HIGH COURT OF AUSTRALIA

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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 PLAINTIFF

PART I: CERTIFICATION

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

PART II: ISSUES

2. On 8 November 2002, the Plaintiff was convicted by the Supreme Court of Queensland of, and sentenced to life imprisonment for, two counts of murder.[1] Section 305(2) of the *Criminal Code* (Qld) mandated that the Plaintiff be sentenced to life imprisonment. It also required that the Court order that the Plaintiff not be released from prison until he had served a minimum of twenty years in prison, or such further period as specified by the Court (**the mandatory minimum period of imprisonment**), unless released sooner "under exceptional circumstances parole". In the exercise of the discretion granted by the section, the Supreme Court ordered that the Plaintiff's mandatory minimum period of imprisonment be twenty years (**the Supreme Court Order**).
3. Mandatory minimum periods do not constitute judicial determinations of when prisoners may be released on parole. Whether a prisoner is actually released after serving their mandatory minimum period of imprisonment is a matter to be decided by the relevant responsible executive authority, in accordance with the legislative and administrative context pertaining at that time.[2]

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[1] At Special Case Book (**SCB**) 22 at [2]-[4].
[2] ***Crump*** at 20 [37] (French CJ).

4. Nevertheless, it is also established that a mandatory minimum period of imprisonment is part of the sentence imposed by the sentencing court.[3] It constitutes a judicial assessment of the gravity of the offence committed,[4] which informs a determination of the minimum period of imprisonment that justice requires before the prisoner's punishment may be mitigated through the grant of conditional freedom.[5] It has been held by a plurality of this Court that the imposition of a mandatory minimum term of imprisonment is a "judgment, decree, order or sentence" in a "matter" within the meaning of s. 73 of the *Constitution* (Cth).[6]

5. In a trilogy of cases,[7] this Court considered the validity of State legislation which made the conditions required to be satisfied for a grant of parole after completion of mandatory minimum terms of imprisonment more onerous. The question in those cases was whether the legislation impermissibly granted judicial power to executive bodies by empowering those bodies to "impeach, set aside, alter or vary" judicially imposed sentences.[8] Central to the negative answer to that question in each case was the proposition that the legislation did not deprive the plaintiffs of any opportunity to be considered for release on parole: Those plaintiffs remained eligible to be granted parole, albeit in circumstances where the power of the relevant authorities to grant parole had been severely constrained.[9]

6. The legislation challenged by the Plaintiff in this case, however, is different. It empowers executive authorities to make declarations that render the prisoners to which they are subject ineligible to be granted parole when they would otherwise be eligible by reason of their having served their mandatory minimum period of imprisonment. While the declarations are in force, those prisoners 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. The text and context of the legislation that authorises the making of those

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[3] ***Minogue*** *v State of Victoria* (2019) 268 CLR 1 at 18 [21] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
[4] *Crump* at 17 [28] (French CJ). For Queensland Court of Appeal cases discussing the principles taken into account by a sentencing court setting the non-parole period under s 305(2) *Criminal Code*, see *R v Cowan; R v Cowan; Ex parte Attorney-General (Qld)* [2016] 1 Qd R 433; *R v Maygar; Ex parte Attorney-General (Qld); R.v WT; Ex parte Attorney-General (Qld)* [2007] QCA 310 at [17], [61] & [64] (per Keane JA).
[5] *Lowe v The Queen* (1984) 154 CLR 606 at 620 (Brennan J).
[6] *Crump* at 25-26 [56]-[58] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[7] *Crump*; ***Knight*** *v State of Victoria* (2017) 261 CLR 306; *Minogue*.
[8] *Crump* at 27 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) and *Knight* at 323 [25] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
[9] *Crump* at 20-21 [41] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Knight* at 323-324 [29] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Minogue* at 18 [21] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

declarations indicate that an object of the declarations is to serve the interests of justice by more severely punishing those prisoners by reason of the circumstances of their offending, their associated conduct, and other circumstances connected with the retributive purposes of the prisoner's sentence.

