "said nothing about whether or not he would be released on parole at the expiration of that minimum term" (at 323 [27]). The Court concluded at 323-324 [29] (citation omitted):

> By making it more difficult for Mr Knight to obtain a parole order after the expiration of the minimum term, s 74AA does nothing to contradict the minimum term that was fixed. Nor does it make the sentences of life imprisonment "more punitive or burdensome to liberty". The section did not replace a judicial judgment with a legislative judgment. It does not intersect at all with the exercise of judicial power that has occurred.

13. Similarly, in Minogue, this Court unanimously rejected a challenge to the validity of s 74AB of the Corrections Act, which was in comparable terms to s 74AA of that Act, but for the fact it was expressed to apply to Dr Minogue. The plaintiff argued that the operation and practical effect of the provision was to impose an additional or separate punishment by extending the non-parole period or by increasing the severity of his punishment. Chief Justice Kiefel and Bell, Keane, Nettle and Gordon JJ stated at 14 [9]:

> The decisions in Knight and Crump compel the conclusion that s 74AB does not alter the plaintiff's sentence, or impose additional or separate punishment on the plaintiff beyond the punishment imposed by the Supreme Court at the time of sentencing, and does not involve the exercise of judicial power.

> Section 74AB does no more than alter the conditions to be met before the plaintiff can be released on parole.

14. Justice Gageler also concluded at 21 [32] (citations omitted):

> The explanation in Knight and in Crump v New South Wales of the distinction between the judicial power exercised when sentencing an offender and the executive power exercised if and when determining whether to release a prisoner on parole denies to s 74AB the character of a law that interferes with a prior exercise of judicial power. The effect of the explanation is that Dr Minogue was and continues to be deprived of his liberty by force of the life sentence imposed on him by the Supreme Court and that the legislative removal of a meaningful prospect of release on parole does not render the life sentence more restrictive of his liberty or otherwise impose greater punishment for the offence of which he was convicted.

15. In the present case, Dutney J's determination of a non-parole period gave rise to the possibility that the plaintiff may be released on parole, subject to the statutory regime in force at the time. That was a statutory consequence – but not an element – of the sentencing judge's determination: Crump at 19 [35] (French CJ). Whether or not the plaintiff would, in fact, be released on parole at the expiry of his non-parole period "was simply outside the scope of the exercise of judicial power constituted by the imposition of the sentences": Knight at 323 [28] (the Court). The making of the no cooperation declaration by the Parole Board did not replace a judicial judgment with an executive one, nor "nullify" the non-parole period; it did no more than alter the conditions to be met before the plaintiff could apply for, or be released on, parole.

16. The plaintiff submits that Crump, Knight and Minogue are distinguishable from this case because, although the provisions considered in those matters "severely constrained" the circumstances in which the relevant parole authorities had power to grant parole, they "did not deprive the plaintiffs of any opportunity to be considered for release on parole" (PS [5]). He claims that prisoners who are subject to a no cooperation declaration are "deprived of the opportunity granted by the Supreme Court Order to be considered for release on parole, even after serving the mandatory minimum terms of imprisonment imposed as part of their sentences" (PS [6]). He also submits that, whilst a no cooperation declaration is in force, the power that the Parole Board would otherwise have to consider the grant of parole is "completely removed from it" (PS [38]).

17. These submissions should not be accepted for the following three reasons.

18. *First*, whilst the plaintiff is unable to make any further applications for parole whilst his no cooperation declaration is in force, the power of the Parole Board to grant parole is not "completely removed". As set out above, the Parole Board has power to revoke a no cooperation declaration if it determines that the plaintiff has given satisfactory cooperation, either on the application of the plaintiff or on its own motion. In those circumstances, the Parole Board retains its power to consider the grant of parole, and the plaintiff "remains eligible for parole even though the circumstances in which parole may be granted by the Board have been severely constrained": Minogue at 17 [18] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

19. *Secondly*, the plaintiff's submission is based on a misapprehension as to the effect of a non-parole period. A non-parole period does not "grant" a prisoner the "opportunity to be considered for release on parole", or any entitlement to make an application for parole. As Gummow, Hayne, Crennan, Kiefel and Bell JJ observed in Crump at 26 [60], a determination of a minimum term does not "create any right or entitlement in the plaintiff to his release on parole" and, in that regard, has "no operative effect". Rather, a non-parole period, at best, provides a prisoner "with hope of an earlier conditional release but always subject to and in accordance with legislation in existence at the time governing consideration of any application for parole. Put in different terms, the fixing of a non-parole period does no more than provide a 'factum by reference to which the parole system' in existence at any one time will operate": Minogue at 16-17 [16] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); see also Crump at 26 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

