IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S165 OF 2011

BETWEEN

KEVIN GARRY CRUMP
Plaintiff

AND

STATE OF NEW SOUTH WALES
First Defendant

AND

NEW SOUTH WALES STATE PAROLE AUTHORITY
Second Defendant

SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

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Filed on behalf of: The Attorney-General for the State of Victoria

Prepared by:
Peter Stewart
Victorian Government Solicitor
25/121 Exhibition Street
MELBOURNE 3000

DX 300077
Tel No. (03) 8684 0444
Fax No. (03) 8684 0449
Ref: 1112002 (Dr Adrian Hoel)
(Adrian.hoel@vgso.vic.gov.au)

I: CERTIFICATION

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

II: BASIS OF INTERVENTION

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

III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

IV: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. It is not necessary to add to the statements of applicable constitutional and statutory provisions set out in the annexures to the submissions of the plaintiff and the State of New South Wales.

V: ARGUMENT

5. The Attorney-General for the State of Victoria intervenes to contend that:

(1) In its purported application to the plaintiff, s 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW) (**the Act**) does not have the effect of setting aside, varying or otherwise altering the effect of the sentence imposed on the plaintiff by the Supreme Court of New South Wales on 24 April 1997.

(2) Section 154A is otherwise a valid exercise of the power of the New South Wales Parliament and the restrictions on State legislative power which the plaintiff seeks to imply from Chapter III of the Commonwealth Constitution should be rejected.

Background and legislative context

6. On 20 June 1974, the plaintiff was convicted of various offences and sentenced to life imprisonment. The sentencing judge declined to fix a non-parole period and made

comments to the effect that the plaintiff should spend the rest of his life in gaol;[1] nevertheless, the plaintiff was eligible to be released on licence pursuant to s 463 of the *Crimes Act 1900* (NSW). Section 463 was repealed by the *Prisons (Serious Offenders Review Board) Amendment Act 1989* (NSW) and the plaintiff was no longer able to apply for release on licence under the *Crimes Act*.[2]

7. In 1992, the New South Wales Parliament inserted s 13A into the *Sentencing Act 1989* (NSW) which relevantly enables persons serving "an existing life sentence to apply to the Supreme Court for the determination of a minimum term and an additional term for the sentence" (s 13A(2)). The Supreme Court may decline to determine a minimum term and an additional term (s 13A(4)(b)).

8. Section 13A(6) provides that "[i]f the Supreme Court sets a minimum term and an additional term under [s 13A], the sentence comprising those terms replaces the original sentence of imprisonment for life". Section 13A(9) sets out various factors to which the Supreme Court is to have regard in setting a minimum term and an additional term. Such a determination may be appealed in the same way as a regular appeal against sentence (s 13A(12)).

9. In 1992, the plaintiff unsuccessfully sought a redetermination of his life sentence pursuant to s 13A.[3]

10. In 1997, the plaintiff reapplied to the Supreme Court for a redetermination of his life sentence and was successful before McInerney J.[4] His Honour fixed a minimum term of 30 years, commencing on 13 November 1973, and set an additional term for the remainder of the plaintiff's natural life.[5]

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1 Special Case Book (**SC**) 50.

2 It remains an open question whether the plaintiff was (and is) still eligible to be conditionally released by exercise of the Royal Prerogative of Mercy.

3 SC 65-118.

4 SC 120-180.

5 SC 179-180.

11. The judgment of McInerney J is in effect a re-exercise of the sentencing discretion.[6] This is confirmed by the terms of s 13A(6) which treat the judgment of McInerney J as replacing the original sentence of imprisonment for life.

12. Section 154A of the Act[7] commenced operation on 20 July 2001 and relevantly provides that, in relation to a "serious offender the subject of a non-release recommendation", the Parole Authority "may make an order directing the release of the offender on parole if, and only if" it is satisfied of the following criteria:

(1) the offender "is in imminent danger of dying, or is incapacitated to the extent that he or she no longer has the physical ability to do harm to any person" (s 154A(3)(a)(i));

(2) the offender "has demonstrated that he or she does not pose a risk to the community" (s 154A(3)(a)(ii)); and

(3) the Parole Authority "is further satisfied that, because of those circumstances, the making of such an order is justified" (s 154A(3)(b)).

