HIGH COURT OF AUSTRALIA

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File Number:	B11/2024
File Title:	Cherry v. State of Queensland
Registry:	Brisbane
Document filed:	AG-NT - Intervener's submissions
Filing party:	Interveners
Date filed:	06 Dec 2024

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY
BETWEEN: **RODNEY MICHAEL CHERRY**
Plaintiff

and

STATE OF QUEENSLAND
Defendant

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

Part I: Internet publication

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

Parts II and III: Basis of intervention

2. The Attorney-General for the Northern Territory of Australia (**Territory**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Defendant.

Part IV: Submissions

A. Summary of argument

3. The Territory generally adopts the written submissions of the State of Queensland and makes two supplemental arguments.

4. The first is that, contrary to the Plaintiff's submissions (**PS**), it is not a defining characteristic of the Supreme Courts of the States that the punishments they impose consequent upon the adjudgment of criminal guilt are final and conclusive, at least in the sense suggested by the Plaintiff. In particular, no negative implication should be drawn from Ch III prohibiting legislation that authorises the executive to narrow or exclude the grant of parole only because a Supreme Court has fixed a non-parole period. Amongst other matters, that characteristic is inconsistent with the long history of the power to grant remissions and pardons before and after Federation: see **Part B**.

5. The second is that *Knight*, *Crump*, and *Minogue*[1] are not distinguishable: **Parts C**. The Plaintiff seeks to distinguish those cases on the basis that the legislation in this case *excludes* the possibility of obtaining parole, where the legislation in those cases merely *narrowed* that possibility. That distinction is illusory. The substantive operation of both sets of legislation is to prevent prisoners who fall outside the statutory criteria from obtaining parole. Further, a review of the reasons in *Knight*, *Crump*, and *Minogue* demonstrates that those judgments did not depend upon a prisoner retaining the right to apply for parole or there being a duty on the part of the parole authority to consider such applications. Similarly, there is nothing in the orders of the Supreme Court in this case which contemplated such reciprocal rights or duties.

B. The Defining Characteristics of a Supreme Court

6. The Plaintiff contends that it is a defining characteristic of the Supreme Courts of the States that the punishments they impose consequent upon the adjudgment of criminal guilt are "final and conclusive": **PS [30]**. The Plaintiff does not explain what is meant by the adjectives "final and conclusive", but it appears to exclude the possibility that the legislature or executive can alter the legal consequences of the orders made by the Supreme Court in terms of the rights, duties or obligations they define: **PS [32]-[33]**. This implication is then said to preclude State legislation which would authorise the executive to prohibit a person from being released on parole following the expiry of a non-parole period set by a Supreme Court: **PS [5], [6]**. The Plaintiff does not contend that a similar limitation on legislative power arises in respect of non-parole periods imposed by State courts other than the Supreme Courts.

7. The starting point is that the Legislative Assembly of Queensland has power to make laws for the "peace, welfare and good government of [the State] in all cases whatsoever."[2] That is a plenary power to make laws on any subject matter,[3] including regulating or abolishing State executive power to order the release of prisoners on parole,[4] subject to constitutional restrictions.

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1 *Crump v State of New South Wales* (2012) 247 CLR 1 (***Crump***); *Knight v Victoria* (2017) 261 CLR 306 (***Knight***); *Minogue v Victoria* (2019) 268 CLR 1 (***Minogue***).

2 *Constitution of Queensland 2001* (Qld), s 8, referring to *Constitution Act 1867* (Qld), s 2.

3 *Union Steamship Co of Australia Pty Ltd v King* (1998) 166 CLR 1, 9 (the Court); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [40] (McHugh J).

4 *Crump* (2012) 247 CLR 1, [36] (French CJ).

