HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **RODNEY MICHAEL CHERRY**
Plaintiff

and

STATE OF QUEENSLAND
Defendant

DEFENDANT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES PRESENTED BY THE SPECIAL CASE

2. The special case presents the following question:

   (a) Do either s 175L or s 175E (or both) empower the parole board to alter the punishment which was imposed by the Supreme Court on the plaintiff when it sentenced him for the murder of his wife and stepdaughter to imprisonment for life with a non-parole period of 20 years?

3. The defendant submits that it follows from three unanimous decisions of this Court—***Crump*** *v New South Wales,*[1] ***Knight*** *v Victoria*[2] and ***Minogue*** *v Victoria*[3]—that the answer to that question is 'no'. If that submission is accepted, no further questions arise. If question (a) is answered 'yes', the following further questions arise:

   (b) Is it a defining characteristic of the Supreme Court, protected by the *Kable* principle, that punishments imposed by it consequent upon the adjudgment of criminal guilt are final and conclusive unless set aside on appeal?

   (c) If so, is either s 175L or s 175E (or both) incompatible with that defining characteristic?

   (d) If s 175L is invalid, does s 193A of the CS Act, as in force before the commencement of the *Police Powers and Responsibilities and Other Legislation Amendment Act 2021*, apply to the plaintiff?

PART III: SECTION 78B NOTICE

4. The plaintiff has given notice under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: FACTS

5. The facts articulated by the plaintiff at PS [9]-[10] are not disputed.

PART V: SUBMISSIONS

SUMMARY OF ARGUMENT

6. The plaintiff's case is that ss 175L and 175E of the *Corrective Services Act 2006* (**CS Act**) infringe the *Kable* principle[4] by empowering the executive to 'set aside' the

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1 (2012) 247 CLR 1 ('*Crump*').

2 (2017) 261 CLR 306 ('*Knight*').

3 (2019) 268 CLR 1 ('*Minogue*').

4 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 ('*Kable*').

punishment imposed on him by the Supreme Court. He argues that ss 175L and 175E do this because 'no cooperation' and 'restricted prisoner' declarations deprive the parole board of power to consider granting parole[5] and have a punitive purpose.[6] The plaintiff's case must fail: it is irreconcilable with the well-settled 'fundamental distinction between the judicial function of sentencing an offender and the executive function of determining whether an offender should be released on parole'.[7]

7. In respect of the plaintiff's criminal matter, the judicial function was exhausted when, on 8 November 2002, Dutney J ordered that the plaintiff be sentenced to imprisonment for life ('the life sentence') and that he not be released before serving 20 years' imprisonment, unless released sooner under exceptional circumstances parole ('the non-parole period'). Nothing in the impugned legislation alters either of those aspects of the sentence. The non-parole period having now expired, the release of the plaintiff on parole is a matter for the executive, subject to the applicable statutory scheme and administrative policies. As in *Crump*, *Knight* and *Minogue*, the non-parole period set by Dutney J remains a 'factum by reference to which the parole system'[8] now operates. The plaintiff does not seek to re-open those authorities; they require that his claim for relief be refused.

STATEMENT OF ARGUMENT

8. The plaintiff's argument that the legislation infringes the *Kable* principle involves two contentions:

   (a) first, it is a defining characteristic of the Supreme Court, derived from its constitutional status as a Chapter III court, that punishments imposed by it consequent upon the adjudgment of criminal guilt are final and conclusive unless set aside on appeal (**major premise**);[9] and

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5 Plaintiff's Submissions ('PS'**)** [38].

6 PS [42].

7 *R v Hatahet* (2024) 98 ALJR 863, 869 [19] (Gordon A-CJ, Steward and Gleeson JJ) ('*Hatahet*'); *Minogue* (2019) 268 CLR 1, 15 [14] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Crump* (2012) 247 CLR 1, 16 [28] (French CJ).

8 *Crump* (2012) 247 CLR 1, 26 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Minogue* (2019) 268 CLR 1, 16-7 [16] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Hatahet* (2024) 98 ALJR 863, 869 [20] (Gordon A-CJ, Steward and Gleeson JJ).

9 PS [30].

(b) second, the impugned legislation empowers the executive to alter the punishment imposed by the Supreme Court on the plaintiff and is therefore repugnant to the defining characteristic just identified (**minor premise**).[10]

9. The plaintiff's major premise is framed in sweeping terms which cannot be accepted.[11] So framed, it is at least inconsistent with the 'ancient right of the Crown to pardon, partially or fully, those who have been convicted of a public offence'.[12] While at common law a full pardon was not equivalent to an acquittal, it plainly set aside the *punishment* imposed by the court. The effect of a full pardon was to remove 'all pains penalties and punishments whatsoever' which ensued from the conviction.[13] Moreover, at federation, and for some subsequent decades, the *only* mechanism for review of a sentence was the prerogative of mercy.[14]

10. The resolution of this case does not require (and therefore should not involve[15]) the identification of any limits on the extent to which legislative or executive power may intersect with a criminal sentence.[16] That is because authority dictates that the plaintiff's minor premise fails. Neither a 'no cooperation declaration' nor a 'restricted

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10 PS [48].

11 See, for example, *Crump* (2012) 247 CLR 1, 529 [33] (noting that the effect of an order under s 13A of the *Sentencing Act 1989* (NSW) was to 'alter or vary the order of the sentencing judge').

