HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

CRAIG WILLIAM JOHN MINOGUE PLAINTIFF

AND

STATE OF VICTORIA DEFENDANT

Minogue v Victoria
[2019] HCA 31
11 September 2019
M162/2018

ORDER

The questions formally stated for the opinion of the Full Court should be answered as follows:

(a) *Is s 74AB of the* Corrections Act 1986 *(Vic) invalid?*

Answer: No.

(b) *Does the validity of s 74AAA of the* Corrections Act *arise in the circumstances of this case?*

Answer: No.

(c) *If the answer to question (b) is "yes", is s 74AAA of the* Corrections Act *invalid?*

Answer: Does not arise.

(d) *Who should pay the costs of the Special Case?*

Answer: The plaintiff.

Representation

C J Horan QC and A F Solomon-Bridge with R A Minson for the plaintiff (instructed by Darebin Community Legal Centre)

P J Hanks QC and A D Pound with S Zeleznikow for the defendant (instructed by Victorian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales, with J E Davidson for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor's Office (NSW))

C D Bleby SC, Solicitor-General for the State of South Australia, with E M G Crompton for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

J A Thomson SC, Solicitor-General for the State of Western Australia, with F B Seaward for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor's Office (WA))

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CATCHWORDS

Minogue v Victoria

Constitutional law – State Parliament – *Constitution* – Ch III – Where plaintiff convicted of murder of police officer – Where plaintiff sentenced to imprisonment for life with non-parole period – Where plaintiff's non-parole period expired – Where s 74AB of *Corrections Act 1986* (Vic) prevented making of parole order in respect of plaintiff unless Adult Parole Board satisfied plaintiff in imminent danger of dying or seriously incapacitated and does not have physical ability to harm any person, and does not pose risk to community – Where s 74AB identified plaintiff by name and applied only to plaintiff – Where plaintiff not in imminent danger of dying or seriously incapacitated – Where s 74AAA of *Corrections Act* imposed conditions for making parole order if person convicted of murder and victim police officer – Whether ss 74AB and 74AAA contrary to Ch III of *Constitution* and therefore invalid – Whether ss 74AB and 74AAA impermissibly legislatively resentenced plaintiff – Whether ss 74AB and 74AAA impose additional or separate punishment to that imposed by sentencing court – Whether s 74AB distinguishable from provision upheld in *Knight v Victoria* (2017) 261 CLR 306; [2017] HCA 29 – Whether *Knight* and *Crump v New South Wales* (2012) 247 CLR 1; [2012] HCA 20 should be reopened.

Words and phrases – "additional or separate punishment", "judicial power", "legislative punishment", "legislatively resentenced", "life imprisonment", "minimum term", "more punitive or burdensome to liberty", "non-parole period", "opportunity to be considered for release on parole", "parole", "severity of the punishment", "substantive operation and practical effect".

Constitution, Ch III.
Corrections Act 1986 (Vic), ss 74AAA, 74AB, 127A.

1 KIEFEL CJ, BELL, KEANE, NETTLE AND GORDON JJ. On 24 August 1988, the plaintiff was convicted of the murder of Angela Rose Taylor, a constable in the Victorian police force, and was sentenced by the Supreme Court of Victoria to imprisonment for life. The Court set a non-parole period of 28 years, during which term the plaintiff would not be eligible to be released on parole[1]. The plaintiff's non-parole period ended on 30 September 2016. On 3 October 2016, the plaintiff applied to the Adult Parole Board ("the Board") for parole. That application remains on foot and has not been determined.

2 On 14 December 2016, a new provision in the *Corrections Act 1986* (Vic) ("the Act"), s 74AAA, commenced operation[2]. As originally enacted, s 74AAA relevantly provided that the Board must not make a parole order under s 74 or s 78 of the Act in respect of a prisoner convicted and sentenced to a term of imprisonment with a non-parole period for the murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer, unless, among other things, the Board was satisfied that the prisoner was in imminent danger of dying, or was seriously incapacitated and, as a result, no longer had the physical ability to do harm to any person[3]. The plaintiff commenced proceedings in this Court seeking to challenge the constitutional validity of s 74AAA (as originally enacted) and, on 20 June 2018, this Court relevantly held (without deciding the constitutional issue) that s 74AAA of the Act (as then in force) did not apply to the plaintiff[4].

3 On 1 August 2018, the Act was further amended[5] to insert a new s 74AB and to substitute ss 74AAA and 127A. The new s 74AB applies specifically to

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1 *Penalties and Sentences Act 1985* (Vic), s 17(1) and (2). The "minimum term" referred to in that section is now described as the "non-parole period": see *Sentencing Act 1991* (Vic), s 3(1) definition of "non-parole period"; *Corrections Act 1986* (Vic), s 74(1); *Knight v Victoria* (2017) 261 CLR 306 at 316 [1]; [2017] HCA 29.

2 *Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* (Vic), s 3 read with s 2(1).

3 See *Minogue v Victoria* (2018) 92 ALJR 668 at 672-673 [7]-[9]; 356 ALR 363 at 366-367; [2018] HCA 27.

4 *Minogue* (2018) 92 ALJR 668; 356 ALR 363.

