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 ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

PARTS I, II & III: CERTIFICATION AND INTERVENTION

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

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

PART IV: ARGUMENT

A. SUMMARY

3. The premise of the plaintiff's argument is that s 175L of the *Corrective Services Act 2006* (Qld) empowers the executive to "alter" the sentence of life imprisonment imposed on the plaintiff by the Supreme Court by depriving him of the opportunity to apply for parole after the end of his non-parole period.[1] In summary, Victoria submits that:

   (1) That premise is contrary to the decisions of this Court in ***Crump*** *v New South Wales,*[2] ***Knight*** *v Victoria*[3] and ***Minogue*** *v Victoria*[4] and should be rejected. Those decisions, which the plaintiff does not seek to re-open, establish that "the fixing of

1 PS at [6]-[7], [40]-[41], [48].
2 (2012) 247 CLR 1.
3 (2017) 261 CLR 306.
4 (2019) 268 CLR 1.

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"[5] and that alterations to the parole regime that make it more difficult for a person to obtain parole do not "impeach, set aside, alter or vary the sentence under which the [person] suffers his deprivation of liberty"[6] or make a sentence of imprisonment "more punitive or burdensome to liberty".[7]

(2) This case cannot be distinguished from *Crump, Knight* and *Minogue*. Like the plaintiffs in those cases, the plaintiff in this case has not lost all opportunity to be considered for parole. But even if that were the effect of a "no cooperation declaration" under s 175L, the plaintiff's attempt to distinguish those authorities turns on an unsustainable distinction between eligibility to apply for parole and eligibility for a grant of parole[8] that is not supported by the authorities[9] and is not a difference of substance or constitutional significance.

(3) Section 175L places conditions on applying or re-applying for parole. Like a provision that alters the conditions for the grant of parole, s 175L does not alter or interfere with the Supreme Court's order setting a non-parole period or render the plaintiff's sentence of life imprisonment more restrictive of his liberty or otherwise impose greater punishment for the offence of which he was convicted.

4. As the plaintiff fails to establish the premise of his argument, it is unnecessary for the Court to determine the further limb of his argument that s 175L infringes the *Kable* principle.

5. The validity of s 175E of the *Corrective Services Act 2006* does not arise for decision because its application to the plaintiff depends on the president of the parole board being satisfied of matters about which they have not made, or been asked to make, a decision. However, if the validity of s 175E does arise for decision, it is valid for the same reasons.

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5 *Minogue* (2019) 268 CLR 1 at [16] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), quoting *Crump* (2012) 247 CLR 1 at [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) and *Minogue v Victoria* (2018) 264 CLR 252 at [17] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) (***Minogue (No 1)***).

6 *Crump* (2012) 247 CLR 1 at [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Knight* (2017) 261 CLR 306 at [25] (the Court).

7 *Minogue* (2019) 268 CLR 1 at [21] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), quoting *Baker v The Queen* (2004) 223 CLR 513 at [29] (McHugh, Gummow, Hayne and Heydon JJ).

8 PS at [5]-[6], [40]-[41].

9 See *Crump* (2012) 247 CLR 1 at [35]-[36] (French CJ), [53], [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), but see [70], [73] (Heydon J); *Knight* (2017) 261 CLR 306 at [27]-[29] (the Court). As to *Minogue* (2019) 268 CLR 1 at [21] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), see below at [15]-[23].

B. SECTION 175L DOES NOT ALTER THE SENTENCE OR IMPOSE ADDITIONAL PUNISHMENT

B.1 The plaintiff's argument is contrary to established principle

6. Despite purporting to accept that the minimum term constituted a "factum by reference to which the parole system operated",[10] the plaintiff contends that the sentence imposed by the Supreme Court had the operative effect of conferring on him *eligibility* to be considered for release on parole once he had served the minimum term.[11] He contends that the power of the parole board to consider a grant of parole was "a direct consequence of the judicial determination constituted by a mandatory minimum period of imprisonment" and that the making of a "no cooperation declaration" under s 175L deprived the board of that power for a further period and therefore altered the punishment imposed by the Supreme Court.[12]

7. Those contentions are contrary to established principle, and to the decisions in *Crump, Knight* and *Minogue*.

8. *First,* the setting of the minimum term did not confer eligibility for parole. Its legal effect, consistently with its terms, was that the plaintiff was not to "be released [on parole] before serving twenty (20) years of his sentence unless released sooner under exceptional circumstances parole" [**SCB 32**].

