HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY No. B11/2024

B E T W E E N:

RODNEY MICHAEL CHERRY
Plaintiff

and

STATE OF QUEENSLAND
Defendant

SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

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

PART III: REASONS WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: ARGUMENT

4. The Attorney General for Western Australia adopts the defendant's submissions and makes the following supplementary submissions.

The impugned provisions do not alter the punishment imposed on the plaintiff

5. In ***Crump*** *v New South Wales* (2012) 247 CLR 1, ***Knight*** *v Victoria* (2017) 261 CLR 306 and ***Minogue*** *v Victoria* (2019) 268 CLR 1, this Court rejected challenges to legislation which severely constrained a prisoner's access to parole. In each case, the impugned legislation had been enacted after a court had sentenced a prisoner to life imprisonment and had set a minimum term of imprisonment which the prisoner had to serve.

6. Each challenge failed because the impugned legislation did not alter the legal effect of the sentence.[1] Indeed, the legislation did not intersect at all with the exercise of judicial power and did not contradict the minimum term that was fixed.[2] The legislation instead took the sentence as a factum by reference to which the parole system operated.[3]

7. This case is indistinguishable from *Crump*, *Knight* and *Minogue* and must fail on the principles which emerge from those cases. The impugned provisions[4] of the *Corrective Services **Act** 2006* (Qld) do not alter the legal effect of the sentence imposed on the plaintiff. Nor do they contradict the minimum term fixed by the
10 Supreme Court of Queensland when sentencing the plaintiff to life imprisonment. Instead, the Act takes that sentence as a factum by reference to which the parole system for which the Act provides operates.

8. The plaintiff was convicted of two counts of murder and sentenced to life imprisonment on each count. The court also ordered that the plaintiff not be released until he had served a minimum of 20 years' imprisonment (unless released sooner under exceptional circumstances parole).[5]

9. Once the plaintiff was sentenced, the exercise of judicial power was spent and responsibility for his future as a prisoner passed to the executive.[6]

10. The plaintiff's sentence was at all times one of life imprisonment.[7] While forming
20 part of his sentence,[8] the order that the plaintiff not be released until he had served a minimum of 20 years' imprisonment (unless released sooner under exceptional circumstances parole) did not create any right or entitlement of the plaintiff to release on parole at the expiration of that period.[9]

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1 *Crump* [35]-[36] (French CJ), [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), [69]-[74] (Heydon J).
2 *Knight* [29] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
3 *Crump* [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Minogue* [16] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
4 The Act sections 175E and 175L.
5 Special Case Book (**SCB**) 22 [4], 32.
6 *Crump* [28] (French CJ), [58] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Minogue* [14] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). The plaintiff unsuccessfully appealed to the Queensland Court of Appeal, which exercised judicial power in dismissing the appeal: *R v Cherry* [2004] QCA 328 (SCB 33-64).
7 *Minogue* [16] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
8 *Minogue* [21] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
9 See *Crump* [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), [71] (Heydon J); *Knight* [27] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Minogue* [15], [21] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

11. The plaintiff may be required to serve the whole of his head sentence.[10] Eligibility for release on parole formed no part of his sentence.[11]

12. Instead, his minimum term reflected a judicial determination that all the circumstances of his offence required that the plaintiff serve no less than that term, without the opportunity of parole.[12] Put another way, it did no more than set a period during which the plaintiff was not to be released on parole.[13]

13. What the plurality said of the plaintiff in *Minogue* may also be said of the plaintiff in this case:[14]

> *In the case of the plaintiff, at all times, there remained only one sentence – imprisonment for life. The fixing of the non-parole period ... said nothing about whether the plaintiff would be released on parole at the end of that non-parole period. It left his life sentence unaffected as a judicial assessment of the gravity of the offence committed. Indeed, the plaintiff has no right to be released on parole and may be required to serve the whole of the head sentence. At best, the non-parole period provided the plaintiff with hope of an earlier conditional release but always subject to and in accordance with legislation in existence at the time governing any 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.*
>
> *Moreover, the power to release a prisoner on parole* after *the expiry of the non-parole period is a matter for the executive, subject to the statutory scheme and administrative policies applicable to the exercise by the Board of the executive function of determining whether to release the prisoner on parole. No less importantly, the legislative scheme, as well as practice and policies, regarding the parole system may validly change from time to time.*

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10 *Minogue* [16] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); see also *Crump* [36] (French CJ), quoting from the reasons of French CJ, Gummow, Hayne, Crennan and Kiefel JJ in *PNJ v The Queen* (2009) 83 ALJR 384 [11].

