IN THE HIGH COURT OF AUSTRALIA
PERTH OFFICE OF THE REGISTRY

No. S165 of 2011

BETWEEN:

KEVIN GARRY CRUMP

Plaintiff

10

and

STATE OF NEW SOUTH WALES

First Defendant

and

20 **NEW SOUTH WALES STATE PAROLE AUTHORITY**

Second Defendant

INTERVENER'S SUBMISSIONS
ATTORNEY GENERAL FOR WESTERN AUSTRALIA

Date of Document 22 February 2012
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Part I – Publication of submissions

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

Part II – Basis for intervention

2. The Attorney General for Western Australia intervenes in these proceedings pursuant to s 78A(1) of the *Judiciary Act 1903* (Cth) in support of the first defendant.

Part III – Why leave to intervene should be granted

3. Not applicable.

Part IV – The applicable constitutional provisions, statutes and regulations

4. The plaintiff's statement of applicable constitutional provisions and legislation and the first defendant's statement of additional provisions are accepted.

Part V – Statement of the intervener's argument

5. The Attorney General for Western Australia adopts the submissions of the first defendant and makes the following supplementary submissions.

   (a) Chapter III of the Commonwealth Constitution does not preclude either the State or Commonwealth Parliaments from amending legislation which creates rights, duties or liabilities by reference to judgments, orders, decrees or sentences of a court (**"court orders"**), or which provides for the manner in which court orders are to be executed.

   (b) A change to the criteria which a parole authority is to apply in considering whether an eligible prisoner should be released on parole (**"release criteria"**) does not set aside or vary the court order which fixes the head sentence and identifies the time during which parole authorities, but not the Crown exercising the Royal prerogative of mercy, are precluded from considering the release of the prisoner on parole.

   (c) Rather, a change to release criteria is an amendment to the legislation which operates on the factum of the court order and affects how the sentence imposed is to be executed in a manner which does not infringe Ch III of the Constitution.

Legislative power to amend legislation which operates by reference to court orders or affects their execution

6. Court orders may operate, or be given operation, in a number of different ways.

7. In some cases the court order will do no more than itself establish an immediate right, duty or liability. For example, where a court finds a defendant to be liable to pay damages to a plaintiff for the commission of a tort or breach of contract the court order, with which the original cause of action merges[1], fixes the liability of the defendant to pay the plaintiff the judgment sum. The court order establishes the present liability of the defendant to pay the plaintiff the judgment sum by reference to the past conduct of the defendant.

8. In other cases the court order may operate for the future as a factum by reference to which State and Commonwealth laws may create rights, duties and liabilities. For example:

   (a) Dangerous sexual offenders legislation, of the kind considered in *Fardon v Attorney-General (Qld)*[2], sets up a regime which may be applied to a person by reason of the person being subject to a court order: the prisoner is liable to be the subject of a detention order by reason of the fact that they have been convicted and sentenced for a particular offence[3].

   (b) A court may be authorised by child welfare legislation to make a protection order which places the child in State care. The child welfare legislation then creates rights, duties and liabilities by reference to the making of the protection order, such as vesting parental responsibility for the child in a State officer and providing for their placement and care[4].

   (c) A court exercising insolvency jurisdiction may make a sequestration order causing a debtor to become a bankrupt[5], with the *Bankruptcy Act 1966* (Cth) rather than the order itself providing for the legal consequences which follow from the making of the sequestration order.

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1 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 597 per Gibbs CJ, Mason and Aickin JJ.
2 (2004) 223 CLR 575.
3 See, for example, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 619 [108] per Gummow J, with whom Hayne J relevantly agreed at 647 [196].
4 See, for example, Part 4 of the *Children and Community Services Act 2004* (WA).
5 See the *Bankruptcy Act 1966* (Cth) s 43.

(d) A court may be authorised to make an order granting probate or letters of administration, to which orders the estate administration legislation may attach legal consequences[6].

9. It is open to Parliament to amend legislation which operates upon the factum of a court order to create rights, duties and liabilities and doing so does not involve a setting aside or variation of the court order. So, for example, Parliament may amend laws as to dangerous sexual offenders, the obligation and powers of child welfare authorities, insolvency or estate administration without infringing any limitation upon legislative power derived from Ch III of the Constitution.

10 10. Even where a court order, such as the establishment of a judgment debt of a fixed amount, itself establishes an immediate right, duty or liability, legislation may operate in relation to that court order or its execution. For example, the operation of the *Bankruptcy Act 1966* (Cth) may have the effect of releasing the judgment debtor from the debt or preventing execution of the court order[7].

11. Further, a State or Commonwealth law may operate to declare rights, duties and liabilities which have been the subject of curial proceedings and to provide for the variation of those rights, duties and liabilities.

(a) In *Re Macks; Ex parte Saint*[8] this Court held valid State provisions which created statutory rights by reference to the "ineffective judgments" of
20 federal courts and provided for the subsequent variation of those rights on appeal. As Gummow J noted, the legislation attached consequences to the fact of the court order as an act in the law[9].