13. The *Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act 2005* defines the term "non-release recommendation".[8] The plaintiff does not dispute that he is a "serious offender the subject of a non-release recommendation".[9]

14. The plaintiff's minimum term expired on 13 November 2003 and he is thus eligible to make an application for parole to the Parole Authority.[10]

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6 Albeit with a duty to have regard to factors that the original sentencing court was not required to take into account: s 13A(9).

7 SC 190.

8 SC 195.

9 Plaintiff's submissions, [5], [11].

10 Act, s 154A(1).

The plaintiff's argument

15. The plaintiff formulates two propositions:

(1) that, in a given polity, the judicial arm of government's "unique and essential function" is the "quelling of controversies" which are not to be re-opened, subject only to limited qualifications (such as the existence of an appellate system);[11]

(2) that the Constitution establishes an "integrated national court system".[12]

16. The plaintiff's argument then proceeds:

(1) Chapter III of the Constitution, and in particular s 73, contains implications to the effect that a State Parliament may not legislate in a way that would "set aside, vary or otherwise alter the effect of, any judgment or order of a State Supreme Court in a 'matter'",[13] as this would impermissibly detract from or interfere with the finality of a judgment (a "quelled controversy") made by "the integers of the unified judicial system" established by the Chapter;[14]

(2) section 154A is "a departure from the effect of what was ordered by McInerney J" and, by reason of the above, is an invalid exercise of State legislative power.[15]

17. It is convenient to address the last point first, since unless the plaintiff establishes a departure from or interference with the sentence imposed by McInerney J, the constitutional issues do not arise.

The Act does not interfere with the sentence imposed

18. Section 154A of the Act has limited the jurisdictional facts which will enliven the Parole Authority's power to direct the plaintiff to be released on parole. However, for

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11 Plaintiff's submissions, [31].

12 Plaintiff's submissions, [34].

13 Plaintiff's submissions, [40].

14 Plaintiff's submissions, [36].

15 Plaintiff's submissions, [55].

the reasons set out below, the Act in its terms or effect does not "vary, set aside or otherwise alter the effect" of the McInerney J judgment or sentence.

19. Rather, when properly construed, s 154A simply provides that, upon application,[16] the issue of parole is to be considered by the Parole Authority.[17] The criteria set out in s 154A(3) of the Act are conditions to be satisfied before the release of a certain class of prisoner. It should be noted that other offenders who do not come within the terms of s 154A are also subject to a regime whereby specified matters must be satisfied before they may be released by the Parole Authority.[18]

What constitutes interference: the respective roles of the judiciary and Executive in sentencing and the execution of sentences

20. McInerney J's judgment involved a re-exercise of the sentencing discretion. The imposition of a sentence is a judicial act.[19] However, following re-sentencing, the Supreme Court was *functus officio*. As is the case in respect of a sentence passed at the conclusion of a criminal trial:

> Subject to the appellate system established by the *Criminal Appeal Act*, the exercise of judicial power ... was spent upon the ... imposition of the [sentence upon the plaintiff]. The controversy ... had been quelled and, allowing for any applicable statutory regime, the responsibility for the future of the [plaintiff] passed to the executive branch of the government of the State.[20]

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16 Act, s 154A(2).

17 Act, s 154A(3).

18 The Parole Authority is subject to a general restriction under s 135 of the Act to the effect that the Parole Authority must not make an order for parole for an offender, unless it is satisfied, on the balance of probabilities, that the release of the offender is appropriate in the public interest. In s 135(2) a range of factors are referred to as matters to which the Parole Authority "must" have regard.

19 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ), citing *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434, 444 (Griffiths CJ); *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 608-609 (Deane J), 689 (Toohey J), 703-704 (Gaudron J); *Nicholas v The Queen* (1998) 193 CLR 173, 185-186 (Brennan CJ), 220-221 (McHugh J), 231 (Gummow J).

