HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **RODNEY MICHAEL CHERRY**
Plaintiff

AND: **STATE OF QUEENSLAND**
Defendant

PLAINTIFF'S OUTLINE OF ORAL SUBMISSIONS

Part I: Internet Publication

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

Part II: Outline of Oral Propositions

2. Section 305(2) of the *Code* requires a sentencing judge to determine, as a punitive element of the sentence,[1] the period of imprisonment that a prisoner must serve before they may be released. The effect of the order made under that section is that the prisoner is then entitled to apply and be considered for release, in non-exceptional circumstances,[2] at the end of that period in accordance with whatever framework for release then exists.[3]

3. The framework for release, by way of parole, that presently exists involves a multidisciplinary deliberative body,[4] the Parole Board, determining whether a prisoner may be granted parole[5] on application made after the prisoner completes the minimum period of imprisonment determined by the sentencing judge.[6] If the application is refused, the Board must specify a period, up to a specified limit, after which the prisoner may apply again, thus entitling the prisoner to ensure that the question of their release is regularly reviewed by the body with the function of determining that question.[7]

4. A 'no cooperation' declaration may be made at any time after a prisoner is sentenced.[8] It might, for example, be made twenty years before the prisoner would otherwise be eligible to be considered for release in consequence of the determination of the sentencing judge. If it is made, then the prisoner has no right to make any further application for parole[9] and no right to require the Board to consider lifting the declaration. The prisoner only has the

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[1] *Bugmy v The Queen* (1990) 169 CLR 525 at 531 per Mason CJ and McHugh J.
[2] CS Act ss. 176-176C.
[3] *Crump v State of New South Wales* (2012) 247 CLR 1 (*"Crump"*) at 19 [34] per French CJ.
[4] CS Act s. 221.
[5] CS Act s. 193.
[6] CS Act ss. 180, 181 and 490A.
[7] CS Act s. 193(6) and (7).
[8] CS Act s. 175K(b).
[9] CS Act s.180(2)(d).

hope that the President or Deputy President of the Board might exercise discretions to bring their matter back before the Board for the purpose of considering lifting the declaration.[10]

5. This may be contrasted with the legal position that pertained under a previous iteration of the CS Act in force on 27 September 2021.[11] Then, the question of whether a prisoner's cooperation in locating the remains of a victim was required to be considered as part of the consideration of an application for parole. Thus, it was considered by the Board when it decided a prisoner's application for parole after the end of the minimum period of imprisonment determined by the sentencing judge; not, for example, twenty years before. It would also be required to be considered by the Board again for subsequent applications that a prisoner could make in accordance with the framework for parole. Thus, the question of the prisoner's cooperation would be considered as part of the framework for parole. That question is one of degree and judgement about which reasonable minds may differ based on the circumstances existing at the time the question is considered.

6. There is a difference of substance if the question of the prisoner's cooperation is required to be considered at the prisoner's judicially determined parole eligibility date, and at regular intervals thereafter in accordance with the framework for parole, rather than as part of a decision which, in substance, takes the prisoner outside of that framework.

7. Similar observations apply in respect of 'restricted prisoner' declarations. Like no cooperation declarations, they may be made at any time during a prisoner's period of imprisonment.[12] They are made by the President of the Parole Board, not the Board itself[13] and can have effect for up to ten years.[14] Successive declarations may be made and there is no limit on how many may be made. The result is that the question of a prisoner's parole may never be considered by the Parole Board.

8. It is the above factors which the Plaintiff relies upon to contend that this case is distinguishable from the legislation considered in *Crump*, *Knight*[15], and *Minogue*[16]. In all of those cases, the legislation made the conditions for obtaining parole in accordance with the framework then existing more restrictive. That is unlike this case where executive decisions may be made taking prisoners outside of that framework.

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[10] CS Act ss. 175R-175U.
[11] Reprint of CS Act (current as at 27 September 2021), s 193A at JBA, Part B, Volume 2, Tab 7.
[12] CS Act ss. 175F(1) and 175G.
[13] CS Act s. 175H.
[14] CS Act s. 175I(3).
[15] *Knight v State of Victoria* (2017) 261 CLR 306.
[16] *Minogue v State of Victoria* (2019) 268 CLR 1.

9. In substance, the legislation permits the executive to make decisions which set aside a judicial decision that determined a prisoner's punishment consequent upon a judicial determination of criminal guilt.

10. The legislation, in substance, is punitive. There are features of the legislation that the Plaintiff will highlight in oral argument which demonstrate that is its purpose.

11. In particular, the statutory definitions of a prisoner amenable to a no cooperation declaration (a no body-no parole prisoner)[17] and the concept of "cooperation" by the prisoner relevant to making a no cooperation declaration capture objects of retribution for a prisoner's offending and associated conduct.

10 12. These observations also apply to two of the factors which the President must consider in determining whether to make a restricted prisoner declaration (ss. 175H(2)(a), which concerns the gravity of the prisoner's offending conduct, and (c), which concerns the interests of a prisoner's "victims"[18] in that prisoner remaining in prison, i.e. in maximising the prisoner's punishment). Whilst the other factor under s. 175H(2)(b) (a prisoner's risk) might superficially seem directed to protective factors, the absence of any requirement to consider whether that risk might adequately be managed on parole indicates[19] that the factor is not "appropriately tailored" to warrant its description as protective.

13. The Plaintiff has standing to challenge the restricted prisoner provisions.[20] Should the Plaintiff succeed in his challenge to the no body-no parole provisions, s. 193(2)(b) CS Act

20 obliges the President of the Board to decide whether to make a restricted prisoner declaration. Should the plaintiff fail in his challenge to the no body-no parole regime, he is one of a small class of people who fall within the definition of a restricted prisoner, and he would become subject to its provisions should the no body-no parole scheme cease to apply to him (such as if the victim's remains were located or ceased to exist). The unity of issues in the two proceedings means there is a public interest in determining the two challenges together.

Dated: 3 February 2025

30 Angus Scott KC
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[17] CS Act s. 175C and the definition of 'homicide offence' in Schedule 4.
[18] The term "victim" is defined by s. 175H(8) in terms of the definition in s. 5 of the *Victims of Crime Assistance Act* 2009.
[19] *Garlett v Western Australia* (2022) 277 CLR 1 at 94 [257]-[258], per Edelman J.
[20] *Cf* Submissions of the Attorney-General for Victoria Intervening, at [32]-[33].