8. The Plaintiff relies on the principle identified in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (***Kable***) to ground the asserted implication: **PS [7], [29], [33]**. The principle for which *Kable* stands is that because the Constitution establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid.[5]

9. However, the Plaintiff does not frame his argument in that way. In particular, he does not contend that ss 175E or 175L of the *Corrective Services Act 2006* (Qld) impair the institutional integrity of the Supreme Court in a manner which is "incompatible with its role as a repository of federal jurisdiction". Laws which have engaged that implication have typically undermined the independence and impartiality of a court by allowing it to be conscripted by the executive or requiring it to depart from the ordinary judicial process, which generally requires that courts apply procedural fairness,[6] adhere as a general rule to the open court principle,[7] and give reasons for their decisions.[8] The Plaintiff does not contend that ss 175E or 175L have any such effect, presumably because they do not require courts to do or to refrain from doing anything.

10. The Plaintiff instead relies on the line of jurisprudence which was foreshadowed in *Kable*[9] and which has been developed after it: **PS [29]**.[10] That principle is that the reference in s 73(ii) of the Constitution to the "Supreme Court of a State" requires that there be a body fitting that description, so that it is beyond the legislative competence of a State to abolish its Supreme Court or to alter the constitution or character of the Court so that it ceases to meet that description.[11]

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5 *Vunilagi v The Queen* (2023) 97 ALJR 627, [12] (Kiefel CJ, Gleeson and Jagot JJ, Gageler J agreeing on this point); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 (***Emmerson***), [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). See, in the context of parole, *Baker v The Queen* (2004) 223 CLR 513 (***Baker***), [5] (Gleeson CJ). See also *Baker* (2004) 223 CLR 513, [51] (McHugh, Gummow, Hayne and Heydon JJ) and *Wainohu v New South Wales* (2011) 243 CLR 181 (***Wainohu***), [105] (Gummow, Hayne, Crennan and Bell JJ).

6 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [67] (French CJ), [177] and [194] (Gageler J).

7 *Wainohu* (2011) 243 CLR 181, [44] (French CJ and Kiefel J).

8 Ibid, [54]-[59] (French CJ and Kiefel J), [95]-[103] (Gummow, Hayne, Crennan and Bell JJ).

9 *Kable* (1996) 189 CLR 51, 103 (Gaudron J), 111 and 117 (McHugh J), 139 (Gummow J).

10 As to this development, see J Stellios, *The Federal Judicature: Ch III of the Constitution*, (2020) 2nd, [9.50], [9.147] and [9.151].

11 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 (***Forge***), [63] (Gummow, Hayne and Crennan JJ); *Wainohu* (2011) 243 CLR 181, [46] (French CJ and Kiefel J). It

11. This Court has not yet fully worked out the defining characteristics of a Supreme Court, nor is any all-embracing proposition likely to be found.[12] In *Kirk*, the Court held that it was a defining characteristic of State Supreme Courts that they have the capacity to engage in judicial review for jurisdictional error.[13] That implication flowed from two matters. The first was empirical: that, at Federation, each of the Supreme Courts of the States possessed the jurisdiction to supervise inferior courts and tribunals for jurisdictional error.[14] The second was structural: that this jurisdiction was necessary to ensure the High Court could fulfil its role as the "Federal Supreme Court" referred to in s 71 of the Constitution by superintending the common law throughout the Commonwealth, including through appeals from the "Supreme Courts of the States" under s 73(ii).[15] Those matters provided the textual foothold[16] and the structural necessity[17] for drawing that constitutional implication.

12. If "final and conclusive" are used in the sweeping sense referred to in [6] above, the Plaintiff's asserted implication is inconsistent with the position at time of Federation and is not necessitated by the appellate structure erected by s 73 of the Constitution.

The executive has historically ordered the early release of prisoners

13. It is legitimate to have regard to the legal position at Federation to determine whether a particular feature is a defining characteristic of a Supreme Court.[18]

14. Both before and after Federation, there was a long practice in the Australian colonies (and, later, the States) of the executive granting remissions and pardons pursuant to the royal prerogative of mercy which affected sentences imposed by courts, including

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was observed in *Forge* (2006) 228 CLR 45, [63] (Gummow, Hayne and Crennan JJ) that the principle in *Kable* is one which hinges upon maintenance of the defining characteristics of a "court", or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court.