20. *Thirdly*, whilst the CS Act places "strict limiting conditions upon the exercise of the executive power to release" the plaintiff (Crump at 19 [35]; Minogue at 17 [19]), this has no bearing on its validity. As French CJ stated in Crump at 19 [36], "[t]he power of the executive government of a State to order a prisoner's release on licence or parole or in the exercise of the prerogative may be broadened or constrained or even abolished by the legislature of the State. Statutes providing for executive release may be changed from time to time". This is consistent with Gleeson CJ's observation in Baker v The Queen (2004) 223 CLR 513 ("Baker") at 520 [7] that "as should in any event be obvious, legislative and administrative changes to systems of parole and remissions usually affect people serving existing sentences. The longer the original sentence, the more likely it is that an offender will be affected by subsequent changes in penal policy".

21. The distinction drawn by the plaintiff between legislation which permits a parole application to be made but requires parole to be refused unless strict conditions are met (as in Crump, Knight and Minogue), and legislation which prevents the making of a parole application unless strict conditions are met (as in the present case), is a "distinction without a difference": Knight at 323 [25]. It is a distinction of form alone.

22. In respect of the plaintiff's assertion that s 175L confers judicial power on the executive, no attempt is made to articulate why that is so. As the defendant submits (defendant's submissions ("DS") at [11]), this claim must be rejected because determinations concerning the grant of parole have long been regarded as a uniquely executive function: see, for example, Power v The Queen (1974) 131 CLR 623 at 627; Bugmy v The Queen (1990) 169 CLR 525 at 534 and 536; Leeth v The Commonwealth (1992) 174 CLR 455 at 471-472, 476 and 490-491; Baker at 528 [29]; Elliott v The Queen (2007) 234 CLR 38 at 41-42 [5]; and Minogue at 15 [14]. In any event, the "repugnancy doctrine in Kable does not imply into the Constitutions of the States the separation of judicial power mandated for the Commonwealth by Ch III": Fardon v Attorney-General (Qld) (2004) 223 CLR 575 at 614 [86] (Gummow J). See also Condon v Pompano Pty Ltd (2013) 252 CLR 38 at 89 [124] (Hayne, Crennan, Kiefel and Bell JJ) and Minister for Home Affairs v Benbrika (2021) 272 CLR 68 at 132 [137] (Edelman J).

23. The plaintiff's submission that s 175L of the CS Act is repugnant to a defining characteristic of the Supreme Court that "punishments imposed by that Court consequent upon the adjudgment of criminal guilt are final and conclusive unless set aside on appeal" (PS [7], [30] and [32]) is also misplaced. As already noted, a provision making it more difficult for an offender to obtain parole after the expiry of a minimum term "does not intersect at all with the exercise of judicial power that has occurred": Knight at 324 [29]. The same is true of the royal prerogative of mercy, the exercise of which "releases the subject from the obligation to serve the sentence in whole or in part in custody, without altering the term of the sentence itself": Kelleher v The Parole Board of New South Wales (1984) 156 CLR 364 at 367 (Mason J); see also at 376 (Wilson J) and 381 (Deane J). Just as the exercise of the prerogative has never been regarded as having a bearing on the characteristics of the court that imposed the sentence, neither s 175L of the CS Act, nor a no cooperation declaration made pursuant to that provision, does so.

24. The plaintiff also relies on a passage from Edelman J's judgment in Minogue to contend that Crump, Knight and Minogue are distinguishable from this case because an alleged object of no cooperation declarations is "to serve the interests of justice by more severely punishing those prisoners by reasons of the circumstances of their offending, their associated conduct, and other circumstances connected with the retributive purposes of the prisoner's sentence" (PS [6] and [42]). He submits that this is because the premise of the definitions of "no body-no parole prisoner" and "cooperation" is that the prisoner bears all, or some, culpability for the inability of authorities to locate the victim, and because there will be cases where the offender is unable to cooperate in the investigation of the homicide offence (PS [43]-[44]).

25. For the reasons set out in the defendant's submissions (DS [41]-[49]), s 175L of the CS Act does not have a punitive purpose. It is clear from the extrinsic materials cited therein that the "no body-no parole prisoner" provisions were intended to reduce the suffering of victims' families and to provide an incentive for offenders to cooperate with authorities, rather than to increase the severity of the punishments imposed.