11 *Minogue* [15] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

12 *Crump* [28] (French CJ), quoting from the reasons of Dawson, Toohey and Gaudron JJ in *Bugmy v The Queen* (1990) 169 CLR 525, 538.

13 *Knight* [25], [27] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

14 *Minogue* [16]-[17] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) (emphasis in original).

14. Whether the plaintiff serves the rest of his sentence in prison or at large on parole, now that his minimum term of imprisonment has expired, is a matter for the executive.[15]

15. The executive's power to order the plaintiff's release on parole, and the criteria applicable to the exercise of that power, can be broadened, constrained or abolished entirely by the legislature of a State.[16] A constraint can be imposed, for example, by qualifying the jurisdictional facts which have to apply in order to enliven the power to make an order directing the release of the plaintiff on parole.[17]

16. Thus in *Crump*, the jurisdictional facts were qualified by section 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW) such that the Parole Authority could not order Mr Crump's release on parole unless it was satisfied *inter alia* that Mr Crump was "in imminent danger of dying, or [was] incapacitated to the extent that he … no longer [had] the physical ability to do harm to any person, and … [had] demonstrated that he … does not pose a risk to the community, and … because of those circumstances, the making of a [parole order] is justified".[18]

17. The legislation impugned in *Knight* and *Minogue* qualified the jurisdictional facts which had to apply to enliven the power to release Mr Knight and Dr Minogue on parole in materially identical ways to the legislation in *Crump*.[19] They did not alter the jurisdictional fact that the prisoner had to have completed his minimum term before a parole order could be made. That remained in effect. However, the legislation qualified the jurisdictional facts which had to apply in a way which severely constrained the prisoner's access to parole.

18. Even if, in practical terms, those severe constraints had the effect of subjecting Mr Crump, Mr Knight and Dr Minogue to a life without meaningful prospect of parole, that did not invalidate the legislation imposing those constraints.[20]

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15 *Minogue* [21] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); see also *Crump* [41] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) quoting from the reasons of McHugh, Gummow, Hayne and Heydon JJ in *Baker v The Queen* (2004) 223 CLR 513 [29].

16 *Crump* [36] (French CJ). See also *Minogue* [15]-[17] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

17 *Crump* [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ). Compare plaintiff's submissions (**PS**) [41].

18 *Crump* [54] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), setting out the text of section 154A.

19 *Knight* [24] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Minogue* [19] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

20 See *Minogue* [30]-[33] (Gageler J).

19. Qualifying the jurisdictional facts which must apply to enliven the power to grant parole is not the only way in which a legislature may constrain access to parole.

20. The impugned provisions of the Act provide for declarations which restrict the ability of the prisoner the subject of the declaration to apply for parole. The plaintiff contends that this distinguishes his case from *Crump*, *Knight* and *Minogue*, on the basis that the impugned provisions of the Act deprive the plaintiff of the opportunity, granted by the Supreme Court's order setting his minimum term, to be considered for release on parole once that term expired, and thereby alter the punishment imposed on him by the Supreme Court.[21]

10 21. As the defendant points out, that argument was made and rejected by this Court in *Crump*.[22] And as the defendant again points out,[23] the plaintiff attempts to distinguish *Crump*, *Knight* and *Minogue* because the impugned provisions of the Act prevent the plaintiff from applying for parole unless strict criteria are met. This is a distinction without a difference.[24] It cannot be the case that legislation which has the effect of making the rejection of an application for parole inevitable is valid, but becomes invalid if it provides no opportunity for making that futile application.[25] As the defendant submits, no constitutional significance should attach to this distinction.