20 *Elliott v The Queen* (2007) 234 CLR 38, 41-42 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *R v O'Shea* (1982) 31 SASR 129, 145 (Wells J); *Nicholas v The Queen* (1998) 193 CLR 173, 187 (Brennan CJ); *Baker v The Queen* (2004) 223 CLR 513, 528 (McHugh, Gummow, Hayne and Heydon JJ).

21. Subsequent remission or early release has long been a matter for the Executive, subject to statute.[21] Sentences are necessarily passed against a legislative background which regulates the execution of the sentence, as well as administrative policies and practices that may from time to time affect the execution of the sentence.[22]

22. The sentencing judge may or may not hold various assumptions and expectations about how the offender's sentence will be served. If those assumptions and expectations turn out to be mistaken, that fact does not necessarily vitiate the sentence or otherwise render it liable to appeal.[23] However:

> it is normally not appropriate for a sentencing judge to seek to anticipate decisions that might fall to be made by other persons, and in other proceedings, *or under other legislation*, over the ensuing decades.[24]

23. Consistently with those observations, this Court stated in *PNJ v The Queen*[25] that

> [i]t may be greatly doubted that the punishment imposed on an offender is sufficiently described by identifying only the term which the court fixes as the least period of actual incarceration that must be served ... *for it is always necessary to recognise that an offender may be required to serve the whole of the head sentence that is imposed.*[26]

The nature and effect of McInerney J's judgment and sentence

24. The judgment of McInerney J is constituted relevantly of his fixing of a minimum term and an additional term for the plaintiff to serve. That judgment, or sentence, is still operative.

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21 *Elliott v The Queen* (2007) 234 CLR 38, 42, 44 [17] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *R v O'Shea* (1982) 31 SASR 129, 145 (Wells J).

22 *Elliott v The Queen* (2007) 234 CLR 38, 44; *Baker v The Queen* (2004) 223 CLR 513 at 520 (Gleeson CJ). For examples of Executive policy affecting the execution of sentences, refer to the practice by which prisoners in New South Wales were granted remissions as a result of the visits of the Queen to New South Wales in 1970, 1973 and 1977 at a rate of one day for each month of their total sentence up to a total of 120 days on each occasion: see New South Wales, Royal Commission into New South Wales Prisons (1978), 461. Regulations regarding remissions were formalised following the enactment of the *Prisons Act 1840* (NSW).

23 *Elliott v The Queen* (2007) 234 CLR 38.

24 *Jamieson v The Queen* (1992) 60 A Crim R 68, 80 (Gleeson CJ) (emphasis added).

25 (2009) 252 ALR 612.

26 (2009) 252 ALR 612, 615 [11] (the Court) (emphasis added).

25. The sentence passed in respect of the plaintiff has not been "extended or made heavier"[27] as a consequence of s 154A of the Act.

26. The plaintiff contends that, but for s 154A of the Act, and pursuant to s 143 of the Act, he would have a right to have the Parole Authority consider whether he should be released on parole.[28] The plaintiff frames this as a contingent right which was created by the judgment of McInerney J, namely, "a new entitlement in favour of the [plaintiff] (that is, eligibility to be released on parole on the expiration of his ... minimum term)".[29]

27. This submission confuses the plaintiff's right to have the Parole Authority consider his release within the statutory framework in place at the time with a supposed "entitlement" or "eligibility to be released". The right is found in the text of s 143 of the Act. In its former application to the plaintiff, it consisted of the right to have the Parole Authority consider whether the plaintiff should be released at least 60 days before the expiry of his minimum term[30] (or, in the event of certain circumstances, not less than 21 days before the expiry of his minimum term[31]). Section 143 did not give the plaintiff any other entitlement or eligibility for release.

28. Secondly, the plaintiff's right to have the Parole Authority consider his release was not sourced in the judgment. Rather it was a right (with a corresponding duty on the Parole Authority) conferred by statute (namely, s 143 of the Act) and which relied, as the factum for its operation, on that part of the judgment of McInerney J which fixed a minimum term. There is nothing in McInerney J's judgment or sentence that orders the Parole Authority to give the plaintiff consideration for release or that would found writs of mandamus to that effect.