12 *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298, 318 [92] (Gordon and Steward JJ), citing Milne, 'The Second or Subsequent Criminal Appeal, the Prerogative of Mercy and the Judicial Inquiry: The Continuing Advance of Post-Conviction Review' (2015) 36 *Adelaide Law Review* 211 at 216-217, citing Smith, 'The Prerogative of Mercy, the Power of Pardon and Criminal Justice' [1983] *Public Law* 398.

13 *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298, 318 [92] (Gordon and Steward JJ). See also *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364, 366-9 (Mason J) (considering the effect of a remission granted in exercise of the prerogative of mercy). Legislation may make the effect of a pardon equivalent to an acquittal: see, eg, *Crimes Act 1914* (Cth), s 85ZR.

14 See *Lacey v Attorney-General* (2011) 242 CLR 573, 578 [8] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Criminal Appeal Act 1912* (NSW); *Criminal Code Amendment Act 1913* (Qld); *Criminal Appeals Act 1924* (SA); *Criminal Code Act 1924* (Tas); *Criminal Appeal Act 1914* (Vic); *Criminal Code Amendment Act 1911* (WA) (each of which introduced appeals against sentence).

15 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 199 [141] (Hayne, Kiefel and Bell JJ); *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219, 249 [60] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Zhang v Commissioner of Australian Federal Police* (2021) 273 CLR 216, 229-30 [20] (the Court).

16 It is therefore unnecessary to consider *Attorney-General v Lawrence* [2014] 2 Qd R 504. *Lawrence* does not support the plaintiff's specific contention that *punishments* imposed by a court are final and conclusive unless set aside on appeal (PS [32]-[34]). The legislation considered in *Lawrence* empowered the executive to make a 'public interest declaration', the effect of which was to detain 'in an institution' a person whom the Supreme Court had released (on a supervision order) from preventative detention (under a continuing detention order). The circumstances in *Lawrence* are so different that the case does not assist with identifying any relevant limit on the extent to which legislative and executive power can intersect with a court order.

prisoner declaration' intersects 'at all' with the exercise of judicial power by Dutney J.[17]

11. At various points in his submissions,[18] the plaintiff appears to seek support for his minor premise from the contention that ss 175L and 175E purport to confer judicial power on the executive. That submission cannot be accepted because determining whether a prisoner should be released on parole is a uniquely executive function. But in any event, nothing turns on characterising s 175L and s 175E as conferring judicial power. There is nothing impermissible about the exercise of judicial power by the executive government of a State,[19] and 'whether or not a power is judicial or non-judicial in character is not determinative as to whether the *Kable* principle has been infringed'.[20]

The 'no cooperation declaration' did not alter the punishment imposed

The legislative scheme

12. The plaintiff is a 'no body-no parole' prisoner because he is serving a period of imprisonment for the murder of his stepdaughter, Kira Guise, and her body has never been found.[21]

13. The parole board received an application for parole from the plaintiff on 13 May 2022.[22] As was permitted by s 180(2)(e) of the CS Act, the application was made 180 days before his 'parole eligibility date',[23] being the day after the day on which he had served 20 years' imprisonment.[24]

14. Section 193(1A) of the CS Act required the plaintiff's application to be decided under s 193A. Section 193A required the parole board to defer consideration of the plaintiff's parole application until the board had considered whether to make a 'no cooperation declaration' about the plaintiff in accordance with the provisions of chapter 5, part 1AB, division 2. Within that division, s 175L provides:

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17 See *Knight* (2017) 261 CLR 306, 323-4 [29] (the Court).

18 PS [7], [48].

19 Leaving aside the matters described in ss 75 and 76 of the *Constitution*.

20 *Garlett v Western Australia* (2022) 227 CLR 1, 23 [40] (Kiefel CJ, Keane and Steward JJ).

21 See CS Act, s 175C; Special Case, [12].

22 Special Case, [15].

23 Section 180(2)(e).

24 Section 181.

> **175L Parole board may make no cooperation declaration**
>
> If the parole board is not satisfied a no body-no parole prisoner has given satisfactory cooperation, the parole board must make a declaration under this division (a ***no cooperation declaration***) about the prisoner.

15. The board made a no cooperation declaration about the plaintiff on 12 July 2023[25] and subsequently refused his application for parole.[26] The effect of the no cooperation declaration is that the plaintiff cannot apply for parole while the declaration is in force.[27]

16. However, the plaintiff may apply at any time to the president or a deputy president of the parole board for reconsideration of the decision to make the declaration: s 175R. Under s 175S(3), the application for reconsideration may only be granted if the president or deputy president is satisfied of certain matters, including where there has been a material change to the prisoner's capacity to cooperate, or that for any other reason it would be appropriate in the interests of justice for the board to consider the prisoner's cooperation.

17. If an application for reconsideration is granted the board must meet to consider whether the prisoner has given satisfactory cooperation: s 175U(1). Even without an application for reconsideration from the plaintiff, under s 175T the president or deputy president has power to call a meeting of the parole board to reconsider the making of a no cooperation declaration. If the board is satisfied that the prisoner has given satisfactory cooperation, the no cooperation declaration will be ended: s 175U(2).

Crump, *Knight* and *Minogue* demonstrate that the plaintiff's minor premise is wrong

18. The making of the no cooperation declaration about the plaintiff did not interfere, or intersect in any way, with the exercise of judicial power by Dutney J. So much follows from the decisions of this Court in *Crump*, *Knight* and *Minogue*.

19. In *Crump*, the plaintiff had been sentenced in 1974 to life imprisonment with no minimum term. Pursuant to a legislative reform made in 1993,[28] the Supreme Court resentenced him in 1997 to life imprisonment with a minimum term of 30 years. In 2001, the legislature inserted s 154A into the *Crimes (Administration of Sentences) Act 1999*. Section 154A permitted the Parole Authority to grant parole to certain

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25 Special Case, [16].