5 *Corrections Amendment (Parole) Act 2018* (Vic), ss 4-6 read with s 2.

the plaintiff; it sets out "[c]onditions for making a parole order for Craig Minogue". It provides:

> "(1) The Board must not make a parole order under section 74 or 78 in respect of the prisoner Craig Minogue unless an application for the order is made to the Board by or on behalf of the prisoner.
>
> (2) The application must be lodged with the secretary of the Board.
>
> (3) After considering the application, the Board may make an order under section 74 or 78 in respect of the prisoner Craig Minogue if, and only if, the Board −
>
> (a) is satisfied (on the basis of a report prepared by the Secretary to the Department) that the prisoner −
>
> (i) is in imminent danger of dying or is seriously incapacitated and, as a result, he no longer has the physical ability to do harm to any person; and
>
> (ii) has demonstrated that he does not pose a risk to the community; and
>
> (b) is further satisfied that, because of those circumstances, the making of the order is justified.
>
> (4) The **Charter of Human Rights and Responsibilities Act 2006** has no application to this section.
>
> (5) Without limiting subsection (4), section 31(7) of the **Charter of Human Rights and Responsibilities Act 2006** does not apply to this section.
>
> (6) In this section, a reference to the prisoner Craig Minogue is a reference to the Craig William Minogue who was sentenced by the Supreme Court on 24 August 1988 to life imprisonment for one count of murder."

4 Section 74AB applies to the plaintiff regardless of whether, before the commencement of that section, the plaintiff had become eligible for parole, or the plaintiff had taken any steps to ask the Board to grant the plaintiff parole, or the

Board had begun any consideration of whether the plaintiff should be granted parole[6].

5 On the other hand, the substituted s 74AAA, headed "Conditions for making parole order for prisoner who murdered police officer", is in general terms. It applies if a person has been convicted of murder and the victim was a police officer. The Board must be satisfied that, relevantly, the person intended to cause, or knew that it was probable that their conduct would cause, the death of, or really serious injury to, a police officer. Because it is not necessary to consider the validity of the substituted s 74AAA, its text need not be set out.

6 On 23 October 2018, the plaintiff commenced proceedings in this Court challenging the constitutional validity of s 74AB and, if it applied, s 74AAA on the ground that the provisions impermissibly legislatively resentenced the plaintiff and that that legislative resentencing was beyond the powers of the Victorian Parliament. Specifically, the plaintiff contended that s 74AB and, if it applied, s 74AAA are contrary to Ch III of the *Constitution* insofar as: first, the substantive operation and practical effect of the provisions are to impose an additional or separate punishment to the punishment imposed by the Supreme Court at the time of sentencing by extending the non-parole period or by increasing the severity of the plaintiff's punishment; second, the provisions constitute cruel, inhuman or degrading treatment or punishment contrary to Art 10 of the *Bill of Rights 1688*[7]; or third, the provisions are inconsistent with the constitutional assumption of the rule of law[8]. The defendant, the State of Victoria, contended that s 74AB is valid and does not constitute legislative punishment, and that the question of the validity of s 74AAA did not arise in this case. The Attorneys-General for New South Wales, South Australia and Western Australia intervened in support of the defendant[9].

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6 *Corrections Act*, s 127A(2)(a).

7 See *Imperial Acts Application Act 1980* (Vic), ss 3 and 8.

8 A fourth argument, regarding s 118 of the *Constitution*, was not pressed at the hearing of this matter.

9 The International Commission of Jurists (Victoria) applied for and was refused leave to intervene as amicus curiae.

7 Four questions were stated for the opinion of the Court:

"(a) Is s 74AB of the Act invalid?

(b) Does the validity of s 74AAA arise in the circumstances of this case?

(c) If the answer to question (b) is 'yes', is s 74AAA invalid?

(d) Who should pay the costs of the Special Case?"

8 The questions should be answered:

(a) No.

(b) No.

(c) Does not arise.

(d) The plaintiff.

9 Section 74AB is relevantly indistinguishable from the provision upheld by this Court in *Knight v Victoria*[10]. In *Knight*, the Court refused to reopen and overturn its decision in *Crump v New South Wales*[11]. The decisions in *Knight* and *Crump* compel the conclusion that s 74AB does not alter the plaintiff's sentence, or impose additional or separate punishment on the plaintiff beyond the punishment imposed by the Supreme Court at the time of sentencing, and does not involve the exercise of judicial power. Section 74AB does no more than alter the conditions to be met before the plaintiff can be released on parole[12]. And, contrary to the plaintiff's alternative submissions, neither *Crump* nor *Knight* should now be reopened. As neither the substantive operation nor the practical effect of s 74AB is to impose punishment on the plaintiff, it is unnecessary to consider the plaintiff's second and third contentions.

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10 (2017) 261 CLR 306.

11 (2012) 247 CLR 1; [2012] HCA 20.

12 *Crump* (2012) 247 CLR 1 at 29 [72]; see also at 19 [35], 26-27 [60], 29-30 [74].

Operation and effect of s 74AB − no legislative punishment

10 Section 74AB is in substantively identical terms to the provision upheld in *Knight*[13]. The principal difference is that s 74AB refers to the plaintiff (rather than Mr Knight).