12 Ibid, [64] (Gummow, Hayne and Crennan JJ).

13 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 (***Kirk***), [55(f)] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

14 Ibid, [97]-[98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

15 Ibid, [98]-[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

16 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (the Court); *McCloy v New South Wales* (2015) 257 CLR 178, [318] (Gordon J) and the authorities cited therein.

17 *Burns v Corbett* (2018) 265 CLR 304, [47] (Kiefel CJ, Bell and Keane JJ), [94] (Gageler J), [127] (Nettle J) and [175] (Gordon JJ).

18 *Kirk* (2010) 239 CLR 531, [97]-[98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). As to the principle in *Kable* per se, see *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, [83] (Bell, Keane, Nettle and Edelman JJ); *Emmerson* (2014) 253 CLR 393, [16]-[18] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Forge* (2006) 228 CLR 45, [26], [30]-[32], [42] (Gleeson CJ), [74], [82], [84] (Gummow, Hayne and Crennan JJ) and [256]-[267] (Heydon J); *Baker* (2004) 223 CLR 513, [27], [47]-[48] (McHugh, Gummow, Hayne and Heydon JJ).

those imposed by the Supreme Courts. The prerogative of mercy has been described as an integral element of the criminal justice system,[19] and until legislatures introduced appeals on questions of fact and law in criminal cases in the early 20th century, it served as the principal means by which convicted persons obtained redress for convictions and sentences.[20]

15. The common law attributed the royal prerogative of mercy to the Sovereign, an incident of which was the power to pardon, partially or fully, those convicted of a public offence.[21] The prerogative was said to be generally "incommunicable", but it could, by personal grant, be exercised by the Governors of colonies.[22] Prior to Federation, such grants had been made to each of the Governors of the Australian colonies through Letters Patent.[23] The power was "used extensively by the early Governors" and was said to have "always been one of the prerogative powers of the Australian colonial and State governors".[24] By Letters Patent issued to each of the colonial Governors on 29 October 1900, the power to grant a pardon was confirmed in relevantly uniform terms for the new States upon the establishment of the Commonwealth.[25] Section 21 of Schedule 1 to the *Criminal Code Act 1899* (Qld) (**Criminal Code**) expressly recognised the continued existence of the prerogative in Queensland at Federation.[26]

16. Clause VII of the Letters Patent granted to the Queensland Governor on 29 October 1900 and gazetted on 1 January 1900 relevantly provided:

> "When any crime or offence has been committed within the State, against the Laws of the State […], the Governor may, as he shall see occasion, in Our name

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19 *Jasmin v The Queen* (2017) 51 WAR 505, [25] (Buss P) and the authorities referred to therein; *Burt v Governor-General* [1992] NZLR 672, 681 (Cooke P, Gault and McKay JJ).

20 *Mallard v The Queen* (2005) 224 CLR 125 (***Mallard***), [4] (Gummow, Hayne, Callinan and Heydon JJ).

21 *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298, [92] (Gordon and Steward JJ), quoting with approval from *Eastman v DPP (ACT)* (2003) 214 CLR 318 (***Eastman***), [98] (Heydon J). See also *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364 (***Kelleher***), 371 (Wilson J); *R v Milnes and Green* (1983) 33 SASR 211, 215-216 and 218 (Cox J), 233 (Wells J, White J agreeing) and 237 (Legoe J).

22 J Chitty, *A treatise on the law of the prerogatives of the Crown: and the relative duties and rights of the subject* (1820), Butterworth, London, 90 and 102-103.

23 *R v Milnes and Green* (1983) 33 SASR 211, 218 (Cox J)

24 Ibid, 216 (Cox J).

25 As to South Australia, see Letters Patent granted to the South Australian Governor on 29 October 1900 and gazetted on 1 January 1901, clause VII. As to Tasmania, see the Letters Patent granted to the Tasmanian Governor on 29 October 1900, Clause IX. As to Victoria, see the Letters Patent granted to the Victorian Governor on 29 October 1900 and gazetted on 2 January 1901, clause IX. As to Western Australia, see Letters Patent granted to the Western Australian Governor on 29 October 1900 and gazetted on 1 May 1901, clause X. As to New South Wales, see the Letters Patent granted to the Governor of New South Wales on 29 October 1900 and gazetted on 1 January 1901, clause IX.