(b) In *Haskins v The Commonwealth*[10] this Court held valid Commonwealth legislation which declared the rights and liabilities of persons punished by the Australian Military Court to be the same as if the punishment had been validly imposed by a court martial. In doing so, the Commonwealth legislation reversed much of the practical effect of the decision of this Court in *Lane v Morrison*[11], which declared Div 3 of Part 4 of the *Defence Force Discipline Act 1982* (Cth) to be invalid. The remedial
30 Commonwealth legislation did not affect this Court's declaration of invalidity. However, it did change the rights and liabilities of persons

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6 See, for example, Part II of the *Administration Act 1903* (WA).
7 See the *Bankruptcy Act 1966* (Cth) ss 58(3) and (4), 75 and 153.
8 (2000) 204 CLR 158.
9 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 232 [208] per Gummow J, referring to the judgment of Stephen J in *Re Humby; Ex parte Rooney* (1973) 129 CLR 231 at 243.
10 (2011) 85 ALJR 836.
11 (2009) 239 CLR 230.

which otherwise flowed as a practical consequence of this Court's declaration in *Lane v Morrison*.

12. A State law may also amend the manner in which a court order is to be executed, a task that is entrusted to the Executive[12].

13. It is, therefore, too broad a proposition to say that a State Parliament lacks power to alter the effect of a court order.[13] Even if it is accepted that a State Parliament cannot exercise the judicial power of the Commonwealth by varying or setting aside a judgment of a Supreme Court (orders which may be made by this Court in the exercise of its appellate jurisdiction), there are many other ways in which the practical or legal consequences of an extant judgment may be validly affected by State law.

The effect of legislation changing the release criteria

Legal effect of a sentence setting a minimum term

14. In considering whether a change to release criteria effects a variation or alteration of the original sentence, it is necessary to identify the legal effect of the sentence. In general, the imposition of a head sentence with a minimum term authorises the executive to detain a person in a prison for the maximum term, and operates to preclude parole authorities, but not the Crown exercising the Royal prerogative of mercy, from considering whether to release the person on parole until the end of the minimum term.

15. The authority to detain in prison ordinarily conferred by a sentence of imprisonment is an authority to detain, and a liability by the prisoner to detention, for the whole of the term of the head sentence. When imposed in the exercise of a discretionary judgement, it is the head sentence which identifies the period of imprisonment reflecting the gravity of the crime, generally without regard to the effect of a discretionary system of remission[14]. As this Court noted in *PNJ v The Queen*[15], it is always necessary to recognise that the offender may be required to serve the whole of the head sentence that is imposed.

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12 Most pertinently, in this case, how a sentence of imprisonment is carried out: see *Baker v The Queen* (2004) 223 CLR 513 at 520 [7] per Gleeson CJ; *Elliott v The Queen* (2007) 234 CLR 38 at 41 [5] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

13 Cf paragraph 2 of the Plaintiff's Submissions.

14 *Hoare v The Queen* (1989) 167 CLR 348 at 353-354 per Mason CJ, Deane, Dawson, Toohey and McHugh JJ. This is subject to statutory exceptions of the kind referred to in *Western Australia v BLM* (2009) 40 WAR 414.

15 (2009) 83 ALJR 384 at 387 [11] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

16. The function of fixing a minimum term has been expressed, in a variety of legislative contexts, as involving the determination of the minimum period for which, in the opinion of the sentencing judge and according to accepted principles of sentencing, the prisoner should be imprisoned[16]. The court order which fixes a minimum term does not create the power or duty of parole authorities to consider whether a prisoner should be released on parole. Rather the power or duty is created by sentence administration legislation which operates by reference to the order which the Court has made and empowers or requires the parole authority to consider the question of release only when the minimum term has expired.

17. Further, in jurisdictions such as New South Wales[17] and Western Australia[18] where the Royal prerogative of mercy has been preserved, any head sentence or minimum term is able to be affected by the Executive. The Royal prerogative may be exercised even when the minimum term has not expired and even if release criteria established by the applicable legislation have not been met. While the exercise of the Royal prerogative will not affect the beneficiary's conviction unless Parliament has provided for that possibility by legislation[19], it can operate to remove from the beneficiary some or all of the pains, penalties and punishments that may ensue from the conviction, whether by altering the sentence or by releasing the beneficiary from the obligation to serve the sentence in whole or in part in custody[20].

18. That common structure of parole legislation is reflected in the laws of New South Wales relating to parole in force both at the time McInerney J varied the plaintiff's sentence and now.

19. Since 1974, the plaintiff has been serving a sentence of penal servitude for life.

20. When McInerney J varied the plaintiff's sentence in 1997 pursuant to s 13A of the *Sentencing Act 1989* (NSW), the sentence of penal servitude for life was

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16 See *Bugmy v the Queen* (1990) 169 CLR 525 at 536 per Dawson, Toohey and Gaudron JJ; *Lowe v The Queen* (1984) 154 CLR 606 at 615 per Mason J; *Power v The Queen* (1974) 131 CLR 623 at 628-629 per Barwick CJ, Menzies, Stephen and Mason JJ; *Western Australia v BLM* (2009) 40 WAR 414 at 423-424 [14]-[15] per Wheeler and Pullin JJA, with whom Owen JA agreed at 420 [1].

