

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

---

RODNEY MICHAEL CHERRY

PLAINTIFF

AND

STATE OF QUEENSLAND

DEFENDANT

*Cherry v Queensland*  
[2025] HCA 14  
*Date of Hearing: 4 February 2025*  
*Date of Judgment: 9 April 2025*  
B11/2024

## ORDER

*The questions stated for the opinion of the Full Court in the special case filed on 4 October 2024 be answered as follows:*

*Question (a): Is s 175L of the Corrective Services Act 2006 (Qld) invalid because it enables the Queensland Executive to impermissibly interfere with the exercise of judicial power by State Courts, contrary to the principle established in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51?*

*Answer: No.*

*Question (b): Is s 175E of the Corrective Services Act 2006 (Qld) invalid because it enables the Queensland Executive to impermissibly interfere with the exercise of judicial power by State Courts, contrary to the principle established in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51?*

*Answer: No answer is required.*







*Question (c): If the answer to Question (a) is "yes", does s 193A of the Corrective Services Act 2006 (Qld) as in force before the commencement of the amendments made by Pt 3 of the Police Powers and Responsibilities and Other Legislation Amendment Act 2021 (Qld) (including omissions and substitutions) apply to the plaintiff?*

*Answer: No answer is required given the answer to question (a).*

*Question (d): Who should pay the costs of the proceeding?*

*Answer: The plaintiff.*

## **Representation**

A D Scott KC with Z G Brereton for the plaintiff (instructed by Prisoners' Legal Service)

G J D del Villar KC, Solicitor-General of the State of Queensland, with F J Nagorcka and G F Perry for the defendant (instructed by Crown Law (Qld))

M J Wait SC, Solicitor-General for the State of South Australia, with J F Metzger for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

N Christrup SC, Solicitor-General for the Northern Territory, with L S Spargo-Peattie for the Attorney-General for the Northern Territory, intervening (instructed by Solicitor for the Northern Territory)

C S Bydder SC, Solicitor-General for the State of Western Australia, with D Van Nellestijn for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor's Office (WA))

A D Pound SC, Solicitor-General for the State of Victoria, with F L Batten for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor's Office)







J S Caldwell for the Attorney-General for the State of New South Wales,  
intervening (instructed by Crown Solicitor (NSW))

Notice: This copy of the Court's Reasons for Judgment is subject to  
formal revision prior to publication in the Commonwealth Law  
Reports.







## CATCHWORDS

### Cherry v Queensland

Constitutional law – Separation of powers – Judicial power – Principle established in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 ("*Kable*") – Where plaintiff convicted of two counts of murder and sentenced to life imprisonment with a non-parole period of 20 years – Where body of one of murder victims never located – Where parole board of Queensland may make "no cooperation declaration" under s 175L of *Corrective Services Act 2006* (Qld) ("CS Act") about "no body-no parole prisoner" where remains of victim not found and where not satisfied prisoner has given "satisfactory cooperation" – Where effect of "no cooperation declaration" is that prisoner may not apply for parole notwithstanding expiration of non-parole period – Where president of parole board may make "restricted prisoner declaration" about "restricted prisoner" under s 175E of CS Act – Where effect of "restricted prisoner declaration" is that prisoner may not apply for parole other than "exceptional circumstances parole" – Where "no cooperation declaration" was made about plaintiff and "restricted prisoner declaration" may be made if "no cooperation declaration" invalid – Whether ss 175L and 175E of CS Act invalid as enabling Queensland executive to impermissibly interfere with exercise of judicial power by State courts contrary to principle in *Kable*.

Words and phrases – "adjudgment of criminal guilt", "body or remains", "conditions for the grant of parole", "defining characteristics of a State Supreme Court", "eligibility for parole", "eligible person", "exceptional circumstances parole", "executive power", "judicial power", "minimum period of imprisonment", "no body-no parole prisoner", "no cooperation declaration", "non-parole period", "parole", "parole board", "power to grant parole", "prisoner", "public interest", "punishment", "punitive purpose", "restricted prisoner", "restricted prisoner declaration", "retribution", "satisfactory cooperation", "sentence imposed by the sentencing judge".

*Corrective Services Act 2006* (Qld), ss 175B, 175C, 175D, 175E, 175F, 175G, 175H, 175I, 175K, 175L, 175N, 175O, 175P, 175Q, 175R, 175S, 175T, 175U, 176, 176A, 176B, 176C, 180, 193A, 193AA, 221, 222.