9. The sentencing of a person convicted of a criminal offence is an exercise of judicial power.[13] It may be accepted that a minimum term[14] is "part of" the sentence imposed on the offender[15] and therefore "part of the punishment imposed".[16] However, as this Court

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10 PS at [41], see also [5], [35].

11 PS at [6], [7], [40]-[41], [48].

12 PS at [40]-[41], [48].

13 *Crump* (2012) 247 CLR 1 at [27] (French CJ), see also [41]-[42] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Minogue* (2019) 268 CLR 1 at [14] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), [32] (Gageler J), [36] (Edelman J).

14 The language "minimum term" or "non-parole period" depends on the applicable statutory scheme. In Queensland, s 305(2) of the *Criminal Code (Qld)* in force as at 8 November 2002 required Dutney J to "make an order that the person must not be released from imprisonment until the person has served a minimum of 20 or more specified years of imprisonment, unless released sooner under exceptional circumstances parole under the *Corrective Services Act 2000*." In Victoria, what was once referred to as the "minimum term" under s 17(1) and (2) of the *Penalties and Sentences Act 1985* (Vic) is now described as the "non-parole period" under the *Sentencing Act 1991 (Vic),* s 3(1) (definition of "non-parole period"). See *Minogue* (2019) 268 CLR 1 at fn 60 (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

15 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 465 (Mason CJ, Dawson and McHugh JJ), 491 (Deane and Toohey JJ); *Postiglione v The Queen* (1997) 189 CLR 295 at 302 (Dawson and Gaudron JJ); *Knight* (2017) 261 CLR 306 at [27] (the Court); *Minogue* (2019) 268 CLR 1 at [37] (Edelman J).

16 *Minogue* (2019) 268 CLR 1 at [37] (Edelman J), quoting *Leeth* (1992) 174 CLR 455 at 471 (Mason CJ, Dawson and McHugh JJ). See also *PNJ v The Queen* (2009) 83 ALJR 384; 252 ALR 612 at [11] (the Court).

stated in *PNJ v The Queen,* the punishment imposed on an offender is not sufficiently described by identifying only the minimum term fixed by the court, "for it is always necessary to recognise that an offender may be required to serve the whole of the head sentence that is imposed."[17]

10. The minimum term represents the minimum period that the sentencing court determines, within the limits of any discretion conferred by the relevant legislation,[18] that justice requires the offender must serve having regard to all the circumstances.[19] The minimum term therefore does "no more than to set a period during which [a person is] not to be eligible to be released on parole"[20] (putting aside any statutory power for release on parole in exceptional circumstances or any exercise of the prerogative of mercy)[21]. "[I]ts expiry is the *earliest* point at which the relevant parole system may come into operation".[22] Moreover, in fixing the minimum period, a court is *not* to consider the likelihood that a person will be granted parole at the end of that period.[23]

11. A person's eligibility for release on parole is not part of the sentencing determination made by a court; rather, it is a consequence of a determination made under the statutory scheme for release at the time the parole determination is made.[24] The setting of the minimum term did not "create any right or entitlement in the plaintiff to his release on

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17 (2009) 83 ALJR 384; 252 ALR 612 at [11] (the Court), referred to with approval in *Minogue (No 1)* (2018) 264 CLR 252 at [17] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

18 The scope of the discretion may vary widely: compare, eg, *Criminal Code (Qld)*, s 305(2); *Sentencing Act 1991* (Vic), ss 11 and 11A; *Corrections Act 1997* (Tas), ss 68, 70 and *Sentencing Act 1997* (Tas), ss 17, 18. See also *Power v The Queen* (1974) 131 CLR 623 at 629-630 (Barwick CJ, Menzies, Stephen and Mason JJ), discussing differences between State schemes at that time.