17 See the *Sentencing Act 1989* (NSW) s 53 and the *Crimes (Administration of Sentences) Act 1999* (NSW) s 270.

18 See the *Offenders Probation and Parole Act 1963* (WA) s 5(3) and the *Sentencing Act 1995* (WA) s 137.

19 See *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at 350-351 [98] per Heydon J, with whom Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ agreed. See also the *Sentencing Act 1995* (WA), s 138.

20 See *R v Foster* [1985] QB 115 at 126-130 per Watkins and May LJJ and Butler-Sloss J; *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364 at 366-368 per Mason J and at 371-372 per Wilson J, with whom Dawson J agreed.

maintained even though the Court had the power to vary the sentence to one of imprisonment for a specified term[21].

21. The variation in the plaintiff's sentence only affected the time at which mercy might be extended to him by way of release on parole, otherwise than by an exercise of the Royal prerogative of mercy. His sentence remained one of penal servitude for life[22].

22. At the time he was originally sentenced, persons under a sentence of penal servitude for life could be released on licence pursuant to s 463 of the *Crimes Act 1900* (NSW) by the Executive, acting through the Governor. From 12 January 1990, this provision was repealed and in its place a detailed system for the making of parole orders was introduced which has been amended from time to time[23].

23. The system permits a person who is the subject of a mandatory sentence of penal servitude for life to apply to the Supreme Court for the sentence to be varied by setting a minimum term and an additional term of imprisonment, which can be for a specified term or the remainder of the person's natural life[24]. Unless and until a minimum term is set and has been served, the person cannot be released on parole[25].

24. The additional term is the period which justice according to law prescribes, in the estimation of the sentencing judge, for the particular offence committed by the particular offender. The legislation under which the plaintiff's sentence was varied provided that the minimum term is the minimum term of imprisonment that the person *must* serve for the offence for which the sentence was originally imposed[26]. The plaintiff was only eligible for parole if serving at least one sentence of imprisonment that had a minimum term[27]. At that time the plaintiff could not be released until all minimum terms had been served[28] and the duty of the second defendant to consider the question of parole only arose after the expiry of all minimum terms[29]. The New South Wales legislation then operated to make the setting of a minimum term a precondition to the power of the second

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21 See s 13A(4) of the *Sentencing Act 1989* (NSW) as in force at the time of the plaintiff's second application, which is reproduced in footnote 1 to the plaintiff's submissions.
22 Compare *Bugmy v The Queen* (1990) 169 CLR 525 at 536-537 per Dawson, Toohey and Gaudron JJ.
23 *Baker v The Queen* (2004) 223 CLR 513 at 528 [28] per McHugh, Gummow, Hayne and Heydon JJ.
24 At all relevant times, pursuant to s 13A of the *Sentencing Act 1989*.
25 *Sentencing Act 1989* (NSW) s 14(2)(a); *Crimes (Administration of Sentences) Act 1999* s 126.
26 *Sentencing Act 1989* (NSW) s 13A(4)(a)(i).
27 *Sentencing Act 1989* (NSW) s 14(2)(a).
28 *Sentencing Act 1989* (NSW) s 14.
29 *Sentencing Act 1989* (NSW) s 22C(1).

defendant to make a parole order and prevented the release of the plaintiff on parole until all minimum terms were served.

25. Given the purpose of setting a minimum term and the difficulties which attend predicting behaviour at a time many years into the future, a minimum term may be imposed notwithstanding that, at the time of setting the term, the available information does not engender much optimism for the offender's future[30]. A minimum term may therefore be set in circumstances where, at the time it is set, there appears to be no prospect that the offender will be suitable for release at the expiry of the minimum term. The practical effect of setting the minimum term is simply that thereafter the Executive, in this case acting through the second defendant, may, but of course need not, grant the offender parole[31] in the context of the information available and the statutory regime in place at a later time.

26. The effect of the information available and the statutory regime in place at that later time may well be that, upon considering the question of release on parole, it would not be open to the authority considering that question to release the plaintiff. Consequently, the plaintiff's submission[32] that at the expiry of his minimum term he "would, without having to satisfy any further requirements, have at the very least some prospect, however minimal, of being released on parole" should not be accepted.

27. It is important to note in this regard that when an offender is released on parole, the offender obtains a mercy. This has not been altered by the changes in the legislative regime governing release on parole in New South Wales, as the plurality explained in *Baker v The Queen*:

> "If the Executive exercised the power given by s 463, the offender obtained a mercy. 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. Whether the power to reduce the effect of a life sentence is given to a court (as the legislation now in question did) or is retained by the Executive, the original sentence passed on the offender could not be and was not extended or made heavier."[33]

28. Therefore at the time of the plaintiff's sentencing by McInerney J it was the sentence administration legislation rather than the sentence which created the second defendant's obligation to consider parole and defined the release criteria.

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30 *Bugmy v The Queen* (1990) 169 CLR 525 at 538 per Dawson, Toohey and Gaudron JJ.
31 *Bugmy v The Queen* (1990) 169 CLR 525 at 538 per Dawson, Toohey and Gaudron JJ.
32 Plaintiff's submissions [28].
33 (2004) 223 CLR 513 at 528 [29] per McHugh, Gummow, Hayne and Heydon JJ.