22. Further, legislation that alters the circumstances in which the executive might
20 extend a mercy[26] by granting parole to a prisoner serving a sentence of life imprisonment (as is the case with restricted prisoners)[27] does not extend or make heavier that sentence, because such an extension of mercy does not affect the sentence at all.[28]

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21 PS [5]-[7].
22 Defendant's submissions (**DS**) [19].
23 DS [40].
24 As was the argument in *Knight* that the legislation impugned in that case could be distinguished from the legislation impugned in *Crump* because it was *ad hominem* legislation: *Knight* [25] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
25 The Act operates in both ways, depending on when in relation to the expiry of a prisoner's minimum term, a declaration under the impugned provisions is made. Where a declaration is made under the impugned provisions prior to the prisoner making, or being eligible to make, an application for parole, and such declaration remains in force, no application for parole can be made: Act, sections 175I(1)(d), 175P(2)(c). Where no declaration is in force with respect to a prisoner, nothing prevents the prisoner, who is otherwise eligible, from making an application for parole, but that application must be refused: the Act sections 175F(2), 175I(1)(e), 175K(a), 175M(1)(a), 193A(2), 193AA(4)-(5).
26 *Baker v The Queen* (2004) 223 CLR 513, [29] (McHugh, Gummow, Hayne and Heydon JJ).
27 See the Act section 175D.
28 See *Minogue* [21] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), [32] (Gageler J).

23. That conclusion holds true in relation to finite sentences, such as those that may be served for a homicide offence by a no body-no parole prisoner[29] (although some of those may also be serving life sentences). In the case of, for example, a prisoner who is serving a sentence of ten years imprisonment, with a mandatory minimum period of imprisonment of 6 years, legislation that alters the circumstances in which the prisoner might be released upon the expiration of the 6 year term does not extend or make heavier the ten year sentence imposed.

24. Accordingly, the power of the Parole Board is not, as the plaintiff contends, a direct consequence of the judicial determination constituted by the mandatory minimum period of imprisonment.[30] The court order which fixes a minimum term of imprisonment does not create a power or a duty for the Parole Board to consider whether a prisoner should be released on parole.

25. The powers and duties of the Parole Board are, instead, created by and subject to sentence administration legislation, in this case the Act.

26. Sentence administration legislation, including the Act, operates by reference to judicial determinations. In other words, judicial determinations are factums by reference to which the parole system in existence at any one time will operate.[31]

27. At all times there remains but one judicial determination in respect of the plaintiff. The impugned provisions of the Act do not affect that determination or change its legal effect.

28. Thus, the Parliament of Queensland cannot be said to have altered the legal effect of the plaintiff's sentence[32] nor made the sentence more punitive.[33] Nor have the impugned provisions impeached, set aside, altered or varied the sentence under which the plaintiff suffers his deprivation of liberty.[34]

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29 See the Act section 175C.
30 PS [40].
31 *Minogue*, [16] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) citing *Crump*, [60].
32 *Crump* [35] (French CJ), [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), [70]-[71] (Heydon J); *Knight* [29] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Minogue* [19] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
33 *Knight* [29] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Minogue*, [13], [20]-[21] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), [32] (Gageler J), [40] (Edelman J).
34 *Crump* [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Conclusion

29. On the indistinguishable authority of *Crump*, *Knight* and *Minogue*, which the plaintiff does not seek to reopen (and for the reasons given by the plurality in *Minogue*[35] should not be reopened), and for the reasons submitted above and by the defendant, it is respectfully submitted that the plaintiff's case must fail.

PART V: LENGTH OF ORAL ARGUMENT

30. It is estimated that the oral argument for the Attorney General of Western Australia will take no more than 15 minutes.

10 Dated: 6 December 2024

CS Bydder SC
Solicitor-General for Western Australia
Email: c.bydder@sg.wa.gov.au
Ph: 08 9264 1806

D Van Nellestijn
Assistant State Counsel
Email: d.vannellestijn@sso.wa.gov.au
Ph: 08 9264 1813

[35] *Minogue* [24] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

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BRISBANE REGISTRY No. B11/2024

B E T W E E N:

RODNEY MICHAEL CHERRY
Appellant

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STATE OF QUEENSLAND
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ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the Attorney General for Western Australia sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

	Description	**Version**	**Provision**
	Statutory Provisions		
2.	*Corrective Services Act 2006* (Qld)	Current	ss. 175C, 175D, 175E, 175F, 175I, 175K, 175L, 175M, 175P, 193A, 193AA
3.	*Crimes (Administration of Sentences) Act 1999* (NSW)	20 July 2001 to 14 December 2001	s. 154A