19 *Power* (1974) 131 CLR 623 at 628-629 (Barwick CJ, Menzies, Stephen and Mason JJ); *Deakin v The Queen* (1984) 58 ALJR 367 at 367; 54 ALR 765 at 766 (the Court); *Bugmy v The Queen* (1990) 169 CLR 525 at 536 (Dawson, Toohey and Gaudron JJ).

20 *Knight* (2017) 261 CLR 306 at [27] (the Court).

21 Eg, in Victoria, the Governor may in the exercise of the prerogative release an offender on parole, even before the end of a non-parole period: *Sentencing Act 1991* (Vic), s 107 (release by Governor in exercise of royal prerogative of mercy).

22 *Leeth* (1992) 174 CLR 455 at 465 (Mason CJ, Dawson and McHugh JJ) (emphasis added).

23 *R v Hatahet* (2024) 98 ALJR 863; 418 ALR 520 at [21], [25] (Gordon A-CJ, Steward and Gleeson JJ), [55] (Jagot J), [66] (Beech-Jones J).

24 *Minogue* (2019) 268 CLR 1 at [15] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), referring to *Crump* (2012) 247 CLR 1 at [14], [37] (French CJ). See also *R v Shrestha* (1991) 173 CLR 48 at 72-73 (Deane, Dawson and Toohey JJ); *Crump* (2012) 247 CLR 1 at [36] (French CJ), [60] (Gummow, Hayne Crennan, Kiefel and Bell JJ; *Knight* (2017) 261 CLR 306 at [28] (the Court).

parole"[25] or his *eligibility* for release on parole.[26] As the joint judgment stated in *Minogue*:[27]

> At best, the minimum term provided the plaintiff with hope of an earlier conditional release but always subject to and in accordance with legislation in existence at the time governing consideration of any application for parole.[28] 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.[29]

12. *Secondly*, the plaintiff's eligibility for parole was and is always governed by, and subject to, the parole scheme as it exists in Queensland from time to time: currently, the *Corrective Services Act 2006*.[30] That Act includes ss 175L and 175E. The parole system is created by the legislature of the State.[31] The legislature determines the jurisdictional facts required to enliven the power of the parole board and the criteria for eligibility for parole, as well as the breadth of any discretion reposed in the parole board.[32]

13. *Thirdly*, it follows from the above principles that the statutory scheme for parole can be validly changed from time to time.[33] Legislative amendments to the parole system that affect the eligibility of a prisoner for parole — such as the introduction of ss 175L and 175E into the *Corrective Services Act 2006* — "may be said to have altered a statutory consequence of the sentence", but they do not set aside or alter the legal effect of the sentence under which a prisoner suffers deprivation of liberty.[34]

14. Nor do such amendments make a sentence more punitive or burdensome to liberty, even where the circumstances in which a person may be released on parole are severely

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

26 *Crump* (2012) 247 CLR 1 at [14], [36]-[37] (French CJ); *Knight* (2017) 261 CLR 306 at [28] (the Court); *Minogue* (2019) 268 CLR 1 at [15] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

27 *Minogue* (2019) 268 CLR 1 at [16] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

28 See *Bugmy* (1990) 169 CLR 525 at 531 (Mason CJ and McHugh J), 536 (Dawson, Toohey and Gaudron JJ); *Shrestha* (1991) 173 CLR 48 at 69 (Deane, Dawson and Toohey JJ).

29 *Crump* (2012) 247 CLR 1 at [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Minogue (No 1)* (2018) 264 CLR 252 at [17] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ). See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [73], [108] (Gummow J).

30 Ch 5, "Parole". For transitional provisions between the *Corrective Services Act 2000* and the *Corrective Services Act 2006*, see Ch 7, Pt 5 "Parole".