26 Special Case, [18].

27 See s 180(2)(d). Where a no cooperation declaration is in force for a prisoner, the prisoner also may not apply for exceptional circumstances parole: s 176B.

28 *Crump* (2012) 247 CLR 1, 11 [11] (French CJ).

prisoners[29] (including Mr Crump) 'if, and only if' the Authority was satisfied of the following matters: that the prisoner was 'in imminent danger of dying, or [was] incapacitated to the extent that he or she no longer [had] the physical ability to do harm to any person', the prisoner had demonstrated that he or she did not pose a risk to the community, and that, because of those circumstances, the making of the order was justified. Crump argued that the 1997 resentencing decision gave him a 'right or entitlement, upon expiration of his minimum term, to have the Parole Authority *consider* whether he should be released on parole'.[30] That argument was rejected, because '[a]s a matter neither of form nor substance did the sentencing determination…create any right or entitlement in the plaintiff to his release on parole'.[31]

20. *Knight* concerned Victorian legislation directed to the circumstances in which the Adult Parole Board could release Julian Knight on parole. Mr Knight had been sentenced to imprisonment for life with a minimum term of 27 years.[32] Shortly before the expiry of the minimum term, the Victorian Parliament enacted s 74AA of the *Corrections Act 1986* (Vic). This section provided that the Adult Parole Board 'must not make a parole order in respect of the prisoner Julian Knight' unless, after considering an application from him, the Adult Parole Board was satisfied that he was in 'imminent danger of dying, or is seriously incapacitated', that he had demonstrated that he did not pose a risk to the community, and that, because of those circumstances, the making of the order was justified.[33]

21. Mr Knight challenged the validity of s 74AA on the basis that it interfered with the sentence imposed on him and therefore substantially impaired the institutional integrity of the Supreme Court.[34] This Court rejected that contention. The unanimous reasons explained that the minimum term 'did no more than to set a period during which Mr Knight was not to be released on parole'.[35] Whether he *would* be released at the end of the minimum term was 'simply outside the scope of the exercise of judicial

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29 The class of prisoner to whom the amendment applied was small, and their identity was readily ascertainable: *Crump* (2012) 247 CLR 1, 15 [22] (French CJ).

30 *Crump* (2012) 247 CLR 1, 3 (submissions of Walker QC) (emphasis added). See also 25 [56].

31 *Crump* (2012) 247 CLR 1, 26 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

32 *Knight* (2017) 261 CLR 306, 316 [1] (the Court).

33 *Knight* (2017) 261 CLR 306, 316-7 [2]-[3], 320-1 [18] (the Court).

34 *Knight* (2017) 261 CLR 306, 308 (submissions of Walker QC) and 322 [23] (the Court).

35 *Knight* (2017) 261 CLR 306, 323 [27] (the Court).

power constituted by the imposition of the sentences.'[36] The legislation therefore did not 'contradict' the minimum term. Nor did making it 'more difficult' for Mr Knight to obtain parole make the sentences of life imprisonment 'more punitive or burdensome to liberty'.[37] Accordingly, the legislation did not intersect 'at all' with the exercise of judicial power comprised by the sentence.[38]

22. Following *Knight*, the Victorian Parliament passed legislation—s 74AB of the *Corrections Act*—in the same terms save that s 74AB applied to Craig Minogue. Dr Minogue had been sentenced to imprisonment for life with a minimum term of 28 years.[39] Section 74AB was enacted shortly after the expiry of his non-parole period.[40]

23. Seeking to distinguish *Knight*, Dr Minogue framed his challenge to s 74AB differently.[41] He contended that s 74AB was an impermissible exercise of judicial power by the State Parliament, separate from the exercise of judicial power by the Supreme Court when it sentenced him.[42] He submitted that this was so for two reasons. First, the 'substantive operation and practical effect' of s 74AB was to extend his non-parole period and thus to 'impose an additional or separate punishment' on him. Second, s 74AB increased the severity of his punishment by causing him to lose an opportunity to be released on parole.[43]

24. Those contentions failed because s 74AB '[did] not do these things'.[44] Chief Justice Kiefel, Bell, Keane, Nettle and Gordon JJ explained:[45]

> In the case of the plaintiff, at all times, there remained only one sentence – imprisonment for life. The fixing of the non-parole period of 28 years 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

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36 *Knight* (2017) 261 CLR 306, 323 [28] (the Court).

37 *Knight* (2017) 261 CLR 306, 323-4 [29] (the Court).

38 *Knight* (2017) 261 CLR 306, 323-4 [29] (the Court).

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

40 *Minogue* (2019) 268 CLR 1, 12-3 [2]-[3] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

41 *Minogue* (2019) 268 CLR 1, 3-4 (submissions of Horan QC).

42 *Minogue* (2019) 268 CLR 1, 15 [13], 17-8 [20] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

43 *Minogue* (2019) 268 CLR 1, 15 [13] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

44 *Minogue* (2019) 268 CLR 1, 15 [13] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

45 *Minogue* (2019) 268 CLR 1, 16-7 [16] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) (footnotes omitted) (emphasis added). This passage was cited with approval in *Hatahet* (2024) 98 ALJR 863, 869 [20] (Gordon A-CJ, Steward and Gleeson JJ).

with hope of an earlier conditional release **but always subject to and in accordance with legislation in existence at the time governing 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.