11 Section 74AB is directed to the Board. It restricts the circumstances in which the Board may make a parole order under s 74 or s 78 of the Act in respect of the plaintiff. First, the section prevents the Board from making an order granting parole unless the plaintiff has lodged an application for parole with the secretary of the Board[14]. Second, it provides that the Board "may" order that the plaintiff be released on parole "if, and only if" the Board is satisfied, among other things, that the plaintiff is in imminent danger of dying or is seriously incapacitated and that, as a result, he no longer has the physical ability to do harm to any person[15]. The plaintiff is not at present in imminent danger of dying; nor is he seriously incapacitated.

12 In *Knight*, the Court unanimously concluded that the relevant provision did not interfere with the sentence imposed on Mr Knight in a manner that was contrary to Ch III of the *Constitution*[16] and did not, in its "legal form [or] in its substantial practical operation", interfere with, set aside, alter or vary the sentence imposed by the Supreme Court[17].

13 In this proceeding, the plaintiff sought to build on the undisputed proposition that the imposition of punishment, or punitive treatment, or additional punishment or punitive treatment, as a consequence of criminal guilt is an exclusively judicial power or function[18]. The plaintiff contended that,

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13 (2017) 261 CLR 306 at 320-321 [18]. See also *Corrections Act*, s 74AA.

14 *Corrections Act*, s 74AB(1) and (2).

15 *Corrections Act*, s 74AB(3).

16 (2017) 261 CLR 306 at 317 [5], 322 [23], 326 [38] (question (a) of the special case).

17 *Knight* (2017) 261 CLR 306 at 317 [6]; see also at 323 [25]. See also *Crump* (2012) 247 CLR 1 at 27 [60].

18 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27; [1992] HCA 64; *Crump* (2012) 247 CLR 1 at 16 [27], 20-21 [41]-[42].

notwithstanding the decision in *Knight*, the substantive operation and practical effect of s 74AB were impermissibly to legislatively resentence the plaintiff in two respects. First, the plaintiff contended that the substantive operation and practical effect of s 74AB are to *extend the non-parole period* by rendering him ineligible for parole for an indefinite period beyond the non-parole period imposed by the Supreme Court and, thus, to impose an additional or separate punishment to the punishment imposed by the Supreme Court at the time of sentencing. Second, the plaintiff contended that s 74AB *increases the severity* of the plaintiff's punishment by causing the plaintiff to lose an opportunity to be released on parole during that period. Section 74AB does not do these things. The plaintiff's contentions are contrary to several long-standing propositions.

14 Since at least the 1970s it has been recognised that there is a distinction between a judge exercising judicial power in sentencing, and the executive determining whether a person, still serving a sentence but eligible for release on parole, should be released on parole[19]. Once a person is sentenced, the exercise of judicial power is spent and the responsibility for the future release of the person while still under sentence passes to the executive branch of the government of the State[20].

15 Here, the plaintiff was sentenced to imprisonment for life. The Court set a non-parole period of 28 years[21]. Upon the passing of that sentence, judicial power was exhausted and the responsibility for the future of the plaintiff passed to the executive. That the responsibility for a prisoner's future passes to, and rests with, the executive is because a prisoner's eligibility for release on parole is not part of the sentencing or resentencing determination made by a court, but, rather, is a consequence of a determination made under the statutory

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19 *Power v The Queen* (1974) 131 CLR 623 at 627; [1974] HCA 26; *Bugmy v The Queen* (1990) 169 CLR 525 at 534, 536; [1990] HCA 18; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 471-472, 476, 490-491; [1992] HCA 29; *Baker v The Queen* (2004) 223 CLR 513 at 528 [29]; [2004] HCA 45; *Elliott v The Queen* (2007) 234 CLR 38 at 41-42 [5]; [2007] HCA 51; *Crump* (2012) 247 CLR 1 at 16-17 [27]-[28], 20-21 [41]-[42]; *Knight* (2017) 261 CLR 306 at 323 [28].

20 *Baker* (2004) 223 CLR 513 at 528 [29]; *Crump* (2012) 247 CLR 1 at 16-17 [28], 20-21 [41], 26 [58], quoting *Elliott* (2007) 234 CLR 38 at 41-42 [5].

21 Under *Penalties and Sentences Act 1985*, s 17 (as then in force).

scheme for release on parole then in place[22]. As was said in *Crump*, "[a]s a matter neither of form nor substance did the sentencing determination [of a non-parole period] create any right or entitlement in the plaintiff to his release on parole"[23].

16 In the case of the plaintiff, at all times, there remained only one sentence[24] − imprisonment for life. The fixing of the non-parole period of 28 years said nothing about whether the plaintiff would be released on parole at the end of that non-parole period[25]. It left his life sentence unaffected as a judicial assessment of the gravity of the offence committed[26]. Indeed, the plaintiff has no right to be released on parole and may be required to serve the whole of the head sentence[27]. At best, the non-parole period 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

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22 *Crump* (2012) 247 CLR 1 at 12 [14], 20 [37], quoting *R v Shrestha* (1991) 173 CLR 48 at 72-73; [1991] HCA 26. See also *Knight* (2017) 261 CLR 306 at 323 [28].