26 See now, Criminal Code, s 18 and s 672A.

> and on Our behalf […], grant to any offender convicted in any Court of the State, or before any Judge, or other Magistrate of the State, within the State, a pardon either free or subject to lawful conditions, or any respite of the execution of the sentence passed on such offender, for such period as the Governor thinks fit, and further may remit any fines, penalties or forfeitures due or accrued to Us."

17. The clause refers to the three main manners in which the prerogative of mercy could be exercised, namely through pardon, through respite of execution, and through the remitter of fines, penalties and forfeitures. The power to pardon included the power to grant a remission of the sentence.[27] A remission advanced the date of the prisoner's release that would otherwise apply under the sentence. A respite from execution empowered the Governor to postpone the time that the prisoner was obliged to commence serving the sentence or to provide a break from the obligation to serve the sentence. Finally, a remitter relieved the defendant of the obligation to pay a fine or penalty or to forfeit property.

18. The exercise of that prerogative power thus affected the legal consequences of a sentence imposed by courts, including the Supreme Court. As a general proposition, the exercise of prerogative power is apt to so interfere with legal rights and obligations.[28] In the context of sentences of imprisonment, the grant of a remission or a pardon altered the legal obligation on a prisoner to serve the term of imprisonment imposed by the court and reduced or removed the power of the gaoler to keep the prisoner detained.

19. Consistent with that, at common law, a pardon was said to be a (emphasis added):[29]

> "solemn act by which the Sovereign, either absolutely or conditionally, *forgives or remits* for the benefit of the person to whom it is granted *the legal consequences of a crime he has committed*"

20. It "remove[d] from the subject of the pardon [i.e. the prisoner], 'all pains penalties and punishments whatsoever'"[30] by "cancelling or reducing the sentence"[31] so that the

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27 *Kelleher* (1984) 156 CLR 364, 367, 368 (Mason J), 371 (Wilson J, Dawson J agreeing at 384); *Hoare v The Queen* (1989) 167 CLR 348, 353 (the Court).

28 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, [135] (Gageler J).

29 *R v Milnes and Green* (1983) 33 SASR 211, 216-217 (Cox J). See now, Criminal Code, s 677

30 *Eastman* (2003) 214 CLR 318, [98] (Heydon J, Gleeson CJ, Gummow, Kirby, Hayne and Callinan agreeing).

31 *Kelleher* (1984) 156 CLR 364, 367 (Mason J).

"punishment which the law has inflicted *[was] certainly altered by the prerogative*."[32] The only exception was that a pardon could not touch the conviction itself (it "is in no sense equivalent to an acquittal"[33]). This incident of the sentence could only be removed on appeal.

21. The exercise of the Governor's discretion under the prerogative of mercy was not only largely unfettered, it was (as an executive process) unconfined by any rules or laws of evidence or procedure, appellate conventions or restrictions.[34] It could be invoked whether there had been a miscarriage of justice, where the grounds of relief were purely compassionate or in some intermediary situation. A person could petition whether he or she was guilty or innocent of the crime for which they had been punished.[35] Finally, there was room for political considerations in determining petitions for mercy.[36]

22. It is plain that there are differences between a grant of mercy by the Governor pursuant to the prerogative and the grant of parole by a parole board pursuant to statute, however, there are also similarities. At least one member of this Court has recognised the analogy between a conditional pardon and parole[37] and the majority in both *Baker*[38] and *Crump*[39] described an order granting parole as the prisoner "obtaining a mercy".

23. Whether or not the grant of a pardon or a remission pursuant to the prerogative has the effect of varying or setting aside a court imposed sentence of imprisonment, as opposed to merely relieving the prisoner of the obligation to serve time whilst leaving the sentence intact, need not be decided. The important point for present purposes is that before and after Federation, the executive had a broad discretion to order that a prisoner be released from custody during the pendency of a court imposed sentence of imprisonment. The existence of this power is inconsistent with the implication that

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32 J Chitty, *A treatise on the law of the prerogatives of the Crown: and the relative duties and rights of the subject* (1820), Butterworth, London, 90 and 102-103.