25. All that had occurred in Dr Minogue's case was that the statutory scheme applicable to the exercise of the executive function of determining whether to release him on parole (after expiry of the non-parole period) had changed.[46] As in *Knight*, the fact that *ad hominem* legislation made it 'more difficult' for Dr Minogue to obtain a parole order after the expiration of the minimum term did 'nothing to contradict the minimum term that was fixed'.[47] Nor did it make the sentence of life imprisonment 'more punitive or burdensome to liberty'.[48]

26. As Gageler J explained, the result in *Minogue*, like the results in *Crump* and *Knight*, turned on the distinction between the judicial power to sentence and the executive power to release a prisoner on parole.[49] For that reason, the fact that the legislation removed a meaningful prospect of release on parole did not affect its constitutional validity.[50]

27. In this case, the distinction between the judicial power to sentence and the executive power to release on parole compels the same result. The no cooperation declaration does no more than place 'strict limiting conditions upon the exercise of the executive power to release' the plaintiff.[51] The effect of the no cooperation declaration is that before the plaintiff may apply for parole, the board must be satisfied that the plaintiff has given satisfactory cooperation.[52] Requiring the plaintiff to clear that hurdle before he may apply for parole does not contradict the non-parole period imposed by

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46 *Minogue* (2019) 268 CLR 1, 17 [17]-[18] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). See also 21 [32] (Gageler J).

47 *Minogue* (2019) 268 CLR 1, 17 [19] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). See also 21 [32] (Gageler J).

48 *Knight* (2017) 261 CLR 306, 323-4 [29] (the Court), citing *Baker v The Queen* (2004) 223 CLR 513, 323-4 [29] (the Court); *Minogue* (2019) 268 CLR 1, 322 [21] (the Court).

49 *Minogue* (2019) 268 CLR 1, 21 [32] (Gageler J). The plaintiff had applied to reopen *Crump* and *Knight*. That application was refused by six members of the Court: see 19 [24] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 21 [34] (Gageler J).

50 *Minogue* (2019) 268 CLR 1, 20-21 [30]-[32] (Gageler J).

51 See *Minogue* (2019) 268 CLR 1, 17 [19] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Crump* (2012) 247 CLR 1, 19 [35]-[36] (French CJ), 26-7 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), 29 [72], [74] (Heydon J); *Knight* (2017) 261 CLR 306, 323-4 [28]-[29] (the Court).

52 It is not constitutionally significant that a reconsideration application is decided 'by one member' of the parole board, rather than the board itself: cf PS [39].

Dutney J, because the non-parole period 'said nothing' about whether the plaintiff would ever be released on parole. It makes no difference to the analysis that, if the plaintiff does not clear this hurdle, he may not apply for parole. It remains the case, as in *Minogue*, that '[t]he plaintiff's non-parole period has expired and, thus…he remains eligible for parole even though the circumstances in which parole may be granted by the Board have been severely constrained'.[53] Nor does the existence of the no cooperation declaration increase the severity of the plaintiff's life sentence, 'for it is always necessary to recognise that an offender may be required to serve the whole of the head sentence that is imposed'.[54]

28. Accordingly, the no cooperation declaration does not 'set aside' or otherwise affect the punishment imposed on the plaintiff by the Supreme Court.

The plaintiff's attempt to distinguish *Crump*, *Knight* and *Minogue* fails

29. The plaintiff says he accepts the principles stated in *Crump*, *Knight* and *Minogue*. He does not seek to reopen those authorities.[55] Instead, he purports to distinguish them by reference to one passage in the separate reasons of Edelman J in *Minogue*.

30. Responding to the argument that s 74AB was a separate exercise of judicial power,[56] Edelman J appeared to accept that a statute 'that amends the conditions required for a grant of parole' might have the 'practical effect of altering a person's minimum period of non-parole'.[57] So much would not suffice, however, to characterise a law as an exercise of judicial power.[58] His Honour considered that a 'more difficult issue' would be presented by a 'written law that does not merely have the same practical effect of 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'.[59] His Honour continued (in the passage upon which the plaintiff seizes):[60]

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53 *Minogue* (2019) 268 CLR 1, 17 [18] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

54 *PNJ v The Queen* (2009) 83 ALJR 384, 387 [11], cited in *Crump* (2012) 247 CLR 1, 19-20 [36] (French CJ). See also *Baker* (2004) 223 CLR 513, 528 [29], cited in *Crump* (2012) 247 CLR 1, 20-1 [41] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

55 PS [35].

56 See [23] above.

57 *Minogue* (2019) 268 CLR 1, 22-3 [40] (Edelman J).

58 *Minogue* (2019) 268 CLR 1, 22-3 [40] (Edelman J).

59 *Minogue* (2019) 268 CLR 1, 23 [41] (Edelman J).

60 *Minogue* (2019) 268 CLR 1, 23 [41] (Edelman J).

> For instance, if a person were sentenced to a maximum term of ten years imprisonment with a non-parole 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 purported to extend the non-parole period of that person to eight years for the purpose of increasing the severity of the punishment for the offence.

31. The plaintiff's reliance on this passage is misplaced for several reasons.

32. *First*, the premise of Edelman J's analysis—that a law amending the conditions required for the grant of parole might have the 'practical effect' of altering a non-parole period—is inconsistent with the reasons of the other members of the Court in *Minogue*, and with *Crump* and *Knight* (and *Baker v The Queen*).[61]

33. *Second*, Edelman J was concerned with a hypothetical *ad hominem* law, enacted 'for the purposes of imposing additional punishment on a *particular* person'.[62] It is impossible to characterise s 175L that way.