26. In any event, as McHugh, Gummow, Hayne and Heydon JJ stated in Baker at 528 [29] in discussing the repeal of s 463 of the Crimes Act 1900 (NSW), which authorised the Governor to grant an offender a release on licence, "in no sense (whether as a matter of substance or as a matter of form) can later legislation, altering the circumstances in which such mercy could or would be extended to a prisoner sentenced to life imprisonment, make that sentence of life imprisonment more punitive or burdensome to liberty". In this respect, it is "always necessary to recognise that an offender may be required to serve the whole of the head sentence that is imposed": PNJ v The Queen (2009) 83 ALJR 384 at 387 [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). The selection of lack of satisfactory "cooperation" by a no body-no parole prisoner as the trigger for the application of s 175L is but an instance of the proposition that, "in general, a legislature can select whatever factum it wishes as the 'trigger' of a particular legislative consequence": Baker at 532 [43] (McHugh, Gummow, Hayne and Heydon JJ). See also Kuczborski v Queensland (2014) 254 CLR 51 at 139 [303] (Bell J).

27. For these reasons, the Court should reject the plaintiff's challenge to the validity of s 175L of the CS Act. There is no persuasive basis for distinguishing the "no body-no parole prisoner" scheme from the statutory schemes that were found to be valid in Crump,

Knight and Minogue. Section 175L does not empower the Queensland executive to alter sentences imposed by the Supreme Court, or otherwise impermissibly interfere with the exercise of judicial power by that court.

28. Accordingly, question (a) in the Special Case should be answered "no".

29. The NSW Attorney makes no submissions about question (c) if, contrary to the submissions of the defendant and the NSW Attorney, question (a) of the Special Case is answered "yes".

Section 175E of the CS Act does not empower the executive to alter the plaintiff's sentence

30. Section 175E of the CS Act confers a discretionary power on the President of the Parole Board to make a "restricted prisoner declaration" about a "restricted prisoner". The latter term is defined in s 175D to mean a prisoner who has been sentenced to life imprisonment for: a conviction of murder and the person killed was a child; more than one conviction of murder; one conviction of murder and another offence of murder was taken into account; or one conviction of murder and the person has previously been sentenced for another offence of murder. The President may only make a restricted prisoner declaration if satisfied it is in the public interest to do so: s 175H(1). Relevantly for present purposes, in considering the public interest, the President must have regard to the nature, seriousness and circumstances of the offence for which the prisoner was sentenced to life imprisonment, any risk the prisoner may pose to the public if the prisoner is granted parole, and the likely effect that the prisoner's release on parole may have on an eligible person or a victim: s 175H(2).

31. The effect of a restricted prisoner declaration is that the restricted prisoner to whom it applies cannot apply for a parole order, other than an "exceptional circumstances parole order": ss 176 and 180(2)(c). Section 176A(2) provides that, where a restricted prisoner declaration is in force, the Parole Board must refuse an application for an exceptional circumstances parole order unless it is satisfied that the prisoner, as a result of a diagnosed disease, illness or medical condition, is in imminent danger of dying and is not physically able to cause harm to another person, or is incapacitated to the extent the prisoner is not physically able to cause harm to another person; the prisoner does not pose an unacceptable risk to the public; and the making of the parole order is justified in the circumstances.

32. The plaintiff contends that s 175E of the CS Act, like s 175L, empowers the executive to make declarations that render the prisoners to which they are subject ineligible to be granted parole when they would otherwise be eligible due to having served their non-parole periods. He argues that this amounts to impermissibly granting judicial power to the executive by empowering it to alter, or set aside, the punishment imposed by the Supreme Court (PS [7] and [48]).

33. The plaintiff's challenge to the validity of s 175E should be rejected. Once a restricted prisoner declaration is made pursuant to that section, the restricted prisoner provisions in the CS Act have the same effect as the statutory schemes considered in Crump, Knight and Minogue. Prisoners who are subject to a restricted prisoner declaration are not ineligible to be granted parole, but remain eligible for "exceptional circumstances parole", which can only be granted if strict limiting conditions are satisfied. The sole significance of the fact that those strict limiting conditions only apply when a restricted prisoner declaration has been made by the executive – rather than due to the application of the statute alone – is that the President has a discretion not to make such a declaration, in which case those limiting conditions would not apply at all. In other words, once a restricted prisoner declaration has been made, its legal and practical effect is identical in substance to the legal and practical operation of the provisions found to be valid in Crump, Knight and Minogue. It would be necessary to reopen those decisions in order to accept the plaintiff's argument, which he does not appear to seek to do (see PS [35]).