7. The issue in this case, therefore, is whether the legislation challenged in this case impermissibly grants judicial power to the Queensland Executive by empowering it to alter the punishment imposed by the Supreme Court of Queensland on the Plaintiff consequent upon its adjudgment of his criminal guilt. The Plaintiff submits that it does because it is repugnant to a "defining characteristic" of the Supreme Court of Queensland, implicit from the text, structure, and context of the *Constitution* (Cth). That defining characteristic is that punishments imposed by that Court consequent upon the adjudgment of criminal guilt are final and conclusive unless set aside on appeal. The Plaintiff submits that the repugnancy of the legislation to that defining characteristic renders the legislation invalid by reason of the principle first identified by this Court in *Kable v Director of Public Prosecutions (NSW)* (***Kable***).[10]

PART III: SECTION 78B NOTICE

8. The Plaintiff has given notice under s 78B of the *Judiciary Act 1903* (Cth).[11]

PART IV: FACTS

9. The offending for which the Plaintiff was convicted was two counts of murdering his wife and his stepdaughter.[12] His stepdaughter's body has never been located.[13] Dutney J sentenced the Plaintiff to life imprisonment on both counts and ordered that the Plaintiff not be released until he had served a minimum of 20 years' imprisonment.[14]
10. On 8 November 2022, the Plaintiff's mandatory minimum period of imprisonment expired. On 13 May 2022, the Parole Board received an application for parole by the Plaintiff.[15] On 12 July 2023, the Parole Board made a "no cooperation declaration" under s 175L of the *Corrective Services Act 2006* (Qld) (**the CS Act**) about the

[10] (1996) 189 CLR 51; see ***Forge*** *v ASIC* (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne, Crennan JJ).
[11] SCB 12.
[12] SCB 22 at [2]-[3].
[13] SCB 23 at [6].
[14] SCB 22 at [4].
[15] SCB 25 at [15].

Plaintiff.[16] In consequence of that declaration, the CS Act required the Parole Board to refuse the Plaintiff's application for parole and the Board did so on 7 May 2024.[17]

Part V: ARGUMENT

The legislation

At the time of the Supreme Court Order

11. At the time that the Supreme Court Order was made, conditional release of prisoners serving sentences of imprisonment was governed by the *Corrective Services 2000* (Qld) (**the 2000 Act**). That Act called such release "Post-Prison Community Based Release", which it provided for by Chapter 5. Section 133 provided for "exceptional circumstances parole order[s]", while s. 134 provided for post-prison based release "other than [by] an exceptional circumstances parole order". Section 135(1) provided that an "exceptional circumstances parole order" could start "at any time". Relevantly, however, s. 135(2)(a) provided that the other type of release could not start until the relevant prisoner had served their mandatory minimum period of imprisonment.
12. The 2000 Act contained no definition of an "exceptional circumstances parole order". However, the words "exceptional circumstances" implied that such circumstances would be required in order for that type of release to be granted. The other type of release was not subject to such a constraint.

The CS Act

13. The 2000 Act was repealed and replaced by the CS Act. That Act calls conditional release of prisoners serving sentences of imprisonment "Parole". It is provided for by Chapter 5 of that Act. It continues the distinction between "exceptional circumstances parole", which, by s. 177, "may start at any time", and other parole, which a prisoner cannot apply for until they have reached their "parole eligibility date".[18] A prisoner will not have reached their parole eligibility date if they have not finished serving their mandatory minimum period of imprisonment.[19]
14. Under the CS Act, parole is granted by the "Parole Board".[20] The Parole Board is a deliberative body, composed of a President, Deputy President, at least two "professional

[16] SCB 26 at [16].
[17] SCB 26 at [17]-[18].
[18] *Corrective Services Act 2006* ("CS Act"), s. 180.
[19] CS Act, s. 181(2)(a).
[20] CS Act, ss. 176 and 193.

members" with relevant university qualifications, at least one member nominated by the Commissioner of Police, at least one public service officer nominated by the Chief Executive with expertise or experience in probation and parole matters, and a number of members determined by the Minister who represent the community.[21] The President and Deputy President must be a former judge of a State Court, the High Court, or a court constituted under a Commonwealth Act, or have qualifications equivalent to such former judges.[22] Members of the Board are appointed by the Governor in Council, on the recommendation of the Minister in accordance with statutory criteria regarding the suitability of the members of the Board.[23]

The 2017 Amendments

15. The CS Act was amended by the *Corrective Services (No Body, No Parole) Amendment Act 2017*. That Act introduced s. 193A to the CS Act. The effect of that section was to mandate that the Parole Board refuse an application for parole by a prisoner serving a homicide offence in particular circumstances. Those circumstances were that the body or remains of the relevant victim had 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 had not been located, unless the Board was satisfied that the prisoner had satisfactorily cooperated in the investigation of the offence to identify the victim's location. In explaining the policy objectives and reasons for the amendment, the Explanatory Note to the bill that introduced the provision referred to the following quote from a report to the Government that recommended the amendment:

> "[A] punishment is lacking in retribution, and the community would be right to feel indignation, if a convicted killer could expect to be released without telling what he did with the body of the victim".[24]

The 2021 Amendments

16. The CS Act was further amended by the *Police Powers and Responsibilities Act 2021* (**the 2021 amendments**). The 2021 amendments introduced the scheme for the declarations that the Plaintiff challenges in this case. There are two categories of declarations introduced by that scheme.

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[21] CS Act, s. 221.
[22] CS Act, s. 222.
[23] CS Act, s. 223.
[24] SCB 431; see also Queensland Parole System Review Report at SCB 308-309.

No cooperation declarations

17. The first category of declaration is a "no cooperation declaration". The Parole Board is empowered by s. 175L of the CS Act to make no cooperation declarations in respect of "no body-no parole" prisoners. Such prisoners are defined by s. 175C as prisoners serving imprisonment for homicide offences (defined by s. 175B to include murder), in circumstances where either the body or the 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 have not been located.

18. Section 175L empowers the Parole Board to make a no cooperation declaration in respect of a "no body-no parole" prisoner if the Board is not satisfied that the prisoner has given satisfactory cooperation. The term "cooperation" is defined by s. 175B to mean the cooperation given by a prisoner "in the investigation…to identify the victim's location…before or after the prisoner was sentenced".

19. The Parole Board may decide to make a no cooperation declaration if a "no body-no parole" prisoner applies for parole or, otherwise, if the Board decides to consider whether such a prisoner has given satisfactory cooperation.

20. Following the 2021 amendments, s. 193A of the CS Act now requires that the Board "defer" consideration of an application for parole by a "no body-no parole" prisoner until after it has decided whether to make a no cooperation declaration. Once it has made such a declaration, the section mandates that the parole application be refused by the Board. Thus, once the no cooperation declaration was made against the Plaintiff, the Board refused his application for parole in accordance with that requirement. While the declaration remains in force, the Plaintiff is precluded from ever applying for or being granted any form of parole.[25]

21. A prisoner the subject of a no cooperation declaration may apply at any time for it to be reconsidered.[26] However, the Board is not required to reconsider the declaration unless the President or Deputy President grants the reconsideration application.[27] If it is refused by the President or Deputy President, the declaration remains in force. The President and the Deputy President also have a discretion to, at any time, call a meeting of the Board for it to reconsider the no cooperation declaration.[28] However, they are

[25] CS Act, ss. 176B and 180(2)(d).
[26] CS Act, s. 175R.
[27] CS Act, ss. 175S and 175U.
[28] CS Act, s. 175U.

under no obligation to do so, or to even consider doing so. Unless they exercise that discretion and a decision is made by the Board to end the declaration, it will remain in force. While the declaration remains in force, the relevant prisoner is unable to apply, or otherwise be considered for, a grant of parole.

Restricted prisoner declarations

22. A "restricted prisoner" is a prisoner who has been sentenced to life imprisonment for various offences, including, relevantly, "more than 1 conviction of murder", as is the case in respect of the Plaintiff.[29] At any time during a restricted prisoner's period of imprisonment, the Chief Executive may give the President of the Parole Board a report about the prisoner. Such a report must also be given once a restricted prisoner makes an application for parole.[30]

23. Once a report is given by the Chief Executive, the President of the Parole Board must decide whether to make a restricted prisoner declaration.[31] Thus, if the provisions of the CS Act that provide for no cooperation declarations are invalid and the Plaintiff's right to apply for parole is thereby re-enlivened, the Plaintiff's exercise of that right will inevitably require the President of the Parole Board to consider whether to make a restricted prisoner declaration about the Plaintiff.