31 See, eg, *Crump* (2012) 247 CLR 1 at [36] (French CJ).

32 See *Crump* (2012) 247 CLR 1 at [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Minogue* (2019) 268 CLR 1 at [15]-[17] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

33 *Minogue* (2019) 268 CLR 1 at [17] (Kiefel CJ, Bell J, Keane, Nettle and Gordon JJ), citing *Crump* (2012) 247 CLR 1 at [28], [36] (French CJ), [59] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), [71]-[72] (Heydon J).

34 *Minogue* (2019) 268 CLR 1 at [19] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), referring to *Crump* (2012) 247 CLR 1 at [35]-[36] (French CJ), [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), [72], [74] (Heydon J) and *Knight* (2017) 261 CLR 306 at [28]-[29] (the Court).

constrained.[35] The making of a "no cooperation declaration" under s 175L does not, either in its substantive operation or practical effect, impose additional or separate punishment on the plaintiff beyond that imposed by the court at the time of sentencing.[36]

B.2 Loss of opportunity to apply for, or be considered for, parole

15. The plaintiff seeks to distinguish *Crump, Knight* and *Minogue* by arguing that the legislation impugned in this case does not merely make the conditions for the grant of parole more difficult to satisfy, but removes the opportunity for a prisoner affected by a "no cooperation declaration" to be considered for a grant of parole once they have served their minimum term.[37] There is no relevant distinction.

16. *First*, the plaintiff has not lost all opportunity to be considered for release on parole. He has made an application for parole, which was refused [**SCB 26 [16]-[18]**]. The plaintiff may apply and be considered for parole again if the parole board is satisfied he has given satisfactory cooperation (s 175Q), which may follow the granting of a reconsideration application made by the plaintiff (ss 175R, 175S, 175U) or the president or deputy president deciding to call a meeting of the board to reconsider the "no cooperation declaration" (ss 175T, 175U). Another possibility is that the body of the victim may be located; the plaintiff would then cease to be a "no body-no parole prisoner" and the "no cooperation declaration" would end (ss 175C and 175P(4)). The giving of cooperation can be regarded as within the plaintiff's control; but, in any event, there is no requirement that the conditions governing the grant of parole must be within the power of the offender. "Not only are the circumstances at the expiration of the minimum term unpredictable: they include circumstances which are beyond the power of the offender to control".[38]

17. *Secondly*, even if it is accepted that the making of a "no cooperation declaration" renders the plaintiff unable to apply for or be considered for parole, that does not alter the legal effect of the sentence imposed by the Supreme Court.

18. It may be accepted that in *Crump, Knight* and *Minogue* the relevant restrictions were framed in terms of "strict limiting conditions upon the exercise of the executive power to

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35 *Knight* (2017) 261 CLR 306 at [29] (the Court); *Minogue* (2019) 268 CLR 1 at [21] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Hatahet* (2024) 98 ALJR 863; 418 ALR 520 at [34] (Gordon A-CJ, Steward and Gleeson JJ).

36 See *Minogue* (2019) 268 CLR 1 at [25] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). See also *Baker* (2004) 223 CLR 513 at [29] (McHugh, Gummow, Hayne and Heydon JJ).

37 PS [6], [38]-[41].

38 *R v Morgan* (1980) 7 A Crim R 146 at 155 (Jenkinson J, Kaye J agreeing).

release"[39] a prisoner, rather than in terms of a prisoner's ability to apply, or be considered, for parole. The legislation in those cases altered the jurisdictional facts necessary to enliven the power to grant parole. If the prisoners were not in imminent danger of dying or seriously incapacitated, there was no power or discretion to grant parole.[40] They were therefore ineligible to be *granted* parole in all but very limited circumstances.

19. However, there is no difference in substance between a scheme that leaves a prisoner able to apply for parole but strictly limits the conditions to be satisfied before they can be *granted* parole, and one that strictly limits the conditions to be satisfied before a prisoner can *apply* for parole. The practical consequence is the same: to confine the circumstances in which the parole board is empowered to extend the mercy of conditional release to a prisoner. In either case, the restrictions on the ability to obtain parole, even restrictions which amount to the removal of a meaningful prospect of release on parole,[41] do not alter the sentence imposed by the court or render it more restrictive of person's liberty.