33 *Eastman* (2003) 214 CLR 318, [98] (Heydon J, Gleeson CJ, Gummow, Kirby, Hayne and Callinan agreeing), approving *R v Cosgrove* [1948] Tas SR 99, 105 (Morris CJ). See also *R v Foster* [1984] 2 All ER 679; *R v Celep* [1998] 4 VR 811, 814-815 (the Court).

34 *Mallard* (2005) 224 CLR 125, [6] (Gummow, Hayne, Callinan and Heydon JJ).

35 *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, [47] (Gleeson CJ, Gummow, Heydon and Kiefel JJ).

36 *Attorney-General (Cth) v Ogawa* (2020) 384 ALR 474, [75] (the Court); *Holzinger v Attorney-General (Qld)* (2020) 385 ALR 158 (the Court).

37 *Kelleher* (1984) 156 CLR 364, 368 (Mason J).

38 *Baker* (2004) 223 CLR 513, [29] (McHugh, Gummow, Hayne and Heydon JJ).

39 *Crump* (2012) 247 CLR 1, [41] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

punishment imposed by State Supreme Courts are "final and conclusive" in the sense used by the Plaintiff. The asserted implication, pitched at that level of generality and as deployed in this case, has no empirical basis.

The appellate structure erected by s 73 of the Constitution

24. The asserted implication, insofar as it is sought to be applied to ss 175E and 175L, is also not necessary to give effect to the appellate structure created by Ch III of the Constitution. Where a non-parole period is set by a court, it forms part of the single sentence which the court imposes.[40] That single sentence is then a "judgment, decree, order or sentence" within the meaning of s 73 of the Constitution and from which an appeal may lie to the High Court from the courts of the States under s 73(ii). That is sufficient to enable this Court to discharge its function as the "Federal Supreme Court" referred to in s 71 and to perform its "constitutional duty of supervising the nation's legal system".[41] It is not necessary, in order to secure that superintendence, to deny to the States legislative and executive power to regulate when a prisoner may be released on parole following the expiry of their non-parole period.

25. The Plaintiff's argument requires s 73 to go beyond the exercise of judicial power and to reach into the executive function. As a majority of this Court recently reiterated:[42]

> There is a fundamental distinction between [the] judicial function of sentencing an offender and the executive function of determining whether an offender should be released on parole. … [T]he judicial function requires consideration of both the appropriateness of a sentence of imprisonment and the appropriate length of such a sentence, including the fixing of a non-parole period were appropriate. *That function is exhausted upon the making of the order which sentences the offender*.

26. The Plaintiff conflates those distinct judicial and executive functions by treating an amendment to the legislative scheme governing the latter as something which interferes with the former. That is plainly not so.[43] Amongst other matters, setting a

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40 *R v Hatahet* (2024) 98 ALJR 863 (***Hatahet***), [20] (Gordon ACJ, Steward and Gleeson JJ).

41 *Kable* (1996) 189 CLR 51, 113 (McHugh J).

42 *Hatahet* (2024) 98 ALJR 863, [19] (Gordon ACJ, Steward and Gleeson JJ), citing with approval *Minogue* (2019) 268 CLR 1, [14] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Baker* (2004) 223 CLR 513, [29] (Gleeson CJ); *Elliott v The Queen* (2007) 234 CLR 38, [5] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *Crump* (2012) 247 CLR 1, [28] (French CJ) and [58] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

43 "The legislative scheme, as well as practice and policies, regarding the parole system may validly change from time to time": *Minogue* (2019) 268 CLR 1, [15] (Kiefel CJ, Bell, Keane, Nettle and

non-parole period does not create a right or entitlement to be released on parole[44] and the judicial function is not concerned with the *likelihood* of a prisoner obtaining parole.[45] Whether or not a prisoner is ultimately released is "simply outside the scope of the exercise of judicial power constituted by imposition of the sentence[]" and legislation which alters that prospect "does not intersect at all with the exercise of judicial power that has occurred".[46] As such, these effects do not touch upon the subject matter of the appellate structure created by s 73 of the Constitution, being the exercise of *judicial* power.[47]