24. The President of the Parole Board may make a restricted prisoner declaration if the President is satisfied that it is in the public interest to do so.[32] In considering the public interest, the President must have regard to the nature, seriousness, and circumstances of the prisoner's offence, any risk that 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 a victim of the offence or an "eligible person".[33] The Supreme Court of Queensland has interpreted the requirement that the President have regard to the prisoner's risk as not requiring consideration of the effect that any conditions of parole may have on that risk.[34]

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[29] CS Act, s. 175D.
[30] CS Act, s. 193AA(2).
[31] CS Act, s. 175G.
[32] CS Act, s. 175H(1).
[33] Defined by schedule 4 and s. 320 of the CS Act as the actual victim of the offence, immediate family members of any deceased victim, the victim's parent or legal guardian if they are under 18 years of age, and other persons that the prisoner relevantly poses a danger to.
[34] ***Neyens*** *v President, Parole Board Queensland* [2023] QSC 296 at [33] and [47]. As at the time of writing these submissions, that decision is the subject of an undecided appeal to the Queensland Court of Appeal.

25. A restricted prisoner declaration is required to state the day that it ends, which must not be later than 10 years after it takes effect.[35] The legislation contains no provisions by which a restricted prisoner may apply for, or for there to otherwise be consideration of, the removal of the restricted prisoner declaration.

26. Once a restricted prisoner declaration is made, the Parole Board may not grant the prisoner the subject of the declaration parole and the prisoner may not apply for parole, other than exceptional circumstances parole, while the declaration is in force.[36] The Board may only grant the prisoner exceptional circumstances parole if it is satisfied that the prisoner is in imminent danger of dying and is not physically capable of causing harm to any person or is incapacitated to the extent that they cannot physically harm a person, the prisoner has demonstrated that they do not pose an unacceptable risk to the public, and the making of the grant is justified in the circumstances.[37]

27. The purpose and effect of restricted prisoner declarations was explained by the Minister in his second reading speech for the Bill that introduced the 2021 amendments:

> "This bill introduces the strongest laws in the nation when it comes to keeping the worst of the worst behind bars. … This bill will mean that those who take the life of a child or who commit multiple murders and are serving a life sentence can be banned from even applying for parole for a period of up to 10 years. No other jurisdiction in Australia has those laws, but we will. Queensland will. Because the Palaszcuk labour government has always acted to protect the innocent and condemn the perpetrators of the worst crimes, we will have these laws".[38]

Submissions

State Legislation may not set aside judicial orders by State Courts

28. Commonwealth legislation that purports to set aside orders of a Court exercising federal judicial power constitutes an impermissible interference with federal judicial power.[39] Such an impermissible interference would be legislation that purports to alter a person's punishment imposed in consequence of the adjudgment of their guilt for a Commonwealth offence. Such a purported interference strikes at the very heart of

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[35] CS Act, s. 175I(3).
[36] CS Act, ss. 180(2)(c) and 193AA(4).
[37] CS Act, s. 176A.
[38] Speech of MT Ryan (Minister for Police and Corrective Services) introducing the Police Powers and Responsibilities and Other Legislation Amendment Bill, 15 September 2021, (transcript pages 2765-2767) (emphasis added).
[39] *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117 at 143 [53] (Gummow, Hayne and Bell JJ).

judicial power.[40] For example, it could not be open to the Commonwealth Parliament to pass a law with the effect that all prisoners sentenced to less than twenty years imprisonment are now taken to be subject to sentences of imprisonment for twenty years. However, what would be the effect of such a law passed by a State Parliament in respect of prisoners convicted of State offences?

29. The answer, it is submitted, lies in the implications drawn from the text, structure and context of the *Constitution* first recognised by this Court in *Kable*. It has been said that the principle to be derived from that case is that it is beyond the legislative power of a State so to alter the character of its Supreme Court that it ceases to meet the description of a "Supreme Court of a State" in Chapter III of the *Constitution*.[41] This principle is infringed by legislation that distorts the "defining characteristics" of such a Court.[42] An example of a "defining characteristic" of a "Supreme Court of a State" that has been held to be incapable of legislative removal is the capacity of such a Court to confine inferior Courts and tribunals within the limits of their authority.[43]

30. The Plaintiff submits that a further defining characteristic of a "Supreme Court of a State", that can be derived from the *Constitution*, is that punishments imposed by that Court consequent upon the adjudgment of criminal guilt are final and conclusive unless set aside on appeal.