20. It was not central to the reasoning in *Crump* or *Knight* that the legislation did not deprive the plaintiffs of an opportunity to be considered for release on parole.[42] It may be accepted that the plurality in *Minogue* took into account that the plaintiff remained "eligible" for parole,[43] in the sense that he retained his ability to apply and be considered for release for parole, in concluding that s 74AB of the *Corrections Act 1986* (Vic) did not make the plaintiff's punishment of a life sentence more severe.[44] That the plaintiff in that case retained his ability to apply for parole, despite the fact that the conditions to be met before he could be *granted* parole were severely limited, and were not then satisfied,[45] accurately described the legal effect of the relevant statutory provisions.

21. But it does not follow from *Crump* and *Knight*, or the principles set out earlier in the plurality's reasons in *Minogue*,[46] that the retention of an ability to *apply* for parole at all

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39 *Crump* (2012) 247 CLR 1 at [35] (French CJ); *Minogue* (2019) 268 CLR 1 at [19] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

40 See legislation at issue excerpted in *Crump* (2012) 247 CLR 1 at [54], *Knight* (2017) 261 CLR 306 at [18] and *Minogue* (2019) 268 CLR 1 at [3].

41 See *Minogue* (2019) 268 CLR 1 at [32] (Gageler J).

42 *Crump* (2012) 247 CLR 1 at [35]-[36] (French CJ), [53], [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), but see [70], [73] (Heydon J); *Knight* (2017) 261 CLR 306 at [27]-[29] (the Court).

43 (2019) 268 CLR 1 at [18] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

44 *Minogue* (2019) 268 CLR 1 at [21] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

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

46 (2019) 268 CLR 1 at [15]-[17] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

times[47] after the expiry of the minimum term is essential to avoid interference with the court's sentencing order. Applying the principles established by these three cases, the minimum term did no more than set a period during which the plaintiff was *not* to be eligible for parole; it did not set a period after which the plaintiff *must* be eligible for parole. In other words, the plaintiff's minimum term is no more than the factum by reference to which the parole system operates with respect to him. His eligibility for parole – including his ability to apply for and be considered for parole and the conditions to be met before he can be granted parole – is dependent on the statutory scheme for release in place at any given time.

22. Further, the reasons of Gageler J and Edelman J did not make this distinction. Justice Gageler accepted that s 74AB had the purpose and practical effect of subjecting the plaintiff to a life without meaningful prospect of parole, but held that, on the authority of *Crump* and *Knight*, this did not interfere with the prior exercise of judicial power, or render his life sentence more restrictive of his liberty or more punitive.[48]

23. Justice Edelman similarly accepted that a law that amends the conditions required for a grant of parole might have the practical "consequence" of altering a person's minimum period of non-parole, quoting from the reasons of French CJ in *Crump* where his Honour distinguished between the legal effect of a judicial decision and the "consequences" attached by statute to that decision.[49] Altering the statutory consequences of a court order, as opposed to altering its legal effect, is not an exercise of judicial power. For Edelman J, the difficulty would only arise if the law was itself enacted for the purposes of imposing additional punishment on a particular person.[50] For the reasons given by the defendant at **DS [41]-[49]**, that issue does not arise here.

B.3 Distinction between judicial and executive functions and the nature of parole

24. The reason why the legislative or executive imposition of limitations on a person's ability to apply for parole is not constitutionally significant is based in the distinction between

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47 Cf *Corrective Services Act 2006*, s 193(6)(b), (7), requiring the parole board when refusing an application for parole to decide a period of time within which a further application (other than exceptional circumstances parole) must not be made without the board's consent. There is a similar "no-return period" scheme in Victoria for prisoners serving terms of life imprisonment: *Corrections Act 1986* (Vic), s 74AAD.

48 *Minogue* (2019) 268 CLR 1 at [30]-[33] (Gageler J).

49 *Minogue* (2019) 268 CLR 1 at [40] (Edelman J), quoting *Crump* (2012) 247 CLR 1 at [36] (French CJ).