34. *Third*, Edelman J did not conclude that the hypothetical law in the example he gave would be invalid, only that it would raise for consideration the three 'large questions' described by French CJ in *Crump*.[63] Those questions concerned whether a 'written law' which altered a judicial decision would be an exercise of judicial power and whether the exercise of judicial power by a State legislature is permissible.[64] The plaintiff, however, makes no attempt to address those questions, presumably because those questions have no relevance to his case. The plaintiff does not contend that s 175L is *itself* an exercise of judicial power. The plaintiff's contention is instead that s 175L 'empowers the Executive' to exercise judicial power.[65] But whether 'a repository of State statutory power' may exercise judicial power is *not* a large

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61 *Minogue* (2019) 268 CLR 1, 18 [22] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 20-1 [30]-[32] (Gageler J); *Knight* (2017) 261 CLR 306, 323-4 [29] (the Court); *Crump* (2012) 247 CLR 1, 20-1 [41], 26-7 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), 29-30 [74] (Heydon J); *Baker v The Queen* (2004) 223 CLR 513, 528 [29] (McHugh, Gummow, Hayne and Heydon JJ).

62 *Minogue* (2019) 268 CLR 1, 23 [41] (Edelman J) (emphasis added). See also 24 [44].

63 *Crump* (2012) 247 CLR 1, 18 [33] (French CJ). Justice Edelman considered it 'unnecessary to consider whether, or when, an exercise of judicial power by the legislature will be invalid': 22 [39].

64 *Crump* (2012) 247 CLR 1, 18 [33] (French CJ).

65 PS [48]. See also PS [40], [41], [42].

question.[66] Leaving aside the matters described in s 75 and s 76 of the *Constitution*, it is plain that the exercise of judicial power by a State executive is permissible.[67]

35. The foregoing matters are fatal to the plaintiff's reliance on the reasons of Edelman J in *Minogue*. Yet even if those matters are left aside, the plaintiff's attempt to draw an analogy between s 175L and the hypothetical law posited by Edelman J still fails.

36. The plaintiff contends an analogy can be drawn because:[68]

    (a) s 175L empowers the executive to nullify the operative effect of the non-parole period fixed by the court;[69] and

    (b) no cooperation declarations have the object—or perhaps an object[70] — of more severely punishing certain 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.'[71]

37. Neither of those contentions can be accepted.

38. As to the first, a declaration made under s 175L does nothing to affect, let alone 'nullify', the non-parole period set by Dutney J.[72] A no cooperation declaration does not 'completely remove' the power of the parole board to consider whether to grant the plaintiff parole.[73] Its effect is simply that before the plaintiff may apply for parole, the no cooperation declaration must end (the prospect of which is within the plaintiff's influence).[74]

39. Yet even if a no cooperation declaration *did* completely remove the parole board's power to grant parole to the plaintiff, it still would not nullify the 'operative effect' of the plaintiff's non-parole period. The operative effect of that order was that the plaintiff could not be released on parole (other than exceptional circumstances parole) until he

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66 *Mineralogy* (2021) 274 CLR 219, 255 [87] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

67 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 544 [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). It is a fundamental premise of *Burns v Corbett* (2018) 265 CLR 304 and *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216 that the executive arm of a State may exercise judicial power.

68 PS [37].

69 PS [41].

70 The plaintiff's submissions slip between the two: compare, eg, [42] and [45] ('an object') with [43], [44], [46] and [47] ('the object').

71 PS [42].

72 See above at [27].

73 PS [38].

74 See further below at [49].

had been imprisoned for 20 years.[75] The order said nothing about what was to occur after the 20 year period expired. That is why, as French CJ explained in *Crump*:[76]

> The power of the executive government of a State to order a prisoner's release on licence or parole or in the exercise of the prerogative of mercy **may be broadened or constrained or even abolished** by the legislature of the State.

40. The plaintiff's submissions attempt to draw a distinction between a law which permits a prisoner to make an application for parole which must be refused unless strict criteria are met (as in *Crump*, *Knight* and *Minogue*) and a law which prevents a prisoner from making an application for parole unless strict criteria are met (as here). That is a distinction concerned entirely with form, to which no constitutional significance should be attached. If the expiry of a non-parole period does not give a prisoner a right to be released on parole, it can hardly give a prisoner a right to *apply* to be released on parole.[77]

41. The plaintiff's second contention—which appears to be that the statutory scheme is such that no cooperation declarations necessarily have an impermissible purpose of more severely punishing certain prisoners—must also be rejected.

42. No body, no parole legislation in Queensland was first recommended in the Final Report of the Queensland Parole System Review (2016) (**Sofronoff Report**).[78] The Report reviewed the operation of no body, no parole schemes in South Australia and the Northern Territory, and observed:[79]

> The 'no body, no parole' legislation is designed to help victims' families and to provide a strong incentive for offenders to cooperate with authorities. …
>
> Withholding the location of a body extends the suffering of victim's families and all efforts should be made to attempt to minimise this sorrow.
>
> As a matter of theory, such a measure is consistent with the retributive element of punishment. 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. The killer's satisfaction at being released on parole

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75 SCB p 31.

76 *Crump* (2012) 247 CLR 1, 19 [36] (French CJ) (emphasis added).

77 So much seems to have been accepted by the Court in *Crump*, given the argument put and the reasoning adopted: see above at [19].

78 Walter Sofronoff QC, *Queensland Parole System Review* (Final Report, November 2016) ('Sofronoff Report).

79 Sofronoff Report, SCB p 308-9.

is grotesquely inconsistent with the killer's knowing perpetuation of the grief and desolation of the victim's loved ones.