31. Section 73 of the *Constitution* confers jurisdiction on this Court to hear and determine "appeals" from "judgments, decrees, orders and sentences" of the Supreme Court of a State, in which the determination of this Court shall be "final and conclusive". That jurisdiction is a jurisdiction to hear appeals from exercises of judicial power by State Supreme Courts.[44] Thus, a State Parliament may not, for example "expand or contract the scope of the appellate jurisdiction of the Court conferred by s. 73".[45]

32. It is submitted that a necessary implication of the scheme provided by s. 73 of the *Constitution* is that punishments imposed by a Supreme Court of a State consequent upon the adjudgment of criminal guilt are final and conclusive unless set aside on

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[40] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).
[41] *Forge* at 76 [63] (Gummow, Hayne and Crennan JJ).
[42] *Ibid* (Gummow, Hayne and Crennan JJ).
[43] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 1 at 566 [55] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[44] *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 299 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).
[45] *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 618 [20] (Gleeson CJ, Gummow and Hayne JJ).

appeal. If it were otherwise, the scheme of s. 73 would be open to circumvention by State legislation that either itself, or by executive power authorised by that legislation, set aside a "sentence" that would otherwise only be amenable to that consequence by the exercise of judicial power granted to this Court by s. 73. Further, such legislation would also circumvent the stipulation in s. 73 that the determination by this Court on such an appeal is "final and conclusive". For example, legislation that purported to set aside a sentence imposed by a State Supreme Court *after* an unsuccessful appeal of that sentence to this Court would be contrary to the requirement that this Court's determination of that appeal is "final and conclusive".

33. Support for the above view is found in the decision of the Queensland Court of Appeal decision of *Attorney-General v Lawrence*.[46] There, in reliance on the principle from *Kable*, the Court of Appeal held invalid a grant of power conferred upon the Executive to make a 'public interest declaration', which had the effect of depriving the conditional liberty that had been granted to a person by a supervision order made by the Supreme Court under the *Dangerous Prisoners (Sexual; Offenders) Act 2003* (Qld). The Court of Appeal described the effect of the statutory provisions granting that power as follows:[47]

> "After the resolution of any appeal or the expiry of the period for any appeal against an order granting supervised liberty to a person made by the Supreme Court …, the executive is empowered to make decisions on the basis of its view of the public interest, the merits of which are not reviewable in any court, whether or not to nullify the Supreme Court's order by imprisoning that person and whether or not subsequently to give effect to the order. The power to nullify orders of the Supreme Court, being exercisable upon the merits of each case on a case by case basis, is analogous with the power of an appellate court to set aside orders found to be made in error…".

34. The effect of the amendments, in their Honours' view, was to transform what had previously been the "final and binding" decision of the Supreme Court (otherwise vulnerable only on appeal to the Court of Appeal, and to the High Court[48]) into a decision which was "provisional only, the continuing force of any such order after the disposition of any appeal or the expiry of the relevant appeal period being contingent

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[46] *Attorney-General v Lawrence* (2013) 2 Qd R 504 (Holmes, Muir and Fraser JJA).
[47] *Ibid* at 528 [35].
[48] *Ibid* at 530 [41].

upon the executive government refraining from making a public interest declaration"[49]. It followed that:

> "[t]he exercise by the executive of [their power to make a public interest declaration in substitution of the supervisory order imposed by the court] would undermine the authority of orders of the Supreme Court…. The amendments do not merely treat the court order as the criterion by reference to which new rights and obligations are made by the executive, they are to be made on a case by case basis on the merits as perceived by the executive, and the substantial effect of such a declaration is equivalent to a reversal of the Court's order".[50]

The legislation impugned in this case purportedly sets aside an exercise of judicial power by the Supreme Court of Queensland

35. In the trilogy of cases described at the commencement of these submissions (i.e. *Crump*,[51] *Knight*[52] and *Minogue*[53]) this Court observed a clear distinction between the exercise of judicial power involved in sentencing an offender, and the exercise of executive power involved in determining whether to release a prisoner on parole. Those cases hold that fixing a minimum term says nothing about whether the prisoner will be released at the expiration of that term.[54] Simply "making it more difficult … to obtain a parole order after the expiration of the minimum term, … 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".[55] Thus, the legislation impugned in those cases did not set aside a sentence of a Court so as to give rise to any issue of constitutional validity.