50 *Minogue* (2019) 268 CLR 1 at [40] (Edelman J).

the judicial power exercised when sentencing an offender and the executive power exercised in determining whether to release an offender early from prison.

25. There is a well-established distinction between trial and sentencing (a judicial function) and actual imprisoning and releasing (an executive function).[51] The power to adjudge criminal guilt and to impose punishment is at the heart of judicial power.[52] On the passing of a sentence, judicial power is "spent"[53] or "exhausted".[54] Thereafter, responsibility for the future release of the prisoner, while still under sentence, passes to the executive, subject to the statutory scheme and any administrative policies applicable from time to time.[55]

26. The modern parole system is created by statute to empower the executive to grant conditional release to offenders sentenced to terms of imprisonment. While on parole, the offender remains under sentence.[56] From time to time, early release schemes also include laws relating to mercy and pardons,[57] the remission of penalties,[58] conditional release on licence,[59] as well as parole. The commonality between these schemes is that

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51 See, eg, *Hatahet* (2024) 98 ALJR 863; 418 ALR 520 at [19] (Gordon ACJ, Steward and Gleeson JJ).

52 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899.

53 *Elliott v The Queen* (2007) 234 CLR 38 at [5] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *Crump* (2012) 247 CLR 1 at [58] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Minogue* (2019) 268 CLR 1 at [14] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

54 *Minogue* (2019) 268 CLR 1 at [15] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). That is subject, of course, to any statutory rights of appeal against conviction or sentence: *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [8] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ)

55 *Elliott* (2007) 234 CLR 38 at [5] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *Crump* (2012) 247 CLR 1 at [58] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Minogue* (2019) 268 CLR 1 at [15], [17] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

56 See, eg, *Corrective Services Act 2006* (Qld), ss 214 and 215; *Corrections Act 1986* (Vic), s 76. See also *Power* (1974) 131 CLR 623 at 628-629 (Barwick CJ, Menzies, Stephen and Mason JJ); *Commissioner of Corrective Services v Wedge* (2006) 68 NSWLR 334 at [93] (Ipp JA); *Wotton v Queensland* (2012) 246 CLR 1 at [6] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

57 See, eg, *Criminal Code (Qld)*, ss 18 (royal prerogative of mercy), 672A (pardoning power preserved), 677 (effect of pardon); *Sentencing Act 1991* (Vic), ss 106 (saving of royal prerogative of mercy) and 107 (release by Governor in exercise of royal prerogative of mercy); *Criminal Procedure Act 2009* (Vic), s 327 (reference by Attorney-General).

58 See, eg, *Criminal Code (Qld)*, s 675 (conditional remission of sentence by Governor); *Corrections Act 1986* (Vic), s 58E (emergency management days); *Sentencing Act 1991* (Vic), s 108 (penalties for offences may be remitted); *Sentencing Act 1995* (NT), ss 114 (remission of sentence by Administrator), 116 (penalties for offences may be remitted); *Crimes (Sentence Administration) Act 2005* (ACT), s 313 (remission of penalties); *Corrections Act 1997* (Tas), ss 86 (remissions), 87 (special management days); *Sentencing Act 1995* (WA), s 139 (Governor may remit order to pay money).

59 See, eg, *Crimes Act 1914* (Cth), s 19AP (release on licence); *Crimes (Sentence Administration) Act 2005* (ACT), Pt 13.1 (release on licence).

they are all examples of a "concession"[60], "mercy"[61] or "mitigation"[62] of the punishment imposed by a court, granted by the executive in discharging its responsibility for a prisoner who has been sentenced to imprisonment. All have historical roots in the royal prerogative of mercy, an executive function; "a pardon is an act of grace [and not of justice], proceeding from the power entrusted with the execution of the laws".[63]

27. Like other forms of early release, "[p]arole is a privilege, not a right."[64] Its purpose is "to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time."[65] In this way, "parole is a concession to the offender, but a concession which it is expected will benefit the community".[66]

28. It is the nature of parole as a concession or mitigation, and its essentially executive nature, that explains why Parliament has such broad legislative power to create and reform parole schemes from time to time, without interfering with the judicial function of imposing punishment. As French CJ remarked in *Crump*, "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 may be *broadened* or *constrained* or *even abolished* by the State."[67]

29. It is apparent from both the development of these early release schemes over time[68] and the differences across Australian jurisdictions today that the scope of the discretion that

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60 New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 September 1966 at 975 (Hon J Maddison, Minister for Justice).