The specification of the minimum term in the sentence was a precondition to the existence of the relevant statutory power and duty. The sentence was not an indication that the plaintiff would or should be released at the end of the minimum term.

Effect of the change in the release criteria on the court order

29. When Parliament alters the release criteria which a parole authority is required to consider it does not affect the head sentence. Nor, so long as parole is not to be granted before the expiration of the minimum term, is the specification of the minimum term affected. Changing the release criteria does not affect the legal operation of the sentence, described above. It merely changes the statutory provisions which operate by reference to the factum of the court order.

30. The introduction of s 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW) (**"the CAS Act"**) did not alter the head sentence imposed on the plaintiff, which remained one of penal servitude for life. Nor did it affect the second defendant's duty to consider whether, having regard to the release criteria in force at the relevant time, the plaintiff should be released on parole. The fact that the plaintiff's prospects of release are diminished is a product of the change to the release criteria specified in the relevant legislation rather than any variation of the sentence imposed by McInerney J. It is but one example of the effect of changes in penal policy on prisoners of the kind referred to by Gleeson CJ in *Baker v The Queen*[34].

31. For the reasons set out above and for the reasons submitted by the first defendant[35], s 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW) (**"the CAS Act"**) does not operate directly upon the sentence of the Supreme Court as varied by McInerney J.

The change in the release criteria does not infringe Ch III of the Constitution

32. For the reasons submitted above and the reasons submitted by the first defendant[36], s 154A of the CAS Act does not offend against the principle in *Kable v Director of Public Prosecutions (NSW)*[37].

33. Nor are changes in legislation governing parole unusual. As Gleeson CJ observed in *Baker v The Queen*[38], custodial regimes which apply to prisoners already

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34 (2004) 223 CLR 513 at 520 [7].
35 First defendant's submissions [7]-[23].
36 First defendant's submissions [24]-[37].
37 (1996) 189 CLR 51.
38 (2004) 223 CLR 513 at 520 [7].

serving sentences are almost always affected in various ways by legislative, judicial, and administrative decision-making. As the schedule to these submissions demonstrates, the release criteria for parole in Western Australia have changed over time in ways which affected prisoners serving sentences imposed before the change to the release criteria – in some cases, adversely to their prospects of release on parole.

34. The effect of changes in the remission and parole regimes on the amount of time offenders spend in custody can also be observed by reference to the history of legislative and administrative measures affecting release on parole. As Wheeler and Pullin JJA (with whom Owen JA agreed) observed in the Western Australian context in *Western Australia v BLM*[39]:

> "In summary, the historical context of the Amendment Act is that for a very long time, by reason of a system of legislative and administrative measures, sometimes automatic and sometimes discretionary, the actual sentence likely to be served, at least by a prisoner who made some effort towards rehabilitation, was less – often very significantly less – than the actual sentence pronounced by the court. In Western Australia, for more than 30 years, because of a combination at different times of minimum sentences, remissions, parole, and discretionary prison leave regimes (the last of which it is unnecessary to discuss in these reasons) the actual time in custody spent by the majority of prisoners appears to have been between one-third and, at most, two-thirds of the sentence actually pronounced by the court."

35. Those executive and legislative measures do not infringe Ch III of the Constitution.

The appellate jurisdiction of this Court

36. In his submissions, the plaintiff contends that appeals only lie to this Court from decisions, relevantly, of a State Supreme Court involving the resolution of a "matter"[40] in the constitutional sense.

37. Whether this Court's appellate jurisdiction is so confined has not yet been settled, although it has attracted comment from members of this Court in a variety of contexts[41]. Resolution of the question will involve consideration of this Court's

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39 (2009) 40 WAR 414 at 424 [19].

40 Plaintiff's submissions [32].

41 See for example *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 612 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ and at 642 per McHugh J; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 142-143 per Gummow J; *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566 at 576 [10], 580 [25] per Gaudron, Gummow and Hayne JJ; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 38 [63] per Gaudron, Gummow and Hayne JJ; and *Momcilovic v The Queen* (2011) 85 ALJR 957 at 976 [6], 995-997 [83]-[89], 1000 [101] per French CJ, at 1006-1007 [134]-[139] per Gummow J, with whom Hayne J relevantly agreed at 1033 [280], and at 1093-1095 [582]-[592], 1096 [598] per Crennan and Kiefel JJ. See also the other authorities cited in the footnotes to this paragraph.

role as the means of ensuring the unity of Australian common law[42], the inconvenience of adopting an unduly narrow construction of s 73 of the Constitution[43] (which is an exhaustive statement this Court's appellate jurisdiction[44]) and the possibility that State legislation may establish an indirect procedure for obtaining an advisory opinion from this Court notwithstanding the absence of any actual "matter"[45].

38. It is unnecessary to determine the issue in this case, because the setting of a minimum term under s 13A of the *Sentencing Act 1989* involved the resolution of a "matter" in the constitutional sense[46]. Consequently, an appeal in relation to the setting of a minimum term would fall within this Court's appellate jurisdiction irrespective of whether that jurisdiction is confined to appeals from decisions involving the resolution of a "matter".