43. The Sofronoff Report led to the enactment of the *Corrective Services (No Body, No Parole) Amendment Act 2017* (Qld) (the **2017 Act**), which relevantly inserted s 193A into the CS Act.[80] Section 193A required the parole board to refuse an application for parole from a prisoner serving a life sentence for a homicide offence, if the body or remains of the victim had not been found, unless the board was satisfied that the prisoner had cooperated satisfactorily. Section 193A as then in force did not prevent such a prisoner from applying for parole and hence did not share the feature of the present scheme which the plaintiff submits leads to its invalidity. Consistently with the Sofronoff Report, the relevant explanatory note indicated that the purpose of the 2017 Act was to provide an incentive for certain prisoners to assist efforts to find and recover the body or remains of the victim.[81]

44. The present scheme was introduced into the CS Act in 2021 by part 3 of the *Police Powers and Responsibilities and Other Legislation Amendment Act 2021* (Qld) (the **2021 Act**). The relevant explanatory note explained the 'primary focus' of the no body, no parole 'principle'[82] was to encourage cooperation from certain prisoners 'by denying them parole release until such time as the Board is satisfied the prisoner has satisfactorily cooperated in identifying the location or last known location of the victim's remains.'[83]

45. The 2021 Act sought to achieve that purpose more effectively in two ways. First, it prevented affected prisoners from making multiple applications for parole without first satisfying the board that they had cooperated satisfactorily. This was a process change which also prevented victims' families, who are entitled to be notified of an offender's applications for parole,[84] from suffering unnecessary trauma.[85] Second, by permitting the board to consider a prisoner's cooperation, and to make a no cooperation declaration, *before* the expiry of an offender's non-parole period, the 2021 Act

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80 Special Case [8]-[10].

81 SCB at 431 (Explanatory Notes to the *Corrective Services (No Body, No parole) Amendment Bill 2017*).

82 Being the principle that 'a prisoner convicted of a homicide offence who refuses to adequately assist police in locating a victims' remains should not be released on parole': SCB at 443.

83 SCB 444.

84 See CS Act, part 13, division 1.

85 Statement of Compatibility, Police Powers and Responsibilities and Other Legislation Amendment Bill 2021, p 33-4.

provided a means of 'incentivising prisoners to provide *earlier* cooperation'.[86] In this way, the 2021 Act sought to address the problem that the relevant cohort of prisoners are generally required to serve long non-parole periods. If consideration of the prisoner's cooperation is left until the non-parole period expires and the prisoner makes an application for parole, the opportunity to recover the victim's remains might be lost (due, for example, to bushfires, floods, development or animal activity).[87]

46. As that background demonstrates, and as the Queensland Court of Appeal has recognised, the no body-no parole scheme is intended 'to recover for the victim's family all of the victim's body/remains'.[88] That is why, for example, a no cooperation declaration will end if the prisoner stops being a 'no body-no parole prisoner' if the body or remains of the victim are located, even if that has occurred without any cooperation from the prisoner.[89] Likewise, irrespective of whether they have cooperated, a prisoner cannot be the subject of a no cooperation declaration if the victim's remains no longer exist and are incapable of being located.[90]

47. Against that background, the Sofronoff Report does not 'confirm' that the purpose of a no cooperation declaration is to punish prisoners more harshly because their lack of cooperation 'aggravates the prisoner's offending'.[91] In any event, denial of parole cannot make a prisoner's life sentence harsher. As McHugh, Gummow, Hayne and Heydon JJ explained in *Baker v The Queen*, if parole is granted then an offender has 'obtained a mercy'. Their Honours continued:[92]

> But in no sense (whether as a matter of substance or as a matter of form) can later legislation, altering the circumstances in which such mercy could or would be extended to a prisoner sentenced to life imprisonment, make that sentence of life imprisonment more punitive or burdensome to liberty.

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86 Special Case Book ('SCB') 444 (emphasis added). The parole board may make a no cooperation declaration at any point after a prisoner is sentenced. The board need not wait for an application for parole from the prisoner, nor even until the prisoner's non-parole period expires: see s 175K(b).

87 SCB 444.

88 *Armitage v Parole Board Queensland* [2023] QCA 239, [34], see also [35] (Flanagan JA, Mullins P and Boddice JA agreeing).

89 See s 175P(4) and s 175C.

90 *Armitage v Parole Board Queensland* [2023] QCA 239, [43] (Flanagan JA, Mullins P and Boddice JA agreeing).

91 PS [43].

92 *Baker v The Queen* (2004) 223 CLR 513, 528 [29] (McHugh, Gummow, Hayne and Heydon JJ), cited with approval in *Crump* (2012) 247 CLR 1, 21 [41] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) and applied to the facts in *Knight* (2017) 261 CLR 306, 323-4 [29] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). See similarly, *Hatahet* (2024) 98 ALJR 863, 872 [34] (Gordon A-CJ, Steward and Gleeson JJ).