61 *Shrestha* (1991) 173 CLR 48 at 63 (Brennan and McHugh JJ); *Baker* (2004) 223 CLR 513 at [29] (McHugh, Gummow, Hayne and Heydon JJ).

62 *Power* (1974) 131 CLR 623 at 629 (Barwick CJ, Menzies, Stephen and Mason JJ); *Shrestha* (1991) 173 CLR 48 at 69 (Deane, Dawson and Toohey JJ).

63 Barnett, "Executive, Legislature and Judiciary in Pardon" (1915) 49 *American Law Review* 684 at 684, quoting *United States v Wilson*, 32 US (7 Pet) 150 at 160 (1833) (Marshall CJ for the Court); see also 686.

64 *McCallum v Parole Board of NSW* [2003] NSWCCA 294 at [28] (Smart AJ, with whom Hidden and Greg James JJ agreed); *Commissioner of Corrective Services v Wedge* (2006) 68 NSWLR 334 at [48] (Santow JA). See also *Crump* (2012) 247 CLR 1 at [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Minogue (No 1)* (2018) 264 CLR 252 at [18] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

65 *Power* (1974) 131 CLR 623 at 629 (Barwick CJ, Menzies, Stephen and Mason JJ), quoted in *Deakin* (1984) 58 ALJR 367 at 367; 54 ALR 765 at 766 (the Court) and *Bugmy* (1990) 169 CLR 525 at 531 (Mason CJ and McHugh J), 536 (Dawson, Toohey and Gaudron JJ).

66 New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 September 1966 at 975 (Hon J Maddison, Minister for Justice), during the second reading speech for the original *Parole of Prisoners Act* 1966; see also *Bugmy* (1990) 169 CLR 525 at 532 (Mason CJ and McHugh J).

67 *Crump* (2012) 247 CLR 1 at [35] (emphasis added).

68 For example, remissions were once widely used in Australia (in conjunction with parole). There was significant reform, including abolition, of remissions schemes in the 1980s and 1990s. See, eg, in relation to Victoria: Freiberg, Ross and Tait, *Change and stability in sentencing: a Victorian study* (1996) at 82-94; Callinan, *The Parole System in Victoria* (July 2013) at 51-53. The ascendancy of parole was not inevitable: in 1980, the Australian Law Reform Commission recommended the abolition of parole and the retention of

Parliament confers on the executive may vary considerably. These developments and differences reflect how Parliaments balance competing considerations in the public interest: rehabilitation, community safety, management of the risk of reoffending, victims' rights, community expectations and economic considerations. While the parole board may in some cases be given a relatively broad discretion to determine whether to grant parole to a prisoner, Parliament is able to restrict the board's discretion and its power to grant parole and use various means to do so.

B.4 Section 175L of the Act changed the parole system, not the plaintiff's sentence

30. To conclude, the changes made by s 175L of the Act are "legislative amendments to the parole system".[69] The making of a "no cooperation declaration" under s 175L alters the circumstances in which a "no body-no parole prisoner" is *eligible* for release on parole, and thereby makes access to parole more difficult for that person.[70] When made in respect of the plaintiff, the "no cooperation declaration" did not set aside or alter the legal effect of Dutney J's order which fixed the plaintiff's sentence (including the minimum term). Section 175L does not intersect at all with the exercise of judicial power by Dutney J.[71]

31. It is therefore unnecessary to consider whether, if the making of the "no cooperation declaration" under s 175L did alter the legal effect of Dutney J's order, it would infringe the *Kable* principle. In so far as it arises, Victoria adopts the defendant's submissions at **DS [9]** and **[34]**.