DATED the 22nd day of February 2012

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42 See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 574 [110] per Gummow and Hayne JJ.

43 See *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 243-244 per Mason CJ, at 283-285 per Deane, Gaudron and McHugh JJ and at 302 per Dawson J (with whom Toohey J agreed at 309); *Mellifont v Attorney General (Qld)* (1991) 173 CLR 289 at 303-305 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ and at 323-329 per Toohey J.

44 *Ruhani v Director of Police* (2005) 222 CLR 489 at 497 [3] per Gleeson CJ, at 530 [119] per Gummow and Hayne JJ and at 574 [288] per Callinan and Heydon JJ.

45 See *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 282 per Deane, Gaudron and McHugh JJ and at 301-302 per Dawson J (with whom Toohey J agreed at 309); and *Mellifont v Attorney General (Qld)* (1991) 173 CLR 289 at 305 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ and at 323-324 per Toohey J.

46 *Baker v The Queen* (2004) 223 CLR 513 at 529 [32]-[33], 534-535 [51] per McHugh, Gummow, Hayne and Heydon JJ.

SCHEDULE
WESTERN AUSTRALIAN LEGISLATION IN RELATION TO PAROLE ELIGIBILITY AND RELEASE ON PAROLE

Legislation governing parole

1. Parole was introduced in Western Australia by the *Offenders Probation and Parole Act 1963* (WA) (**"the OPP Act"**). The OPP Act dealt with both eligibility for parole and the criteria applicable to determining whether to release a prisoner who was eligible for parole (**"release criteria"**).

2. The OPP Act was amended on several occasions before being replaced by a suite of legislation including the *Sentencing Act 1995* (WA) (**"the 1995 Act"**) and the *Sentence Administration Act 1995* (WA) (**"the SA Act"**). The SA Act has since been replaced by the *Sentence Administration Act 2003* (WA) (**"the 2003 Act"**) and both the 1995 Act and the 2003 Act, which have each been subject to further amendment. However, the 1995 Act and the 2003 Act currently govern eligibility for parole and release criteria in Western Australia.

3. The effect of remission regimes on the time at which persons could be released on parole in Western Australia is conveniently set out in *Western Australia v BLM*[1]. In this schedule, reference is made to the most important provisions which have governed eligibility for parole and release criteria in Western Australia since 1963. Those provisions must be understood in the context of the system of remissions and legislative changes to that system to which the Western Australian Court of Appeal referred in *BLM*.

4. Those provisions must also be considered bearing in mind that Western Australian legislation providing for and regulating eligibility for parole and release criteria has consistently and expressly preserved the Royal prerogative of mercy[2].

Eligibility for parole

5. When the OPP Act commenced operation, eligibility for parole was not automatic. Only a prisoner in respect of whom a minimum term had been fixed was eligible for parole, which could be granted at the discretion of the newly established Parole Board[3].

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1 (2009) 40 WAR 414 at 422-426 [9]-[24] per Wheeler and Pullin JJA, with whom Owen JA agreed, and at 463-467 [190]-[207] per Buss JA, with whom Miller JA agreed.

2 OPP Act s 5(3); *Sentencing Act 1995* (WA), s 137.

3 OPP Act s 41.

6. In the case of most serving prisoners[4] at the commencement of the OPP Act, minimum terms were to be fixed by the Parole Board[5].

7. In the case of persons who were sentenced to imprisonment by a court after the commencement of the OPP Act, the court was required to fix a minimum term[6] unless:

   (a) the term of imprisonment was less than 12 months, in which case the court could but was not required to fix a minimum term[7];

   (b) the person was sentenced to imprisonment for life or ordered to be detained after completion of his or her sentence (whether as an habitual criminal or otherwise), in which case a minimum term could not be fixed[8]; or

   (c) the court considered that the nature of the offence and the antecedents of the convicted person rendered the fixing of a minimum term inappropriate, in which case the court was not required to fix a minimum term[9].

8. Pursuant to the *Offenders Probation and Parole Amendment Act 1983* (WA), courts were required in fixing minimum terms to take into account the remissions which a prisoner would have been entitled to if they had not been excluded by the OPP Act[10].

9. The *Offenders Probation and Parole Amendment Act (No 2) 1985* (WA) gave the courts greater discretion in fixing minimum terms for offenders sentenced after the legislation came into operation[11]. The court was authorised, but not required, to fix a minimum term for sentences of at least 12 months' imprisonment if the court considered that the nature of the offence or the antecedents of the offender or any of those things considered together rendered the fixing of a minimum term appropriate. For sentences of less than 12 months' imprisonment, the court could fix a minimum term if it considered

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4 Prisoners imprisoned for life, prisoners with less than 12 months to serve and prisoners who were to remain detained after completion of their sentence (whether as an habitual criminal or otherwise) could not have minimum terms set by the Parole Board: OPP Act s 47(1).
5 OPP Act ss 47-50.
6 OPP Act s 37(1).
7 OPP Act s 37(1).
8 OPP Act s 37(2)(b).
9 OPP Act s 37(2)(a).
10 OPP Act s 37A.
11 OPP Act s 37(7).

that there were special circumstances which justified doing so[12]. The effect of the legislation was to restrict the circumstances in which prisoners would be made eligible for parole.