27. The Plaintiff's structural argument is in substance identical to the second proposition advanced by the unsuccessful plaintiff in *Crump*: that the legislation there under consideration purported to "set aside, vary, alter, or otherwise stultify" the effect of the non-parole period set by McInerney J by providing that the plaintiff could not be granted parole except in extremely narrow circumstances.[48] The plurality dismissed that argument because the non-parole period did not "create any right or entitlement in the plaintiff to his release on parole" and "itself had no operative effect", it being a mere "factum by reference to which the parole system [including later amendments] operated."[49] The subsequent legislation did not affect the non-parole period, but merely altered the statutory consequences which attached to it.[50] The Plaintiff's argument must fail for the same reason.

Conclusion

28. For those two reasons, it was not a defining characteristic of the Supreme Court of Queensland at Federation that punishments imposed by that Court consequent upon the adjudgment of criminal guilt were "final and conclusive" as those words appear to

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Gordon JJ). See also *Crump* (2012) 247 CLR 1, [28], [36]-[37] (French CJ), [59] and [71]-[72] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Baker* (2004) 223 CLR 513, [7] (Gleeson CJ).

44 *Minogue* (2019) 268 CLR 1, [15] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

45 *Hatahet* (2024) 98 ALJR 863, [20]-[25] (Gordon ACJ, Steward and Gleeson JJ).

46 *Knight* (2017) 261 CLR 306, [28]-[29] (the Court).

47 *New South Wales v Kable* (2013) 252 CLR 118, [70] (Gageler J); *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, [63] (Gleeson CJ, Gummow and Hayne JJ); *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 299 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ) and 312 (Brennan J).

48 See *Crump* (2012) 247 CLR 1, [56] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) and also [32] (French CJ).

49 *Crump* (2012) 247 CLR 1, [56] (Gummow, Hayne, Crennan, Kiefel and Bell JJ, French CJ agreeing). See also [34] (French CJ). See, similarly, *Knight* (2017) 261 CLR 306, [25] (the Court) and *Minogue* (2019) 268 CLR 1, [9] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

50 *Crump* (2012) 247 CLR 1, [35]-[36] (French CJ). See also *Minogue* (2019) 268 CLR 1, [19] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

be used by the Plaintiff. In particular, there is no implication to be drawn from Ch III that the State legislation cannot authorise the executive to make orders which prevent a prisoner from applying for parole for a period of time, merely because the Supreme Court of that State has fixed a non-parole period: **cf PS [32]**.

C. *Crump, Knight* and *Minogue* are not distinguishable

29. The Plaintiff does not say that *Crump*, *Knight* and *Minogue* were wrongly decided. He contends that those cases are distinguishable because those plaintiffs retained the capacity to apply for parole. There are three problems with that submission.

The Plaintiff's false dichotomy

30. The first problem is that it sets up a false dichotomy by suggesting that the legislation in this case *removes* the opportunity to obtain parole whereas the legislation in *Crump*, *Knight* and *Minogue* merely *constrained* that opportunity: **PS [5]-[6], [38]-[41]**.

31. That distinction is illusory. The legislation in *Crump*, *Knight* and *Minogue* narrowed the capacity of the executive to grant parole for certain persons unless identified circumstances existed, namely that the person was in imminent danger of death or was so incapacitated that they lacked the physical capacity to harm another person.[51] The effect of those reforms was to deny to persons who lacked those characteristics the opportunity to be released on parole. Thus, in *Knight*, the plaintiff (unsuccessfully) contended that the effect of the impugned legislation was to increase the severity of the punishment imposed on him by causing him to "*lose an opportunity to be released on parole*".[52]

32. That is precisely the same effect which the Plaintiff complains of here. The legislature has identified a factum (that a no-body-no-parole prisoner has not given satisfactory co-operation: s 175L) and provided that, if that factum exists, the prisoner should not be released on parole: ss 176B and 180(2)(d). As in *Crump*, *Knight* and *Minogue*, that effect is mediated through members of the executive turning their mind to the existence of that factum and either being satisfied or not satisfied of its existence.