23 (2012) 247 CLR 1 at 26 [60]; see also at 29 [73]. See also *Knight* (2017) 261 CLR 306 at 323 [27]; *Minogue* (2018) 92 ALJR 668 at 674 [17]-[18], 686 [104]; 356 ALR 363 at 369, 385.

24 *Power* (1974) 131 CLR 623 at 628-629; *Lowe v The Queen* (1984) 154 CLR 606 at 615; [1984] HCA 46; *Crump* (2012) 247 CLR 1 at 17 [28].

25 *Knight* (2017) 261 CLR 306 at 323 [27].

26 *Crump* (2012) 247 CLR 1 at 17 [28], quoting *Lowe* (1984) 154 CLR 606 at 615; see also at 616, 624.

27 *PNJ v The Queen* (2009) 83 ALJR 384 at 387 [11]; 252 ALR 612 at 615; [2009] HCA 6; *Minogue* (2018) 92 ALJR 668 at 674 [17]; 356 ALR 363 at 369.

28 See *Bugmy* (1990) 169 CLR 525 at 531, 536; *Shrestha* (1991) 173 CLR 48 at 69.

period does no more than provide a "factum by reference to which the parole system" in existence at any one time will operate[29].

17 Moreover, the power to release a prisoner on parole *after* the expiry of the non-parole period is a matter for the executive, subject to the statutory scheme and administrative policies applicable to the exercise by the Board of the executive function of determining whether to release the prisoner on parole. No less importantly, the legislative scheme, as well as practice and policies, regarding the parole system may validly change from time to time[30].

18 And that is what has occurred here. The changes made by s 74AB are legislative amendments to the parole system to prevent the Board from ordering that the plaintiff be released on parole unless satisfied, among other things, that the plaintiff is in imminent danger of dying or is seriously incapacitated and that, as a result, he no longer has the physical ability to do harm to any person. The plaintiff's non-parole period has expired and, thus, contrary to the plaintiff's submissions, he remains eligible for parole even though the circumstances in which parole may be granted by the Board have been severely constrained.

19 As this Court said in *Crump* and in *Knight*, legislative amendments to the parole system that impose "strict limiting conditions upon the exercise of the executive power to release" a prisoner, like those in s 74AB, "may be said to have altered a statutory consequence of the sentence" but such amendments do not impeach, set aside, alter or vary the legal effect of the sentence under which a prisoner suffers deprivation of liberty[31]. As the Court said in *Knight* in relation to the substantively identical provision to s 74AB, "[b]y making it more difficult for [the plaintiff] to obtain a parole order after the expiration of the minimum term, [the section] does nothing to contradict the minimum term that was fixed"[32].

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29 *Crump* (2012) 247 CLR 1 at 26 [60]; *Minogue* (2018) 92 ALJR 668 at 674 [17]; 356 ALR 363 at 369. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 610 [73], 619 [108]; [2004] HCA 46.

30 *Crump* (2012) 247 CLR 1 at 17 [28], 19 [36], 26 [59], 28-29 [71]-[72]. See also *Baker* (2004) 223 CLR 513 at 520 [7]; *Minogue* (2018) 92 ALJR 668 at 675 [20], 687 [107]; 356 ALR 363 at 369, 386.

31 *Crump* (2012) 247 CLR 1 at 19 [35]; see also at 19 [36], 26-27 [60], 29 [72], [74]; *Knight* (2017) 261 CLR 306 at 323-324 [28]-[29].

32 (2017) 261 CLR 306 at 323-324 [29].

20 The plaintiff's contention that s 74AB constitutes the imposition of "additional punishment" and thus a "separate exercise" of *judicial power* by the State Parliament is contrary to each of the foregoing premises. Section 74AB does not alter or contradict the plaintiff's non-parole period. It also does not extend, or add to, that non-parole period. The non-parole period remained 28 years.

21 Further, s 74AB did not make the plaintiff's sentence of life imprisonment "more punitive or burdensome to liberty"[33]. A sentence of life imprisonment is the maximum penalty that can be imposed in Victoria[34]. Where a non-parole period is imposed, it forms part of that overall sentence[35]. Whether a prisoner serves the rest of that sentence in prison or at large on parole, once a non-parole period has expired, is a matter for the executive. The plaintiff retains his ability to make an application for parole[36]. But he has no right to be released on parole[37]. And while the plaintiff might have hoped that the previous statutory regime would still be in force when the non-parole period expired, he had no right or entitlement that that regime should continue to apply to him[38]. The plaintiff has not lost any opportunity to be considered for release on parole − he is still eligible to be granted parole, by reason of the expiration of the non-parole period, but the circumstances in which parole may be granted by the executive have been severely constrained. His punishment is no more severe; it remains a sentence of life imprisonment.

22 Thus, s 74AB did not replace a judicial judgment with a legislative judgment[39] and neither the enactment, nor the substantive operation and practical

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33 *Baker* (2004) 223 CLR 513 at 528 [29], quoted in *Knight* (2017) 261 CLR 306 at 324 [29]. cf *Lowe* (1984) 154 CLR 606 at 625; *Olsen v Sims* (2010) 28 NTLR 116 at 131 [55].