10. The *Acts Amendment (Imprisonment and Parole) Act 1987* (WA) changed the system for determining eligibility for parole. After the commencement of the legislation a court sentencing a person to imprisonment (other than for an aggregate term of less than one year, a form of life imprisonment or subject to an order that the person be detained after completion of the sentence[13]) was permitted, but not required, to order that the person be eligible for parole if it considered that making such an order was appropriate[14]. In determining whether making such an order would be appropriate, the court was permitted to have regard to:

    (a) the nature of the offence;

    (b) the circumstances of the commission of the offence;

    (c) the antecedents of the convicted person;

    (d) circumstances which are relevant to the convicted person or which might, in the opinion of the court, be relevant to the convicted person at the time at which the convicted person would become eligible to be released from prison on parole; and

    (e) any other matter the court thought relevant[15].

11. If a person was made eligible for parole, the date upon which the person became eligible for parole was not fixed by the court but was determined by a statutory formula[16].

12. On the commencement of the 1995 Act and the SA Act, the OPP Act was replaced. For the most part, the provisions dealing with eligibility for parole were to the same effect as their counterparts in the OPP Act immediately before the OPP Act's repeal[17]. However, the 1995 Act imposed a duty on courts for the first time to fix minimum periods when imposing a form of life imprisonment. In the case of life imprisonment for murder, the minimum

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12 OPP Act s 37(1).
13 OPP Act s 37A(5) and (6).
14 OPP Act s 37A(1).
15 OPP Act s 37A(3).
16 OPP Act s 37A(2).
17 See the 1995 Act ss 89 and 93.

period was required to be at least 7 and no more than 14 years[18]. Life imprisonment for wilful murder required a minimum period of between 15 and 19 years[19]. The minimum period for strict security life imprisonment – which was only available for wilful murder – had to be fixed at between 20 or 30 years, although the court could also order that the offender never be paroled[20].

13. The *Sentencing Legislation Amendment and Repeal Act 2003* (WA) amended the provision of the 1995 Act authorising a court to make a person eligible for parole. Under the new provision, the court has discretion to make a person eligible for parole unless the term of imprisonment imposed is less than 12 months[21] but can decide not to do so if it considers that the person should not be eligible for parole because of at least 2 of the following 4 factors:

    (a) the offence is serious;

    (b) the offender has a significant criminal record;

    (c) the offender, when released by order from custody subject to conditions before the end of his or her sentence, did not comply with the order;

    (d) any other reason the court considers relevant[22].

14. The legislation also altered the statutory formula which determined when a prisoner would be eligible for release on parole[23]. However, the position of persons who had been sentenced to a term of imprisonment (other than a form of life imprisonment) with eligibility for parole before the legislation commenced has been preserved[24].

15. With the abolition of the distinction between wilful murder and murder, the distinction between strict security life imprisonment and life imprisonment has been abolished[25]. Persons convicted of murder are now liable (subject to certain irrelevant exceptions) to a mandatory penalty of life imprisonment[26]

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18 The 1995 Act s 90(1).
19 The 1995 Act s 90(2).
20 The 1995 Act s 91.
21 The 1995 Act s 89(2). The limitation on the power to order that a person be eligible for parole provided for by this subsection is more complicated but it is unnecessary for present purposes to address those complications.
22 The 1995 Act s 89.
23 The 1995 Act s 93.
24 *Sentencing Legislation Amendment and Repeal Act 2003* (WA) ss 22 and 29(2) and Sch 1 cl 5(2)(a).
25 Pursuant to the *Criminal Law Amendment (Homicide) Act 2008* (WA).
26 *Criminal Code* (WA) s 279(4) to (6).

and the court imposing that sentence must set a minimum period of at least 10 years or order that the offender never be released[27].

16. This remains the position in Western Australia in relation to parole eligibility.

Release criteria

Prisoners serving sentences of life imprisonment

17. At the commencement of the OPP Act, prisoners who were subject to life imprisonment could be released on parole by the Governor on the Parole Board's recommendation unless the sentence had been commuted from a sentence of death or the sentence had been imposed upon conviction for wilful murder or murder[28]. Those prisoners could only be released by an exercise of the Royal prerogative of mercy[29].

18. Initially, the Board was required to provide a report and recommendation about prisoners serving life sentences only on the request of the Minister[30]. However, the *Offenders Probation and Parole Amendment Act 1965* (WA) imposed a requirement that the Parole Board provide regular reports to the Minister about all prisoners serving life sentences[31].

19. Pursuant to the *Offenders Probation and Parole Amendment Act 1969* (WA), the Parole Board was empowered to release on parole for periods of up to 5 years persons serving life sentences for offences other than wilful murder and murder who had been released on parole by order of the Governor and had subsequently had that parole cancelled[32]. However, that power was removed by the *Offenders Probation and Parole Act Amendment Act 1977* (WA).