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51 *Crump* (2012) 247 CLR 1, [4] (French CJ); *Knight* (2017) 261 CLR 306, [3] (the Court); *Minogue* (2019) 268 CLR 1, [11] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

52 *Minogue* (2019) 268 CLR 1, [13] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

33. The only distinction is that, in the earlier cases, that determination would be made from time to time, whereas the determination made under s 175L operates unless and until it is reconsidered and removed: s 175U(2). That is a distinction without significance. It is plainly a matter which the Plaintiff considers harsh and undesirable as a matter of policy, but it is an outcome that reflects policy choices open to the legislature.[53]

The reasoning in Crump, Knight and Monigue did not depend on the capacity to apply

34. The Plaintiff says that it was "central to the negative answer" to the questions in *Crump*, *Knight* and *Minogue* that the plaintiffs remained eligible to be granted parole and, in support, cites *Crump* [41], *Knight* [29] and *Minogue* [21]: **PS [6] and n9**. Scrutiny of the reasons in those cases does not bear that out.

35. The identified paragraph in *Crump* makes no reference to the plaintiff in that case remaining eligible for parole following the statutory amendment.

36. The passage at *Knight* [29] is merely descriptive of the scheme under consideration in that case. On no reading of that paragraph could it be said, by describing the new statutory scheme as "making it more difficult for Mr Knight to obtain parole after the expiration of the minimum term", that the Court was implying that it was critical to the outcome of the case that the possibility of being granted parole remained. As explained below, the reasoning which led to the outcome demonstrates that it was a matter of supreme indifference whether the new scheme prohibited parole or merely narrowed the circumstances in which it could be granted.

37. Much to the same effect, the reference in *Minogue* [21] to the plaintiff retaining his ability to make an application for parole is descriptive only of the effect of s 74AB(1) of the *Corrections Act 1986* (Vic). The remainder of the paragraph makes it clear that whether or not he retained a right to apply for parole following the amendment was irrelevant because what mattered was that his punishment was no more severe as it remained a sentence of life imprisonment.

38. The true position is that the reasoning in *Crump*, *Knight* and *Minogue* did not turn on whether the plaintiff in each case remained eligible for parole. The critical features of the reasoning were that (a) the non-parole period fixed by the court did not create a

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53 *Baker* (2004) 223 CLR 513, [8] (Gleeson CJ).

right to parole,[54] (b) that a legislature was at liberty to amend the parole legislation after a court had fixed a non-parole period[55] and (c) that amendments to the parole legislation which merely altered the provisions governing the circumstances in which parole could be granted did not interfere with the plaintiff's liability to serve the head sentence.[56]

39. In *Minogue* at [19], the plurality held (emphasis added):

> "As this Court said in *Crump* and in *Knight*, *legislative amendments* to the parole system *that impose 'strict limiting conditions upon the exercise of the executive power to release'* a prisoner, like those in s 74AB, 'may be said to have altered a statutory consequence of the sentence' *but such amendments do not impeach, set aside, alter or vary the legal effect of the sentence under which a prisoner suffers deprivation of liberty*. As the Court said in *Knight* in relation the substantive identical provision to s 74AB, 'by making it more difficult for [the plaintiff] to obtain a parole order after the expiration of the minimum term, [the section] does nothing to contradict the minimum term that was fixed'".

40. The plurality observed that Mr Minogue was not in imminent danger of dying and was not seriously incapacitated.[57] Hence it cannot be said that he had not been deprived of the opportunity to be considered for parole upon the expiry of the non-parole period. This confirms that the plurality's reference to "severely constrained" at *Minogue* [18] is not an oblique reference to the plaintiff having retained some small opportunity to be granted parole. Rather, it is a recognition that the parole board's power to grant parole had been narrowed by the amendment such that it was in effect prohibited from granting him parole notwithstanding the expiry of the non-parole period set by the court.