34 See *Sentencing Act 1991*, s 109(1).

35 See *Penalties and Sentences Act 1985*, s 17(1); *Sentencing Act 1991*, s 11(1).

36 See *Corrections Act*, s 74AB(1).

37 See [15] above.

38 *Crump* (2012) 247 CLR 1 at 28-29 [71].

39 See *Crump* (2012) 247 CLR 1 at 20-21 [41] and *Knight* (2017) 261 CLR 306 at 323-324 [29], both citing *Baker* (2004) 223 CLR 513 at 528 [29].

effect, of s 74AB was a separate exercise of judicial power. Section 74AB is valid and is not contrary to Ch III of the *Constitution*.

23 The fact that the restrictions in s 74AB apply only to a single named prisoner, as in *Knight*[40], does not alter those conclusions. Of course, "[t]here are circumstances in which the party-specific nature of legislation can be indicative of the tendency of that legislation to interfere with an exercise of judicial power"[41] but, like the position in *Knight*, this is not one of them.

Crump and *Knight* should not be reopened

24 Contrary to the plaintiff's alternative submissions, the decisions in *Crump* and *Knight* should not be reopened[42]. As has been seen, *Crump* and *Knight* rested on principles "carefully worked out in a significant succession of cases"[43]. There were no material "difference[s] between the reasons of the justices constituting the majority"[44] in *Crump*, and in *Knight* the Court delivered a unanimous judgment which declined to reopen and overrule *Crump*. Those decisions reflect that it is generally legislatively competent for State Parliaments to make "special, and different, provision"[45] for exceptional cases of

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40 (2017) 261 CLR 306 at 320-321 [18], 323 [25]. See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 64, 121, 125; [1996] HCA 24; *Fardon* (2004) 223 CLR 575 at 590 [13]-[14], 592 [19].

41 *Knight* (2017) 261 CLR 306 at 323 [26].

42 See generally *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599, 602, 620; [1977] HCA 60; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439; [1989] HCA 5; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352-353 [70]; [2009] HCA 2; *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1 at 19 [28]; [2016] HCA 16.

43 *John* (1989) 166 CLR 417 at 438.

44 *John* (1989) 166 CLR 417 at 438.

45 *Baker* (2004) 223 CLR 513 at 521 [8].

prisoners. And the decisions have since been "independently acted on in a manner which militate[s] against reconsideration"[46].

Other grounds of alleged invalidity of s 74AB

25 As s 74AB does not, either in its substantive operation or its practical effect, impose additional or separate punishment on the plaintiff beyond the punishment imposed by the Supreme Court at the time of sentencing, the plaintiff's further contentions, that s 74AB is invalid because it imposes cruel, inhuman or degrading punishment contrary to Art 10 of the *Bill of Rights* or because it is inconsistent with the constitutional assumption of the rule of law, fall away.

Alleged invalidity of s 74AAA

26 As the plaintiff ultimately accepted, if s 74AB is valid (as it is), there is no need or scope for the operation of s 74AAA and in his case it is therefore unnecessary to consider its validity.

Questions and answers

27 The questions formally stated for the opinion of the Full Court should be answered as follows:

(a) Is s 74AB of the *Corrections Act 1986* (Vic) invalid?

Answer: No.

(b) Does the validity of s 74AAA of the *Corrections Act* arise in the circumstances of this case?

Answer: No.

(c) If the answer to question (b) is "yes", is s 74AAA of the *Corrections Act* invalid?

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46 *John* (1989) 166 CLR 417 at 438-439. See, eg, *Sentence Administration Amendment (Multiple Murderers) Act 2018* (WA); Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 November 2018 at 7868, 7873.

Answer: Does not arise.

(d) Who should pay the costs of the Special Case?

Answer: The plaintiff.

28 GAGELER J. Dr Minogue acknowledges that s 74AB of the *Corrections Act 1986* (Vic) is relevantly indistinguishable from the provision upheld in *Knight v Victoria*[47]. He puts an argument against the validity of s 74AB which, he says, was not put and considered in *Knight* and is therefore left open by the holding in *Knight*.

29 Dr Minogue's argument, as I understand it, starts with the proposition that s 74AB has the purpose and practical effect of subjecting him to a life without meaningful prospect of parole. That treatment, he argues, amounts to legislative infliction of punishment as a consequence of criminal guilt separate from and additional to that imposed by the Supreme Court of Victoria at the time of sentencing and to "cruel and unusual punishments" within the meaning of Art 10 of the *Bill of Rights 1688*. Either characterisation, he goes on to argue, is enough to take s 74AB beyond the legislative capacity of the Parliament of Victoria.

30 For my own part, I do not think that it can be gainsaid that s 74AB has the purpose and practical effect of subjecting Dr Minogue to a life without meaningful prospect of parole. Consistently with what I said in *Minogue v Victoria*[48], I accept that he is accordingly "treated or punished in a cruel, inhuman or degrading way" and, as a person "deprived of liberty", is not "treated with humanity and with respect for the inherent dignity of the human person" within the meaning of ss 10(b) and 22(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

31 To accept that s 74AB has the purpose and practical effect of subjecting Dr Minogue to a life without meaningful prospect of parole, however, is short of accepting that Dr Minogue's treatment by s 74AB amounts to "punishment" in the one sense in which that term might arguably have present constitutional significance – as connoting a legislative exercise of judicial power[49]. Deprivation of liberty consequent upon a determination of criminal guilt is, without more, an exercise of judicial power. "Punishment", in the generic sense of State infliction of involuntary hardship or detriment, is not[50].