48. While it may be accepted that one practical effect of a no cooperation declaration is to deny a prisoner the possible benefit of parole, there is nothing impermissible in that. 'Legislative detriment cannot be equated with legislative punishment',[93] and the granting and withholding of parole is a permissible means by which the executive may seek to influence prisoner behaviour. Indeed, '[t]he very purpose of granting remissions is to benefit a prisoner for good behaviour'.[94]

49. The plaintiff also suggests that the punitive purpose of no cooperation declarations is evidenced by various hypothetical scenarios in which the no cooperation declaration will be unable to achieve the purpose of locating the victim's body or remains.[95] For example, the plaintiff suggests there will be 'cases where the prisoner is unable, in a practical sense, to cooperate in locating the victim or their remains because to do so could result in the prisoner being killed themselves' (although he does not suggest that this is his reason for not cooperating).[96] That submission overlooks the fact that before making a no cooperation declaration, the parole board must have regard to 'any information the board has about the prisoner's capacity to give satisfactory cooperation'.[97] If cooperating might result in a prisoner being killed, no doubt that would affect the prisoner's capacity to cooperate. The plaintiff also suggests that a prisoner might be unable to cooperate because they 'maintain their innocence after having been falsely convicted where there has been a miscarriage of justice'. But that example cannot be relevant, because parole is not granted to address miscarriages of justice. Other mechanisms exist for that purpose.[98] Finally, and in any event, even if no cooperation declarations sometimes do not result in a victim's remains being located, it does not follow that their purpose is punitive.[99]

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93 *Duncan v New South Wales* (2015) 255 CLR 388, 409 [46], cited in *Minogue* (2019) 268 CLR 1, 23 [40] (Edelman J)

94 *Hatahet* (2024) 98 ALJR 863, 870 [24] (Gordon A-CJ, Steward and Gleeson JJ) (treating remissions as interchangeable with parole). See also *Hoare v The Queen* (1989) 167 CLR 348, 353 (the Court).

95 PS [44].

96 PS [44].

97 See s 175O(1)(a)(ii).

98 See, eg, s 672A of the *Criminal Code (Qld)*.

99 PS [44]. The plaintiff gains nothing in this respect from his faintly raised reliance on *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 (see PS fn 60, 62). *NZYQ* and its sequel, *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40, concern the doctrine of the separation of powers which does not apply to the States. Moreover, even if s 175L were a Commonwealth law, it would not engage the principle those cases discuss. The denial of parole does not interfere with a prisoner's right to liberty or bodily integrity: cf *YBFZ* [2024] HCA 40, [18]. There would therefore be no necessity to justify an equivalent Commonwealth law by reference to a 'legitimate non-punitive purpose': cf *NZYQ* (2023) 97 ALJR 1005, 1015 [40].

50. The plaintiff presents no persuasive basis to distinguish *Crump*, *Knight* and *Minogue*. There is none. His challenge to s 175L of the CS Act must fail.

'Restricted prisoner declarations' do not alter the punishment imposed

The legislative scheme

51. The plaintiff is a 'restricted prisoner' within the meaning of s 175D of the CS Act both because he was convicted of the murder of a child and because he has been sentenced to life imprisonment for more than one conviction of murder.[100] Notwithstanding the no cooperation declaration made about the plaintiff, a restricted prisoner declaration may be made about him 'at any time during [his] period of imprisonment'.[101]

52. The special case records that the president of the parole board has not yet considered whether to make, nor made, a restricted prisoner declaration about the plaintiff.[102] If the no cooperation declaration about the plaintiff were to end (or were to be declared invalid), the parole board would be required to defer deciding any application made by the plaintiff for parole, until the president of the board had considered whether to make a 'restricted prisoner declaration' under s 175E.[103]

53. The president may make a restricted prisoner declaration if satisfied that it is in the public interest to do so.[104] If the president makes a restricted prisoner declaration, the prisoner's application for parole is taken to have been refused by the parole board on the day the declaration was made.[105] A restricted prisoner declaration must state the day it ends, which cannot be later than 10 years after the day it take effect.[106] A new restricted prisoner declaration may take effect when an existing declaration ends.[107]

54. While the restricted prisoner declaration remains in force, a restricted prisoner cannot apply for a parole,[108] other than exceptional circumstances parole.[109] The parole board must refuse an application for exceptional circumstances parole unless, under s 176A(2), the board is satisfied:

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100 Section 175D.
101 Sections 175F-175H.
102 Special Case, [26].
103 See s 193AA(2)(b), (3) and (4), and ss 175E-175G, 175J.
104 Section 175H(1).
105 Section 193AA(4).
106 Section 175I(1)(c) and (3).
107 Section 175I(2)(a).
108 Section 180(2)(c).
109 Section 176.

(a) the prisoner, as a result of a diagnosed disease, illness or medical condition –

(i) is in imminent danger of dying and is not physically able to cause harm to another person; or

(ii) is incapacitated to the extent the prisoner is not physically able to cause harm to another person; and

(b) the prisoner has demonstrated that the prisoner does not pose an unacceptable risk to the public; and

(c) that the making of the parole order is justified in the circumstances.

55. The purpose of these provisions is to 'protect the community and reduce re-traumatisation of victim's families, while ensuring public confidence in the parole system'.[110] In particular, the provisions seek to 'provide some reassurance and certainty to victims' families that they will not have to relive the crimes committed by restricted prisoners by regularly receiving a notification that the prisoner is applying for parole'.[111]

Crump, *Knight* and *Minogue* are indistinguishable

56. The making of a restricted prisoner declaration places a restricted prisoner in precisely the same position as the plaintiffs in *Crump, Knight* and *Minogue*. The fact that that result is brought about by an administrative decision, rather than directly by the statute, is not a basis upon which to distinguish those authorities.

57. Nothing in the statutory scheme supports the plaintiff's submission that the object of a restricted prisoner declaration will be punitive. In considering whether it is in the public interest to make a restricted prisoner declaration, the president must consider:[112]

(a) the nature, seriousness and circumstances of the offence or offences for which the prisoner was sentenced to life imprisonment;

(b) any risk the prisoner may pose to the public if granted parole; and

(c) the likely effect of the prisoner's release may have on an eligible person[113] or victim.

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110 SCB 443. See also *Neyens v President, Parole Board of Queensland* [2024] QCA 208, [25(f)], [30].