36. However, in *Minogue*, Justice Edelman said:[56]

> "A more difficult issue is the validity of a written law that does not merely have the same practical effect as altering a punitive sentence but is itself enacted for the purposes of imposing additional punishment on a particular person, and thus amending their sentence for the past offence. For instance, if a person were sentenced to a maximum term of ten years imprisonment with a non-parole

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[49] *Ibid* at 529 [39].
[50] *Ibid* at 530 [41].
[51] (2012) 247 CLR 1 at 16 [28] (French CJ); *see also* 26 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); 28 [70] (Heydon J).
[52] (2017) 261 CLR 306 at 323 [27].
[53] (2019) 268 CLR 1 at 15 [14] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 21 [32] (Edelman J).
[54] *Knight* at 323 [27] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
[55] *Ibid* at 323-324 [29].
[56] *Minogue* at 23 [41] (Edelman J).

> period of four years, the issue of whether a written law was an invalid exercise of judicial power may arise if legislation were subsequently passed which purposed to extend the non-parole period of that person to eight years for the purpose of increasing the severity of the punishment of the offence."

37. It is respectfully submitted that the legislation impugned in this case is in the same category as the hypothetical example identified in the above passage from the judgment of Justice Edelman in *Minogue*. This is so for two reasons.

38. First, the legislation impugned in this case does not merely make the conditions for the grant of parole more difficult to satisfy whilst leaving untouched the opportunity for the prisoners affected by the legislation to be considered for a grant of parole once they have served their mandatory minimum period of imprisonment. The power that the Parole Board would otherwise have to consider such a grant is completely removed from it by the legislation upon the making of either a no cooperation or restricted prisoner declaration. Once such a declaration is made, no application for parole can even be made and, if it has already been made, it cannot be granted.

39. Whilst a prisoner subject to a no cooperation declaration can apply for it to be removed, that application may be refused by one member of the Parole Board, and there is otherwise no obligation on any person or body to consider again the question of whether there should be such a declaration. No provision is made by the impugned legislation for a restricted prisoner declaration to be removed and it can continue in force for up to ten years.

40. The power that the Parole Board would otherwise have to consider a grant of parole is a direct consequence of the judicial determination constituted by a mandatory minimum period of imprisonment. The effect of that determination is that the Board is deprived of the power to consider whether to grant parole to a prisoner, unfettered by any requirement that exceptional circumstances be shown, until the expiry of the mandatory minimum period of imprisonment. That effect is altered by no cooperation and restricted prisoner declarations, which deprive the Board of power to consider the grant of parole for a further period (as opposed to merely making the grant of parole, in the exercise of power available to the Board, more difficult).

41. Thus, whilst the mandatory minimum period of imprisonment can be said to have constituted a "factum by reference to which the parole system operated",[57] it did have a relevantly "operative" effect in this case.[58] That operative effect was that it determined a jurisdictional fact that had to be satisfied in order for the relevant authority responsible for grants of parole to have power to make such a grant in the Plaintiff's favour. The effect of no cooperation and restricted prisoner declarations is that they nullify the effect of such determinations, in that they withdraw that jurisdictional fact whilst those declarations are in force.

42. Secondly, the text and context of the legislation that authorises the making of no cooperation and restricted prisoner declarations indicate that an object of the 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.

43. The premise of the legislative definition of a "no body-no parole" prisoner and of "cooperation", which are essential to the making of a no cooperation declaration for such a prisoner is that the prisoner bears all, or some, culpability for the inability of the relevant authorities to locate the victim, their body or remains which aggravates the prisoner's offending and thereby warrants harsher punishment. This is confirmed by the reference in the extrinsic materials accompanying the 2017 Amendments to the statement that a "punishment is lacking in retribution…if a convicted killer could expect to be released without telling what he did with the body of the victim".[59] Thus, it can be seen that the purpose of no cooperation declarations is punitive because it is based on "classic criminal notions of just desert".[60]

44. Further, there will be cases where a victim's body or remains will never be able to be located. If the offender can demonstrate that this is because no remains of the victim still exist then they may not be amenable to a no cooperation declaration.[61] However, there will be cases where the prisoner is unable to demonstrate that. There will also be cases where the prisoner is unable, in a practical sense, to cooperate in locating the

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[57] *Crump* at 26 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[58] *cf Ibid.*
[59] SCB 431.
[60] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 (***NZYQ***) at 1017 [51].
[61] *Armitage v Parole Board Queensland* [2023] QCA 239 (Special Leave refused ([2024] HCASL 101).