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47 (2017) 261 CLR 306; [2017] HCA 29.

48 (2018) 92 ALJR 668 at 682 [72], 683 [79]; 356 ALR 363 at 379, 380; [2018] HCA 27.

49 *Duncan v New South Wales* (2015) 255 CLR 388 at 405 [31], 408 [43], 410 [51]; [2015] HCA 13. See Carney, "The exercise of judicial power by State Parliaments" (2017) 44 *Australian Bar Review* 204 at 207-211.

50 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12 [17]; [2004] HCA 49.

32 The explanation in *Knight*[51] and in *Crump v New South Wales*[52] of the distinction between the judicial power exercised when sentencing an offender and the executive power exercised if and when determining whether to release a prisoner on parole denies to s 74AB the character of a law that interferes with a prior exercise of judicial power. The effect of the explanation is that Dr Minogue was and continues to be deprived of his liberty by force of the life sentence imposed on him by the Supreme Court and that the legislative removal of a meaningful prospect of release on parole does not render the life sentence more restrictive of his liberty or otherwise impose greater punishment for the offence of which he was convicted.

33 The same explanation denies to s 74AB the character of a law that is itself an exercise of judicial power. Although not put in either of those cases, Dr Minogue's argument is foreclosed by the reasoning in both of them.

34 I agree with Kiefel CJ, Bell, Keane, Nettle and Gordon JJ that *Knight* and *Crump* should not be reopened, and I agree with their answers to the questions posed by the parties in the special case.

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51 (2017) 261 CLR 306 at 323-324 [26]-[29].

52 (2012) 247 CLR 1 at 16-17 [28], 26-27 [60]; [2012] HCA 20.

35 EDELMAN J. The facts and background of this special case are set out in the joint judgment of Kiefel CJ, Bell, Keane, Nettle and Gordon JJ, with which I generally agree.

The judicial power of sentencing

36 The sentencing of offenders, including the fixing of a non-parole period, has been said to be "as clear an example of the exercise of judicial power as is possible"[53]. Common characteristics of the exercise of judicial power in sentencing an offender include: (i) following a hearing that affords natural justice, (ii) the exercise of authority over a particular person, (iii) by reference to a past criminal act, and (iv) for the purposes of punishment. The boundaries of each of these characteristics are elastic and no single characteristic is a necessary or sufficient element of judicial power.

37 The plaintiff was sentenced in circumstances in which the relevant legislation required the court, unless it considered it inappropriate, to fix "as part of the sentence"[54] a minimum term during which an offender was not eligible to be released on parole. It is well established that the fixing of a non-parole period is "an integral part"[55] of the process of sentencing offenders. It is also well established that a non-parole period is "part of"[56] or a "component of"[57] the sentence imposed upon an offender. It is "undoubtedly part of the punishment imposed"[58].

38 As the joint judgment explains, in contrast with the judicial power of sentencing, the power to determine whether a person should be released on

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53 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 470; [1992] HCA 29. See also *Crump v New South Wales* (2012) 247 CLR 1 at 16 [27]; [2012] HCA 20.

54 *Penalties and Sentences Act 1985* (Vic), s 17(1), (2). See now *Sentencing Act 1991* (Vic), s 11(1).

55 *R v Shrestha* (1991) 173 CLR 48 at 61; [1991] HCA 26; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 491.

56 *R v Shrestha* (1991) 173 CLR 48 at 60; see also at 69; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 465; *Knight v Victoria* (2017) 261 CLR 306 at 323 [27]; [2017] HCA 29.

57 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 491; *Postiglione v The Queen* (1997) 189 CLR 295 at 302; [1997] HCA 26.

58 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 471. See also *PNJ v The Queen* (2009) 83 ALJR 384 at 387 [11]; 252 ALR 612 at 615; [2009] HCA 6.

parole is an executive power. By "providing the prisoner a basis for hope of earlier release"[59], parole has a rehabilitative purpose. Nevertheless, there "is but one sentence, that imposed by the trial judge, which cannot be altered by the paroling authority"[60].

Legislative exercise of judicial power

39 Underlying many of the plaintiff's submissions was an assumption which, stated at its narrowest, is as follows: it is an impermissible "legislative exercise of judicial power"[61] for a State Parliament to enact a law which has the purpose of punishing a person by altering the person's minimum period of non-parole. Ultimately, it is unnecessary to consider whether, or when, an exercise of judicial power by the legislature will be invalid. The fundamental reason why the plaintiff's submissions fail is that their premise, that the enactment of s 74AB of the *Corrections Act 1986* (Vic) is an exercise of judicial power, is incorrect.