111 SCB 437, 451.

112 Section 175H(2).

113 An 'eligible person' in relation to a prisoner, 'means a person included on the eligible persons register as an eligible person in relation to the prisoner': CS Act, sch 4 dictionary. Relevantly, a person is eligible to be registered against a homicide offender if the person is an immediate family member of the victim, or the chief executive is satisfied their registration is warranted because of the effect of the

58. The president may also have regard to any other matter or information the president considers relevant to the public interest.[114]

59. It is apparent that these factors are directed to whether the prisoner should be granted a mercy, not with 'retribution'. Indeed, it is difficult to see how a decision about whether to release a prisoner on parole could be made without considering (for example) the nature, seriousness and circumstance of the offending. The fact that, in a particular case, the president might choose to give weight to the seriousness of the offence, notwithstanding the prisoner's level of risk to the public is relatively low, does not make the statutory scheme 'punitive'.[115] Moreover, for the reasons set out above,[116] even if a restricted prisoner declaration could be characterised as 'punitive', that characterisation would have no constitutional significance.

Consequences of invalidity: 'revival' of the 2017 no body, no parole scheme

60. If (contrary to the defendant's submissions) question (a) in the Special Case is answered 'yes', question (c) will arise for consideration.

61. As explained above, the 2021 Act repealed the then-existing no body, no parole scheme (contained in s 193A) and replaced it with a new s 193A and other provisions (including s 175L) which comprise the scheme for no cooperation declarations. If the 2021 Act was invalid to the extent it inserted that new scheme, the result would be that the CS Act as it stood *without* those amendments would be operative and valid. The amendments disclose 'no Parliamentary "intention" to remove' the pre-existing s 193A 'independently of the adoption of the new provisions'.[117] Accordingly, the invalidity of the new provisions would not '[leave] intact the repeal of the earlier

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homicide offence on them, or the chief executive is satisfied that the person's life or physical safety could be endangered: s 323.

114 Section 175H(4)

115 PS [45]. See *Neyens v President of the Parole Board of Queensland* [2024] QCA 208, [25(f)], [30] ('The discretion conferred on the president by the 'restricted prisoner declarations' provisions is one to be exercised in the public interest, as a separate step antecedent to consideration of any parole application, for the express purpose of limiting re-traumatisation of victims' families and community protection'.)

The plaintiff's reliance (PS [47]) on statements made in Parliament to attribute a punitive purpose should be rejected. Similar statements were made in *Crump*, *Knight* and *Minogue* and did not affect the validity of the impugned legislation in those cases. The same conclusion applies here. See: New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 May 2001 at 13971; Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 March 2014 at 746; Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 July 2018 at 2238-2239.

116 See above, [32]-[34] and fn 96.

117 Cf *Roach v Electoral Commissioner* (2007) 233 CLR 162, 202 [97] (Gummow, Kirby and Crennan JJ).

provisions [because] the efficacy of the former was a condition of the repeal of the latter.'[118]

62. Accordingly, if question (a) is answered 'yes', the result is that any application for parole made by the plaintiff would necessarily be considered under the previous s 193A. His application would therefore be refused unless the board was satisfied he had cooperated satisfactorily in the investigation of the offence to identify the victim's location. The plaintiff appears to accept this.[119]

Conclusion

63. The questions in the special case should be answered as follows:

(a) No.

(b) No.

(c) Does not arise.

(d) The plaintiff.

PART VI: NOTICE OF CONTENTION

64. Not applicable.

Part VII: TIME ESTIMATE

65. The defendant estimates that it will require 1.5 hours to present oral argument.

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Dated: 22 November 2024

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118 Cf *Roach v Electoral Commissioner* (2007) 233 CLR 162, 202-3 [97] (Gummow, Kirby and Crennan JJ).

119 PS [49].

IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

BETWEEN: **RODNEY MICHAEL CHERRY**

Plaintiff

and

STATE OF QUEENSLAND

Defendant

ANNEXURE TO THE DEFENDANT'S SUBMISSIONS

Statutes and Statutory Instruments referred to in the submissions

Pursuant to *Practice Direction No. 1 of 2019*, the defendant sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
	Constitutional provisions		
1.	Commonwealth Constitution	Current	Ch III
	Statutes		
2.	*Corrective Services Act 2006* (Qld)	Current (from 30 September 2024)	175C, 175D, 175E, 175F, 175G, 175H, 175I, 175J, 175K, 175L, 175P, 175O, 175R, 175S, 175U, 175T, 176, 176A, 176B, 180, 181, 193, 193A, 193AA, part 13 div 1, sch 4 dictionary
3.	*Corrective Services Act 2006* (Qld)	27 September 2021 to 3 December 2021	193A
4.	*Crimes (Administration of Sentences) Act 1999* (NSW)	20 July 2001 to 14 December 2001	154A

5.	*Corrections Act 1986* (Vic)	1 August 2018 to 8 August 2018	74AA, 74AB
6.	*Criminal Code (Qld)*	Current (from 23 September 2024)	672A
7.	*Criminal Appeal Act 1912* (NSW)	As enacted	
8.	*Criminal Code Amendment Act 1913* (Qld)	As enacted	
9.	*Criminal Appeals Act 1924* (SA)	As enacted	
10.	*Criminal Code Act 1924* (Tas)	As enacted	
11.	*Criminal Appeal Act 1914* (Vic)	As enacted	
12.	*Criminal Code Amendment Act 1911* (WA)	As enacted	
13.	*Police Powers and Responsibilities and Other Legislation Amendment Act 2021* (Qld)	As enacted	