victim or their remains because to do so could result in the prisoner being killed themselves, or they maintain their innocence after having been falsely convicted where there has been a miscarriage of justice. Thus, in such circumstances, the prisoner will be amenable to a no cooperation declaration which will result in them being permanently ineligible for parole for the rest of their life, despite having served their mandatory minimum period of imprisonment, when they cannot in any reasonably foreseeable circumstance offer any cooperation in locating the victim or their remains. To the extent that it might be thought that the purpose of no cooperation declarations is a non-punitive one, of locating a victim or their remains, that purpose cannot be achieved in fact in those cases and the declarations cannot reasonably be seen as necessary to effectuate that purpose. They are therefore punitive for that reason.[62]

45. Similarly, it is evident that an object of a restricted prisoner declaration is punishment. The ultimate jurisdictional fact that must be satisfied for the President of the Parole Board to make a restricted prisoner declaration is that it is in the public interest to do so. Two of the mandatory considerations that s. 175H of the CS Act requires the President to have regard to in considering the public interest are concerned with the circumstances of a prisoner's offending (i.e. "the nature, seriousness and circumstances of the prisoner's offence"[63]) and other circumstances connected with the retributive purposes of the prisoner's sentence (i.e. "the likely effect that the prisoner's release on parole may have"[64] on the prisoners victim or other eligible persons). Whilst the other mandatory consideration might be thought to be protective rather than punitive (i.e. the prisoner's risk), it is entirely open to the President to give primary weight to punitive rather than protective considerations in the exercise of his or her discretion regarding the public interest. Further, the importance of the prisoner's risk as a factor relative to punitive considerations is diminished by the Supreme Court of Queensland's interpretation of the requirement that the President have regard to the prisoner's risk as not requiring consideration of the affect that any conditions of parole may have on that risk.[65] If that interpretation is right, then it would be open to the President to ignore circumstances

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[62] *NZYQ* at 1015 [39]-41] and 1017 [52].
[63] CS Act, s. 175H(2)(a).
[64] CS Act, s. 175H(2)(c).
[65] *Neyens* at [33] and [47].

where any risk posed by a prisoner is ameliorated by any conditions that the Parole Board might impose on a grant of parole.[66]

46. The punitive object of restricted prisoner declarations 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".

47. It can therefore be seen that the objects of restricted prisoner declarations are punitive because they are directed at classic criminal notions of just desert, and they permit primary weight to be given to those notions in disregard of factors that might indicate that the declarations are unnecessary to achieve any protective objects.

48. It is therefore submitted that the impugned legislation does purport to empower the Executive to set aside punishments imposed by the Supreme Court of Queensland consequent on its adjudgment of criminal guilt. It thereby purports to impermissibly confer judicial power on the Executive because it is repugnant to a "defining characteristic" of the Supreme Court of Queensland. It is invalid for this reason.

49. In these circumstances, the Plaintiff submits that the answers to the questions stated for the opinion of the Full Court should be as follows:[67]

    a. Questions (a)-(c): "yes";

    b. Question (d): The Defendant.

PART VI: ORDERS SOUGHT

50. The Plaintiff therefore seeks:

    a. A declaration that ss 175L is invalid (in that it requires the Supreme Court to exercise powers repugnant to or incompatible with the institutional integrity of the Supreme Court, contrary to its function as a Court which exercises judicial power pursuant to Ch III *Constitution* (Cth)).

    b. A declaration that s 175E CSA is therefore invalid (in that it requires the Supreme Court to exercise powers repugnant to or incompatible with the institutional integrity of the Supreme Court, contrary to its function as a Court which exercises judicial power pursuant to Ch III *Constitution* (Cth)).

    c. Costs.

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[66] The Board's power to impose such conditions is granted by s. 200 of the CS Act.
[67] SCB 28.

PART VII: TIME ESTIMATE

51. The Plaintiff estimates that they will need 2 hours for oral argument.

Dated: 18 October 2024

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ANNEXURE A: LIST OF PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS

Legislation	**§§**	**Date relied upon**
Constitution (Cth)	73	Current
Corrective Services Act 2006 (Qld)	175B, 175C, 175D, 175E, 175G, 175H, 175I, 175L, 175R, 175S, 175U, 176, 176A, 176B, 177, 180, 181, 193, 193A, 193AA, 200, 221, 222, 223, 320	Current
Corrective Services Act 2000 (Qld)	133, 134, 135	8 November 2002
Criminal Code (Qld)	305(2)	8 November 2002