HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: RODNEY MICHAEL CHERRY
Plaintiff

and

STATE OF QUEENSLAND
Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY (INTERVENING)

Part I: FORM OF SUBMISSIONS

This outline of oral submissions is in a form suitable for publication on the internet.

Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1. History demonstrates that a decision by the executive to grant or withhold early release from a period of incarceration does not impermissibly interfere with the judicial process: **NTS [4], [12]-[23]**.

   (a) If the prerogative of mercy is exercised, it releases the prisoner from the obligation to serve their full period of imprisonment and releases the jailer from the obligation of keeping the person imprisoned: *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364, 367-368 (**JBA v 4 no. 26**); *Hoare v The Queen* (1989) 167 CLR 348, 353 (**JBA vol 4 no. 23**); *R v Milnes and Green* (1983) 33 SASR 211, 216-217.

   (b) That may occur before or after the expiry of a prisoner's non-parole period and, in either event, does not impermissibly interfere with a judicial order.

(c) So too, legislation which alters a person's capacity to obtain parole does not purport to "impeach, set aside, alter or vary the legal effect of the sentence". It merely alters the statutory consequences which attach to the non-parole period: *Minogue v Victoria* (2019) 268 CLR 1 (***Minogue***), [19] (**JBA vol 5 no. 34**).

(d) In particular, legislation which merely makes it more likely that a person will serve the entirety of the sentence of imprisonment actually imposed by a court cannot be said to impermissibly interfere with the judicial order.

2. The Plaintiff's contentions set up a false dichotomy between *removing* and *constraining* the capacity to obtain parole: **NTS [5], [30]-[33], cf PS [5]-[6], [39]-[41]**.

(a) The dichotomy is false because, where an amendment constrains the capacity of the executive to grant parole, it means that prisoners who were previously eligible for parole, but who are now caught by the amendment, are no longer eligible.

(b) This is analogous to *Minogue* (2019) 268 CLR 1 (**JBA vol 5 no. 34**), where the legislation permitted the grant of parole only if a person was in imminent danger of death or was so incapacitated that they lacked the physical capacity to harm another person. In Dr Minogue's circumstances, the law operated to remove any prospect of parole: at [11]. It imposed "strict *limiting conditions* upon the exercise of the executive power to release" a prisoner: at [19]. The law was nevertheless valid in its application to him.

Dated: 4 February 2024

Nikolai Christrup SC