34. The plaintiff also submits that the restricted prisoner provisions impose additional punishment because they have a punitive purpose. He asserts that this is because, in determining whether to make a restricted prisoner declaration, the President of the Parole Board must have regard to the nature, seriousness and circumstances of the prisoner's offence and "other circumstances connected with the retributive purposes of the prisoner's sentence", such as the likely effect that the prisoner's release on parole may have on the victim or an eligible person (PS [45]). It is argued that the "punitive object" is also "confirmed by the statement by the Minister to Parliament in his second reading speech for the 2021 amendments indicating that they are to 'condemn the perpetrators of the worst crimes'" (PS [46]).

35. The fact that the restricted prisoner provisions were intended to, and do in fact, apply only to offenders who have committed the "worst crimes" does not render them invalid.

In this respect, the following comments made by Gleeson CJ in Baker concerning the use of a "non-release recommendation" as the trigger for the application of s 13A of the Sentencing Act 1989 (NSW) are instructive (at 521-522 [8]-[9]):

> When the 1997 amendments to s 13A, the subject of the present constitutional challenge, were made, there was a limited number of prisoners serving life sentences who had been the subject of non-release recommendations. Their identities, and the circumstances of their crimes, were widely known. The New South Wales Parliament decided that, in the scheme of s 13A, they should be treated as exceptional cases. It made special, and different, provision for them. As a matter of legislative power, the Parliament was entitled to do so.
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> …
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> Persons who were the subject of a non-release recommendation had one thing in common: the legislature knew that the judges who sentenced them thought that their crimes were so serious that, in their cases, imprisonment for life should mean exactly that … [T]he fact that a particular judge expressed such an opinion is, as a matter of fact, indicative of the gravity of the conduct of an offender. It was within the power of the Parliament to select such an expression of opinion as an indication that the offending was of the most serious kind. The Parliament was entitled to create a special regime for the most serious offenders, and to select as the criterion for distinguishing the most serious offenders the making of a non-release recommendation. The selection was not arbitrary, and the criterion was not irrelevant. If it was unfair, its unfairness could have been thought to lie in the consequence that some other offenders of a most serious kind received more favourable treatment.

36. It is also unremarkable that s 175H(2) of the CS Act requires the President to have regard to the nature, seriousness and circumstances of the prisoner's offence, and the likely effect that the prisoner's release on parole may have on the victim or an eligible person, in determining whether to make a restricted prisoner declaration. These are familiar concepts in statutory regimes regulating the grant of parole. In New South Wales, for example, the State Parole Authority must have regard to the "nature and circumstances of the offence to which the offender's sentence relates" and "the likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole" in considering whether it is in the interests of the safety of the community to release an offender on parole: ss 135(3)(a) and (d) of the Crimes (Administration of Sentences) Act 1999 (NSW).

37. As set out in the defendant's submissions (DS [55]), the purpose of the restricted prisoner provisions is not to impose additional punishment, but to reduce the "re-traumatisation" that the parole process can have on the families of victims.

38. No breach of the Kable principle has been established. Section 175E of the CS Act was not enacted for a punitive purpose, and does not enable the Queensland executive to alter sentences imposed by the Supreme Court. There is no interference with the exercise of judicial power.

39. Question (b) of the Special Case should be answered "no".

Part IV Estimate of time for oral argument

40. It is estimated that 10 minutes will be required for oral argument.

Dated: 6 December 2024

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ANNEXURE

Constitutional provisions, statutes and statutory instruments referred to in the NSW Attorney's submissions

	Legislation	Provision	Version
1	Constitution of Australia	Chapter III	Current
2	Corrective Services Act 2006 (Qld)	175B, 175C, 175D, 175E, 175H, 175L, 175Q, 175R, 175T, 175U, 176, 176A, 176B, 180, 193A	Current
3	Corrections Act 1986 (Vic)	74AA, 74AB	1 August 2018 to 8 August 2018
4	Crimes (Administration of Sentences) Act 1999 (NSW)	135	Current
		154A	20 July 2001 to 14 December 2001
5	Crimes Act 1900 (NSW)	463	1 November 1989 to 12 January 1990
6	Sentencing Act 1989 (NSW)	13A	Reprint 10 November 1998