C. THE QUESTION OF THE VALIDITY OF S 175E DOES NOT ARISE IN THIS CASE

32. The question of the validity of s 175E of the *Corrective Services Act 2006* does not arise in this case and should not be determined. First, if s 175L is valid, it is unnecessary to determine the validity of s 175E. Secondly, and even if s 175L is invalid, there does not exist a state of facts which makes it necessary[72] to decide the validity of s 175E as there is currently *no* restricted prisoner declaration under s 175E in respect of the plaintiff and

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general and special remissions for federal offenders in an interim report: ALRC, *Sentencing of Federal Offenders* ((1980, Interim Report No 15) at [341]-[345], [350]. In its final report in 1988, the ALRC recommended instead that parole be reformed and that general remissions be abolished: ALRC, *Sentencing* (1988, Report No 44) at [72], [86].

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

70 See *Crump* (2012) 247 CLR 1 at [36] (French CJ).

71 See *Knight* (2017) 261 CLR 306 at [29] (the Court).

72 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (Dixon CJ, delivering judgment of the Court).

the statutory preconditions for the making of a restricted prisoner declaration have not been met.

33. The application of s 175E to the plaintiff depends on, amongst other things, the president of the parole board being satisfied it is in the public interest to make a restricted prisoner declaration (s 175H). The president has not been provided with a report from the chief executive, which is required to enliven the president's discretion to make a restricted prisoner declaration (ss 175F and 175G). Nor, given the power is discretionary (ss 175E, 175H), is it inevitable that a restricted prisoner declaration will be made.

34. It follows that the question of the validity of s 175E is premature and should not be answered.

35. However, if the validity of s 175E does arise for decision, it is valid for the reasons advanced by the defendant at **DS [51]-[59]**. In short, prisoner subject to a "restricted prisoner declaration" may still apply for exceptional circumstances parole. *Crump*, *Knight* and *Minogue* are therefore entirely indistinguishable. In any event, even if a prisoner subject to a "restricted prisoner declaration" was not able to apply for exceptional circumstances parole, s 175E would be valid for the reasons advanced above at [17]-[23].

PART V: ESTIMATE OF TIME

36. Victoria estimates that it will require approximately 10 minutes for the presentation of oral submissions.

Dated: 6 December 2024

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

RODNEY MICHAEL CHERRY
Plaintiff

and

STATE OF QUEENSLAND
Defendant

ANNEXURE TO SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

Pursuant to Practice Direction No 1 of 2019, the Attorney-General for the State of Victoria sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
1.	*Corrections Act 1997* (Tas)	Current	ss 68, 70, 86 and 87
2.	*Corrections Act 1986* (Vic)	Current	ss 58E,74AB, 74AAD and 76
3.	*Corrective Services Act 2000* (Qld)	As at 8 November 2002	
4.	*Corrective Services Act 2006* (Qld)	Current	ss 175C, 175E, 175F, 175G, 175H, 175L, 175P, 175Q, 175R, 175S, 175T, 175U, 193, 214 and 215

5.	*Crimes (Sentence Administration) Act 2005* (ACT)	Current	s 313
6.	*Crimes Act 1914* (Cth)	Current	s 19AP
7.	*Criminal Code Act 1899* (Qld), Schedule 1 (the Criminal Code)	As at 8 November 2002	ss 305(2), and 677
8.	*Criminal Code Act 1899* (Qld), Schedule 1 (the Criminal Code)	Current	ss 18, 672A, 675 and 677
9.	*Criminal Procedure Act 2009* (Vic)	Current	s 327
10.	*Penalties and Sentences Act 1985* (Vic)	Repealed	ss 17(1) and (2)
11.	*Sentencing Act 1995* (NT)	Current	ss 114 and 116
12.	*Sentencing Act 1997* (Tas)	Current	ss 17 and 18
13.	*Sentencing Act 1991* (Vic)	Current	ss 3(1), 11, 11A, 106, 107 and 108
14.	*Sentencing Act 1995* (WA)	Current	s 139