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54 *Crump* (2012) 247 CLR 1, [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Knight* (2017) 261 CLR 306, [27] (the Court); *Minogue* (2019) 268 CLR 1, [15] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). See also *Hatahet* (2024) 98 ALJR 863, [20] (Gordon ACJ, Steward and Gleeson JJ).

55 *Crump* (2012) 247 CLR 1, [28], [36]-[37] (French CJ), [59] and [71]-[72] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Minogue* (2019) 268 CLR 1, [15] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). See also *Baker* (2004) 223 CLR 513, [7] (Gleeson CJ) and *Hatahet* (2024) 98 ALJR 863, [26] (Gordon ACJ, Steward and Gleeson JJ).

56 *Crump* (2012) 247 CLR 1, [60]-[61] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Knight* (2017) 261 CLR 306, [27]-[29] (the Court); *Minogue* (2019) 268 CLR 1, [15]-[23] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

57 *Minogue* (2019) 268 CLR 1, [11] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

The Supreme Court did not order that the Plaintiff be considered for parole

41. The third problem with the Plaintiff's argument is that, by suggesting that ss 175L and 175E have the effect of altering or setting aside the order of the Supreme Court, the Plaintiff reads into that order incidents which do not exist: **PS [7], [28], [35], [48].**

42. The relevant order of Dutney J was in the following terms (**SCB 12**):

> The Plaintiff "not be released before serving twenty (20) years of the sentence unless released sooner under exceptional circumstances parole under the Corrective Services Act 2000".

43. The order was made pursuant to s 305(2) of the *Criminal Code Act 1899* (Qld) which provided that if a person is being sentenced for more than one conviction of murder "the court sentencing the person must make an order that the person must not be released from imprisonment until the person has served a minimum of 20 or more specified years of imprisonment, unless released sooner under exceptional circumstances parole under the *Corrective Services Act 2000*".

44. The order by its terms is demonstratively not an order that the executive must *consider* whether to release the Plaintiff upon the expiry of the 20 years. It did not grant an opportunity to be *considered* for release on parole on the expiry of that term: cf **PS [6]**. The order is merely that the executive must not release the Plaintiff on parole before the expiration of 20 years otherwise than by exceptional circumstances parole.

45. Further, there was no provision in the *Corrective Services Act 2000* (Qld) as it stood at the time which imbues the order with any special or different meaning. In particular, there was no provision to the effect that an order of the kind made the Dutney J operates as an order that the parole board (then the Queensland Community Corrections Board) had to consider, whenever an application was made, whether to release the prisoner on parole on the expiry of the period fixed by the court.

46. The order of Dutney J is therefore not an obstacle to the subsequent enactment of a provision authorising the executive to determine that the Plaintiff should be prohibited from applying for parole or from being considered for parole.

Part V: Estimate of time

47. The Territory estimates that no more than 10 minutes will be required for argument.

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY
BETWEEN: **RODNEY MICHAEL CHERRY**
Plaintiff

and

STATE OF QUEENSLAND
Defendant

ANNEXURE TO INTERVENER'S SUBMISSIONS (ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY OF AUSTRALIA)

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Attorney-General for the Northern Territory sets out below a list of the constitutional, statutory and statutory instrument provisions referred to in these submissions.

No.	Description	Version	Provisions
1.	*Commonwealth Constitution*	Current	Ch III ss 71, 73
2.	*Constitution Act 1867* (Qld)	Current	s 2
3.	*Constitution of Queensland 2001* (Qld)	Current	s 8
4.	*Corrections Act 1986* (Vic)	1 August 2018	s 74AB(1)
5.	*Corrective Services Act 2000* (Qld)	29 August 2002	
6.	*Corrective Services Act 2006* (Qld)	Current	ss 175E, 175L, 175U(2), 176B, 180(2)(d)
7.	*Criminal Code Act 1899* (Qld)	1 January 1901	s 21 of sch 1
8.	*Criminal Code Act 1899* (Qld)	27 September 2002	s 305(2)
9.	*Criminal Code Act 1899* (Qld)	Current	ss 18, 672A, 677