20. The *Acts Amendment (Abolition of Capital Punishment) Act 1984* (WA) abolished capital punishment for wilful murder and substituted the alternative penalties of strict security life imprisonment and life imprisonment. The Parole Board was required to provide regular reports to the Minister in relation to a prisoner serving a sentence of strict security life imprisonment[33].

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27 The 1995 Act s 90.
28 OPP Act s 42.
29 See also the *Criminal Code* (WA) s 705.
30 OPP Act s 34(2).
31 The first report was required 5 years into the prisoner's imprisonment unless the sentence was commuted from a death sentence, in which case the first report was required after 10 years. Subsequent reports were required every 5 years: OPP Act s 34(2)(ba).
32 OPP Act s 42(3).
33 OPP Act s 34(2)(ba)(iv). The first report was required 20 years into the sentence and thereafter every 3 years.

21. Pursuant to the *Offenders Probation and Parole Amendment Act 1985* (WA), the Parole Board's obligation to report to the Minister about prisoners who had been convicted of wilful murder after the abolition of capital punishment in 1984 and sentenced to life imprisonment rather than strict security life imprisonment was changed[34].

22. The Parole Board's reporting obligations to the Minister were changed again by the *Acts Amendment (Imprisonment and Parole) Act 1987* (WA). In addition to specifying the times when the Board was required to report to the Minister[35], the legislation required the Board to give express attention in its report to:

    (a) the nature and circumstances of the offence for which the sentence was imposed;

    (b) the degree of risk that the release of the prisoner appears to present to the community or to any individual in the community;

    (c) the period for which, and the extent to which, the prisoner should be supervised by a parole officer when on parole; and

    (d) such other matters as the Board thought fit,

    whenever the report recommended the release of a prisoner serving a sentence of strict security life imprisonment or life imprisonment[36].

23. The legislation also permitted the Governor to release such prisoners on parole after receiving the Board's report, save that a prisoner serving a sentence of strict security life imprisonment could not be released until after he or she had served at least 20 years of the sentence unless the Governor was of the opinion that special circumstances existed[37].

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34 OPP Act s 34(2)(ba)(v). The first report was required 10 years into the sentence and thereafter every 3 years.

35 The reporting times for prisoners serving sentences of strict security life imprisonment or life imprisonment for wilful murder imposed before the commencement of the legislation remained unchanged. For prisoners sentenced to life imprisonment for wilful murder after the commencement of the legislation, the first report was required 12 instead of 10 years into the sentence. For prisoners sentenced to life imprisonment for an offence other than wilful murder after the commencement of the legislation, the first report was required 7 instead of 5 years into the sentence. For all sentences of strict security life imprisonment or life imprisonment, subsequent reports were required every 3 years. The Board was also required to provide reports at the Minister's request and could provide a report at any other time in circumstances that appeared to the Board to be exceptional: OPP Act s 34.

36 OPP Act s 34(8).

37 OPP Act s 40D.

24. With the commencement of the 1995 Act and the SA Act, persons sentenced to a form of life imprisonment began to have minimum periods fixed at the time of sentencing. A prisoner serving a form of life imprisonment could not be released before the minimum period had been served[38]. Given the range of minimum periods which could be imposed, the legislation made it likely that persons sentenced to a form of life imprisonment after the commencement of the legislation would serve a longer period of imprisonment before they could be released on parole.

25. The legislation also required any person determining whether to release a prisoner on parole (whether the prisoner was serving a form of life sentence or not) to give paramount consideration to the protection and interest of the community[39]. Otherwise, the provisions relating to releasing persons serving a form of life sentence on parole were essentially the same as their predecessors in the OPP Act[40]. Transitional provisions preserved the position of persons sentenced before the commencement of the 1995 Act and the SA Act[41].

26. The SA Act was repealed by the *Sentencing Legislation Amendment and Repeal Act 2003* (WA) and in its place was enacted the 2003 Act, which applies to all sentences of life imprisonment whether passed before or after the legislation commenced operation[42]. However, the provisions of the 2003 Act are similar in their effect to the equivalent provisions of the SA Act[43], save that they did not identify the protection and interest of the community as a paramount consideration. That omission was corrected by the *Parole and Sentencing Legislation Amendment Act 2006* (WA), which requires persons performing functions under the 2003 Act to regard the safety of the community as the paramount consideration[44].

Prisoners serving other sentences

27. When the OPP Act commenced operation, the Parole Board was empowered to release prisoners who were not subject to life imprisonment at its discretion, save that:

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38 The 1995 Act s 96.
39 SA Act s 18.
40 See the SA Act ss 20, 23 to 24.
41 See the *Sentencing (Consequential Provisions) Act 1995* (WA) ss 86 and 87.
42 *Sentencing Legislation Amendment and Repeal Act 2003* (WA) ss 22 and 29(2) and Sch 1 cl 5(3).
43 The 2003 Act ss 18, 25 and, formerly, 26.
44 The 2003 Act s 5B.