40 Even on the plaintiff's assumption that there is a zone in which the exercise of judicial power by the legislature is invalid, a written law will not be an exercise of judicial power merely because it has the practical operation or effect, or practical "consequence"[62], of altering a person's minimum period of non-parole. A law that amends the conditions required for a grant of parole by the executive might have the practical effect of altering a person's minimum period of non-parole but, without more, it is not a law targeted at a particular person for a particular criminal act. And it is not a law imposed for the purposes of punishment for that act: "Legislative detriment cannot be equated with legislative punishment."[63] Hence, s 74AB of the *Corrections Act* is not an exercise of judicial power merely because it may be that, as the Statement of Compatibility to the *Corrections Amendment (Parole) Bill 2018* (Vic) accepted to be arguable, "the practical effect of these reforms is equivalent to replacing a

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59 *Bugmy v The Queen* (1990) 169 CLR 525 at 536; [1990] HCA 18. See also *R v Shrestha* (1991) 173 CLR 48 at 69.

60 *Power v The Queen* (1974) 131 CLR 623 at 629; [1974] HCA 26. See also *Crump v New South Wales* (2012) 247 CLR 1 at 17 [28].

61 *Duncan v New South Wales* (2015) 255 CLR 388 at 408 [43]; [2015] HCA 13.

62 *Crump v New South Wales* (2012) 247 CLR 1 at 19 [36]. See also *Minogue v Victoria* (2018) 92 ALJR 668 at 678 [47]; 356 ALR 363 at 374; [2018] HCA 27.

63 *Duncan v New South Wales* (2015) 255 CLR 388 at 409 [46].

court sentence that includes a non-parole period with an effective sentence that does not include a parole period"[64].

41 A more difficult issue is the validity of a written law that does not merely have the same practical effect as altering a punitive sentence but is itself enacted for the purposes of imposing additional punishment on a particular person, and thus amending their sentence, for the past offence. For instance, if a person were sentenced to a maximum term of ten years' imprisonment with a non-parole period of four years, the issue of whether a written law was an invalid exercise of judicial power may arise if legislation were subsequently passed which purported to extend the non-parole period of that person to eight years for the purpose of increasing the severity of the punishment for the offence[65]. All three of the "large" questions identified by French CJ in *Crump v New South Wales*[66] would be raised:

> "• whether a law of a State altering a judicial decision would be a purported exercise of judicial power by the legislature of the State;
>
> • whether the State *Constitution* authorises the exercise of judicial power by the legislature;
>
> • whether, in any event, the State legislature is prevented from enacting such a law by an implication drawn from the provisions of Ch III of the *Constitution*."

The *Corrections Act*, s 74AB

42 There were statements made in Parliament in the course of the passage of the *Corrections Amendment (Parole) Act 2018* (Vic), which inserted s 74AB into the *Corrections Act*, that might suggest that the provision had the goal of amending the plaintiff's non-parole period, and therefore his sentence, for the purposes of punishment for the past offence. They included statements referring to the plaintiff's crime and saying that the section will "ensure that Dr Minogue is denied parole"[67], that he "will never, ever get access to parole", that "[he] never

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64 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 July 2018 at 2237.

65 See *Lowe v The Queen* (1984) 154 CLR 606 at 620; [1984] HCA 46.

66 (2012) 247 CLR 1 at 18 [33] (footnote omitted).

67 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 July 2018 at 2239.

gets out of prison"[68], and that he will "die in jail"[69]. Similar statements were made in the New South Wales Parliament in respect of the Bill that introduced s 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW) in relation to Mr Crump[70] and in the Victorian Parliament in respect of the Bill that introduced s 74AA of the *Corrections Act* in relation to Mr Knight[71].

43 However, in this case, as in *Crump v New South Wales*[72] and *Knight v Victoria*[73], those statements are better understood as referring to the practical effect of the provision upon the plaintiff rather than suggesting that s 74AB of the *Corrections Act* was enacted for the purposes of punishment for past offences by the plaintiff. In this case, this is for three reasons.

44 First, other statements made in the course of the passage of the *Corrections Amendment (Parole) Act* focus upon the plaintiff only as a member of a class of persons to whom the amendments to the parole regime in that Act were generally directed. For instance, statements that "[t]he government will ensure that Dr Minogue and other prisoners who murder police officers are not released on parole" and that Victorians will be provided with "complete certainty that Dr Minogue, and any other person who committed the same abhorrent crime, is locked behind bars and fully serve their prison sentence" show that the law was not intended to apply ad hominem punishment[74]. Although the plaintiff's circumstances might have been a motive for the law, s 74AB formed only part of the amendments to a parole regime that applies to a class of persons generally.

45 Secondly, even if s 74AB of the *Corrections Act* were read independently of s 74AAA and as directed only at the plaintiff, and not as part of the wider

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68 Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 21 June 2018 at 2874.

69 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 June 2018 at 2168.

70 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 May 2001 at 13972-13973.

71 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 March 2014 at 746.

72 (2012) 247 CLR 1.

73 (2017) 261 CLR 306.

74 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 July 2018 at 2239.

amendments to the parole regime, other aspects of the context of s 74AB reveal that its purpose is the prospective protection of the public by amendment of conditions concerning eligibility for parole rather than an additional retrospective sanction for the plaintiff's offence. In the Second Reading Speech to the *Corrections Amendment (Parole) Act* the Minister said that the "main purpose of the Bill is to enhance community safety"[75]. Section 1 of the *Corrections Amendment (Parole) Act* provides that its purpose, and thus the purpose of s 74AB, is "to amend the *Corrections Act 1986* in relation to the conditions for making a parole order for certain prisoners convicted of the murder of a police officer, including the prisoner Craig Minogue". The Explanatory Memorandum to the *Corrections Amendment (Parole) Bill* refers to cl 1 and reiterates that the purpose of the Bill is "to provide restrictive conditions for making a parole order for certain prisoners"[76]. The Statement of Compatibility to that Bill also refers to the "important purpose [of] protecting society"[77], and provides that the amendments "only alter the conditions on which the Board may order release on parole during the currency of the sentence, and after the expiration of a non-parole period"[78].