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27 *Baker v The Queen* (2004) 223 CLR 513, 528 [29] (McHugh, Gummow, Hayne and Heydon JJ).

28 Plaintiff's submissions, [53].

29 Plaintiff's submissions, [56].

30 Act, s 143(1).

31 Act, s 143(2).

29. Thirdly, notwithstanding the enactment of s 154A, the Parole Authority is still under a duty to consider the release of the plaintiff on parole, provided that he, or someone on his behalf, submits an application for that purpose to the Secretary of the Parole Authority.[32] Should the plaintiff make such an application in the future he could, by way of mandamus, enforce the duty of the Parole Authority to consider it.[33]

30. Thus, nothing in s 154A has affected the sentence imposed by McInerney J as a perfected judicial order. The relevant rights enlivened by the judgment were only ever rights conferred by legislation which, in turn, was always susceptible to amendment and repeal.

The Chapter III implication

Existing implications do not support the plaintiff

31. In the alternative, if the legislation does "otherwise alter the effect" of[34] the judgment or sentence of McInerney J, s 154A of the Act is still a valid law of the State of New South Wales.

32. In the State context, the recognised constraints on legislative power that are derived from Chapter III of the Constitution are:

(1) the principle that the institutions known as the Supreme Courts of the States may not be abolished; and

(2) the principle identified in *Kable v Director of Public Prosecutions (NSW)*[35] as developed in subsequent authorities of the Court.

33. The State laws which this Court has held invalid for breach of the above restraints have all been laws which have purported to interfere with the functions or powers of State Supreme Courts, or which have otherwise interfered with the institutional integrity of those courts or "courts of a State" (within the meaning of ss 73 and 77 of the

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32 Act, s 154A(1)-(2).

33 It is unclear whether the document in SC 192 was created in response to an application.

34 The Act does not, on any view, "set aside or vary" the judgment or sentence of McInerney J.

35 (1996) 189 CLR 51.

Constitution) as fit repositories for the vesting of federal jurisdiction.[36] The Act in this matter does not purport to interfere with the functions or powers of the New South Wales Supreme Court or its judges. Section 154A does not have any application to the Supreme Court at all.

34. Nonetheless, the plaintiff urges the Court to draw a further implication from Chapter III, that:

> just as a State Parliament may not confer upon a State court a function which is inconsistent with its role as a repository of federal jurisdiction, so may that State Parliament not arrogate to itself any part of the judicial power for which Ch III provides, a power that must, given the terms of s 73, include the power to set aside, vary, or otherwise alter the effect of, any judgment or order of a State Supreme Court in a "matter", even one pronounced otherwise than in the exercise of federal jurisdiction.[37]

35. The acceptance of such a further implication would go a significant way towards entrenching a separation of powers doctrine at the State level, a doctrine which has been consistently held inapplicable to those polities.[38]

36. More fundamentally, the implication does not follow from the first proposition. The proposition that a State Parliament may not confer on a State court a function inconsistent with its role as a repository of federal jurisdiction is concerned with the institutional integrity of the relevant State courts so that they may perform their constitutionally prescribed roles.[39] An exercise of judicial power by a State Parliament would not necessarily, and without more, affect the institutional integrity of the Supreme Court or other State courts.

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36 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181.

37 Plaintiff's submissions, [40].

38 See e.g. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 66-68 (Brennan CJ), 80-81 (Dawson J), 92-3 (Toohey J), 103-104 (Gaudron J), 109-110 (McHugh J), 137 (Gummow J); *Wainohu v New South Wales* (2011) 243 CLR 181, 212 (French CJ and Kiefel J); *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 39 (Gaudron, Gummow and Hayne JJ); *Mann v Carnell* (1999) 201 CLR 1, 26 (McHugh J).

39 *Forge v Australian Securities & Investments Commissions* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ); J J Spigelman, "The centrality of jurisdictional error" (2010) 21 *Public Law Review* 77, 79.