(a) in the case of prisoners for whom a minimum term had been fixed, the minimum term must have expired[45];

(b) in the case of prisoners who had been detained as habitual criminals, they had been detained for at least two years after the expiry of their sentences[46];

(c) in the case of prisoners who had been detained after the expiry of their sentences for any other reason, the sentence must have expired and detention must have begun[47].

28. Pursuant to the *Offenders Probation and Parole Amendment Act 1964* (WA), the Parole Board was empowered to release a prisoner serving a term of less than 12 months after the prisoner had served at least half of the term[48].

29. Pursuant to the *Offenders Probation and Parole Amendment Act 1969* (WA), the Parole Board was empowered to release persons detained after the expiry of their sentences at an earlier stage[49].

30. From the commencement of the *Acts Amendment (Imprisonment and Parole) Act 1987* (WA), the Parole Board was ordinarily required to release prisoners who had been made eligible for parole under the amendments made by that legislation at the time that the statutory formula determined that they were eligible for release[50]. However, the Board had a discretion to refuse to release or delay the release of a prisoner on parole. If the prisoner was serving a "special term" (that is, a sentence of at least 5 years' imprisonment imposed in respect of any of a number of violent offences), the Board could exercise that discretion after having regard to any or all of:

(a) the nature and circumstances of the offence for which the sentence was imposed;

(b) the degree of risk that the release of the prisoner appears to present to the community or to any individual in the community;

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45 OPP Act s 41(1)(a).
46 OPP Act s 41(1)(b).
47 OPP Act s 41(1)(c) and (d).
48 OPP Act, s 47(3).
49 OPP Act s 41(1). The changes meant that a person detained as an habitual criminal could be released earlier after he or she had been detained for two years if the Governor so ordered. Additionally, if a person had been sentenced to detention after the expiry of a sentence for which a minimum term had been fixed, for the purpose of release on parole the period of detention began at the expiry of the minimum sentence and the person was no longer required to complete the head term of imprisonment before becoming eligible for release on parole.
50 OPP Act s 40A(2).

(c) the contents of a report made to it by the permanent head of the Department or other information concerning the prisoner that was brought to its attention[51].

31. If the prisoner was not serving a special term, the Board could only exercise that discretion if it considered there to be special circumstances justifying its doing so, after having had regard to the contents of a report made to it by the permanent head of the Department or other information concerning the prisoner that was brought to its attention[52].

32. In the case of prisoners subject to detention after the expiry of their sentence, the Board retained power to release them on parole if the order for detention was made before the commencement of the legislation. For orders made after that date, the Governor had the power to release them on parole after receiving a report from the Board. The time that had to be served before release remained the same[53].

33. As has been noted, with the introduction of the SA Act any person determining whether to release a prisoner on parole was required to give paramount consideration to the protection and interest of the community[54]. Otherwise, the provisions relating to releasing persons on parole were essentially the same as their predecessors in the OPP Act[55]. The only differences to note were that:

(a) sentences of 3 years or more in respect of certain violent offences now fell within the definition of a "special term"[56]; and

(b) the requirement for special circumstances before delaying or refusing parole extended to "special terms"[57].

34. Transitional provisions preserved the position of persons sentenced before the commencement of the 1995 Act and the SA Act[58]. However, persons who were made eligible for parole pursuant to s 37A of the OPP Act (as inserted by the *Acts Amendment (Imprisonment and Parole) Act 1987* (WA)) were

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51 OPP Act s 40B(2) to (4).
52 OPP Act s 40B(2) and (5).
53 OPP Act s 40C. The time for the Board to make reports on such prisoners was changed by the legislation so that the first report was required one or two years after detention commenced, depending on the circumstances, and thereafter every year: OPP Act s 34.
54 SA Act s 18.
55 See the SA Act ss 19, 21 and 26.
56 SA Act s 19(4).
57 SA Act s 26(3).
58 See the *Sentencing (Consequential Provisions) Act 1995* (WA) ss 82 to 85.

considered for release subject to the new requirement to give paramount consideration to the protection and interest of the community[59].

35. As has been noted above, the SA Act was repealed by the *Sentencing Legislation Amendment and Repeal Act 2003* (WA) and in its place was enacted the 2003 Act. The 2003 Act applied to all sentences whether passed before or after the legislation commenced operation where the offender was made eligible for parole[60].

36. Under the 2003 Act, the Board can (but is not required to) release a prisoner who is eligible for release on parole if, having regard to parole considerations[61], any report made by the CEO of the Department and any other information brought to its attention, the Board decides that it is appropriate to release the prisoner on parole[62]. There is no presumption that parole will be granted and no requirement for special circumstances before refusing or delaying release on parole. Further, since the commencement of the *Parole and Sentencing Legislation Amendment Act 2006* (WA), persons performing functions under the 2003 Act have been required to regard the safety of the community as the paramount consideration[63].

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59 *Sentencing (Consequential Provisions) Act 1995* (WA) s 84.

60 *Sentencing Legislation Amendment and Repeal Act 2003* (WA) ss 22 and 29(2) and Sch 1 cl 5(2)(b).

61 A wide range of considerations now referred to as release considerations and set out in the 2003 Act s 5A (formerly s 16).

62 The 2003 Act s 20.

63 The 2003 Act s 5B.