46 Thirdly, there are reasons of authority. Ultimately, the purpose of every legislative act must be considered in its own context. It is possible, although unlikely, that provisions with identical words might have different meanings and might be enacted for different purposes. Hence, the decisions of this Court in *Crump v New South Wales*[79] and in *Knight v Victoria*[80] do not strictly compel the conclusion that the purpose of s 74AB of the *Corrections Act* was to amend the conditions of parole rather than to vary the plaintiff's sentence for punitive purposes. Nevertheless, since s 74AB was closely modelled on the provision

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75 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 July 2018 at 2238.

76 Victoria, *Corrections Amendment (Parole) Bill 2018*, Explanatory Memorandum at 1.

77 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 July 2018 at 2238; Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 25 July 2018 at 3276.

78 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 July 2018 at 2236; Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 25 July 2018 at 3274.

79 (2012) 247 CLR 1.

80 (2017) 261 CLR 306.

relevant to Mr Knight[81], which was, in turn, modelled on the New South Wales provision relevant to Mr Crump[82], a powerful factor in the assessment of the purpose of s 74AB is the purpose that this Court accepted had motivated those provisions: to amend the conditions for parole orders[83], so that the conditions would function as "a factum by reference to which the parole system ... operated"[84].

47 For these reasons, s 74AB of the *Corrections Act* does not involve punishment in the traditional sense: usually a State sanction imposed by a court or tribunal upon an offender for a past offence[85]. However, the function of punishment cannot necessarily be neatly contained in this traditional sense. It has been recognised in this Court that there is no clear line between a protective purpose and the other general purposes of punishment[86]. Once it is recognised that punishment embraces a number of purposes, including prevention, "the claim that a measure is primarily preventive does not necessarily take it outside the realm of punishment"[87]. Hart once observed that a prisoner who was told that his sentence was extended as a measure of social protection rather than punishment "might think he was being tormented by a barren piece of conceptualism – though he might not express himself in that way"[88].

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81 Victoria, *Corrections Amendment (Parole) Bill 2018*, Explanatory Memorandum at 6.

82 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 March 2014 at 746. See *Knight v Victoria* (2017) 261 CLR 306 at 321 [19].

83 *Knight v Victoria* (2017) 261 CLR 306 at 320 [17].

84 *Crump v New South Wales* (2012) 247 CLR 1 at 26 [60].

85 See Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) at 4-5, quoted in *Al-Kateb v Godwin* (2004) 219 CLR 562 at 650 [265]; [2004] HCA 37.

86 *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 145 [32], 146 [35]; [2004] HCA 42; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 613 [82]; [2004] HCA 46.

87 Zedner, "Penal subversions: When is a punishment not punishment, who decides and on what grounds?" (2016) 20 *Theoretical Criminology* 3 at 7.

88 Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) at 166-167.

48 If s 74AB of the *Corrections Act* imposed punishment upon the plaintiff in the traditional sense then this might be conclusive of its character as an exercise of judicial power[89]. Ultimately, however, the fundamental issue in this case is not the boundaries of the concept of punishment or whether preventive orders could be characterised as falling within an extended conception of punishment. The issue is whether s 74AB of the *Corrections Act* is an exercise of judicial power. Section 74AB does not bear sufficient hallmarks to be characterised as an exercise of judicial power. It does not impose punishment in the traditional sense. It is forward looking, rather than imposing additional punishment for a past offence. Although it would be significant, but not conclusive[90], if all of the amendments to the parole regime were directed only at the plaintiff[91], s 74AB of the *Corrections Act* is part of a regime of amendments that is of general application even if its enactment may have been motivated by an intention to respond to the plaintiff's circumstances. It was enacted by the legislative process. Like the laws considered in *Crump v New South Wales*[92] and in *Knight v Victoria*[93], it is a legislative exercise of only legislative power.

Conclusion

49 Section 74AB of the *Corrections Act* was not enacted for the purposes of punishing the plaintiff by altering his minimum period of non-parole. It was not an exercise of judicial power by the legislature. I agree with the answers to the stated questions given by Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.

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89 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444; [1918] HCA 56; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27; [1992] HCA 64. See also *Magaming v The Queen* (2013) 252 CLR 381 at 396 [47], 399-400 [61]-[62]; [2013] HCA 40; *Duncan v New South Wales* (2015) 255 CLR 388 at 407 [41]; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 340 [14]-[15], 357 [88]; [2018] HCA 2.

90 See *Knight v Victoria* (2017) 261 CLR 306 at 323 [26].

91 See Murray, "Ad Hominem Parole Legislation, Chapter III and the High Court" (2018) 43 *University of Western Australia Law Review* 275 at 281.

92 (2012) 247 CLR 1.

93 (2017) 261 CLR 306.