Implication cannot be drawn from text and structure of Chapter III or s 73

37. Even if a State Parliament cannot exercise judicial power, it is a further step again to imply that it cannot affect the *result* of an exercise of judicial power. It is that step which the plaintiff must persuade the Court is "necessary or obvious"[40] or "logically or practically necessary for the preservation of the integrity of [the constitutional] structure".[41]

38. Section 73 of the Constitution, upon which the plaintiff substantially depends to draw the asserted implication,[42] vests the High Court with jurisdiction to "hear and determine appeals from all judgments, decrees, orders and sentences" of, relevantly, "any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council".

39. "Determining appeals" may involve a court setting aside or varying a judgment or orders made by the court below it in the judicial hierarchy. However, "determining appeals", as contemplated by s 73, does not embrace actions which, without setting aside or varying any judgment or orders of the court below, would "otherwise alter the effect" of that judgment or those orders, at least in the sense in which the plaintiff contends in relation to s 154A.

40. Put differently, the alteration of the criteria for the grant of parole is not something that could have been done, had there been any appeal from the judgment of McInerney J, in the course of "determining" that appeal. Those criteria were at all times matters for the Executive rather than the judicial branch, subjective to any applicable statutory regime.[43]

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40 *McGinty v Western Australia* (1996) 186 CLR 140, 184 (Dawson J).

41 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ).

42 Plaintiff's submissions, [32]-[38], [40], [42], [44].

43 *Elliott v The Queen* (2007) 234 CLR 38, 41-42 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), set out at paragraph 20 above.

41. Provided that legislation does not interfere with the *exercise* of judicial power, it is well established that the Commonwealth Parliament may alter the substantive rights upon which courts adjudicate, and may even do so while litigation is pending. In *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth*[44] the Court held:

> It is well established that Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution.
>
> "Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action."
>
> (*R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250). So, in *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495, esp at 503-504, 579-580, the validity of the *Wheat Industry Stabilization Act (No.2) 1946* (Cth) was upheld, notwithstanding that the Act validated an order for the acquisition of wheat, the validity of which was in issue in the proceedings.
>
> It is otherwise when the legislation in question interferes with the judicial process itself, rather than with the substantive rights which are at issue in the proceedings. *Liyanage v The Queen* [1967] 1 AC 259 was such a case where the legislation attempted to circumscribe the judicial process on the trial of particular prisoners charged with particular offences on a particular occasion and to affect the way in which judicial discretion as to sentence was to be exercised so as to enhance the punishment of those prisoners.[45]

42. As McHugh J stated in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,[46] again by reference to the Commonwealth Parliament:

> If it wishes to do so, Parliament may legislate to alter substantive rights that are in issue in pending litigation without usurping the judicial power of the Commonwealth.
>
> There is no automatic interference with the judicial process even when the motive or purpose of the Parliament in enacting the legislation is to circumvent or forestall the relevant proceedings.

43. If rights in issue in pending proceedings are able to be altered by legislation so as to circumvent or forestall those proceedings, without interfering with the judicial process itself, then it cannot be said to be a necessary implication from s 73 or Chapter III that

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44 (1986) 161 CLR 88.

45 (1986) 161 CLR 88, 96.

46 (1992) 176 CLR 1, 73, citing authorities including *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88, 96-97.

rights determined (or "created") in concluded proceedings, once the judicial process is complete and incapable of being interfered with, cannot be affected by later legislation. If anything, the position is *a fortiori* in the case of State Parliaments, in respect of which no separation of powers is mandated.

44. The plaintiff's case, at its highest, is that s 154A "otherwise alters the effect" of McInerney J's judgment or sentence. It cannot be said that it varies or sets aside that judgment or sentence. Whatever may be the limits (if any) on State Parliaments varying or setting aside judicial orders, that is not what s 154A does. The argument that s 154A, if it alters the effect of the judgment or sentence of McInerney J, does so contrary to the Constitution, finds no basis in the text or structure of s 73 or Chapter III.

Dated: 22 February 2012

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STEPHEN McLEISH
Solicitor General for the State of Victoria
T (03) 9225 6484
F (03) 9670 0273
mcleish@owendixon.com

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ELIZABETH BENNETT
Jban Rosanove Chambers
T: (03) 9225 6722
F: (03) 9225 8485
elizabeth.bennett@vicbar.com.au