*Corrective Services (No Body, No Parole) Amendment Act 2017* (Qld).

*Police Powers and Responsibilities and Other Legislation Amendment Act 2021* (Qld).

*Crimes (Administration of Sentences) Act 1999* (NSW), s 154A.

*Corrections Act 1986* (Vic), ss 74AA, 74AAA, 74AB.







1 GAGELER CJ, GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ. By a proceeding commenced in the original jurisdiction of this Court the plaintiff challenges the constitutional validity of ss 175L and 175E of the *Corrective Services Act 2006* (Qld) ("the CS Act"). The plaintiff submits that each provision permits the executive branch of State government to interfere impermissibly with the exercise of judicial power by the Supreme Court of Queensland contrary to the principle established by this Court in *Kable v Director of Public Prosecutions (NSW)*.<sup>1</sup> If s 175L were found to be invalid, the parties have agreed by special case to ask a further question, namely, whether former s 193A of the CS Act would thereby apply to the plaintiff. For the reasons which follow, the plaintiff's challenge to the validity of s 175L fails and it is otherwise unnecessary for this Court to consider the validity of s 175E or the possible application of former s 193A.

2 The plaintiff's challenge to the validity of ss 175L and 175E faces the difficult task of distinguishing the principles established by the decisions of this Court in *Crump v New South Wales*,<sup>2</sup> *Knight v Victoria*<sup>3</sup> and *Minogue v Victoria*.<sup>4</sup> In essence, those cases establish that a State may validly change the conditions for a grant of parole from time to time and that this does not constitute an impermissible interference with judicial power.

### **Applicable legislation**

3 Chapter 5 of the CS Act sets out a series of provisions regulating the grant of parole in Queensland. Sections 175L and 175E are contained in Pt 1AB of Ch 5, which deals with two types of parole "declarations" that may be made by the parole board of Queensland or its president.

#### *No cooperation declarations*

4 Division 2 of Pt 1AB addresses the making of a "no cooperation declaration". Section 175L provides that if the parole board is "not satisfied a no

---

1 (1996) 189 CLR 51.

2 (2012) 247 CLR 1.

3 (2017) 261 CLR 306.

4 (2019) 268 CLR 1.



Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Gleeson J  
Jagot J  
Beech-Jones J

2.

body-no parole prisoner has given satisfactory cooperation" the board must make a no cooperation declaration about the prisoner. The declaration may be made when a prisoner applies for parole or when the board otherwise decides to consider whether to make the declaration.<sup>5</sup>

5 Section 175C defines a "no body-no parole prisoner" as follows:

"A prisoner is a *no body-no parole prisoner* if—

- (a) the prisoner is serving a period of imprisonment for a homicide offence; and
- (b) either—
  - (i) the body or remains of the victim of the offence have not been located; or
  - (ii) because of an act or omission of the prisoner or another person, part of the body or remains of the victim has not been located."

6 For the purposes of deciding whether a prisoner has given satisfactory cooperation, the parole board must have regard to: a report about the prisoner's cooperation prepared by the commissioner of the police service; any information about the prisoner's capacity to give satisfactory cooperation; any relevant remarks made by the sentencing court; and, if the prisoner requests, the transcript of the proceeding for the homicide offence.<sup>6</sup> The material to which the parole board has regard might include any written submission given by the prisoner at the invitation of the board.<sup>7</sup> A commissioner's report must contain a statement as to whether the prisoner has given any cooperation in relation to the homicide offence for which

---

5 *Corrective Services Act 2006* (Qld) ("the CS Act"), s 175K.

6 CS Act, s 175O(1).

7 CS Act, s 175N. The parole board is obliged to give a prisoner the opportunity to make such a submission.



3.

the prisoner is serving a sentence of imprisonment, and, if the prisoner has given cooperation, an evaluation of what the prisoner has done.<sup>8</sup>

7 If made, a no cooperation declaration must relevantly state: the reasons the board is not satisfied the prisoner has given satisfactory cooperation; that the prisoner may not apply for parole under s 176<sup>9</sup> or s 180<sup>10</sup> of the CS Act (unless the prisoner is subsequently given a notice under s 175Q); and that the prisoner may, at any time, make a reconsideration application.<sup>11</sup> The board must give a copy of the declaration to the prisoner.<sup>12</sup> If the prisoner stops being a no body-no parole prisoner (which would occur if the body or remains of the victim were located), the no cooperation declaration ends.<sup>13</sup>

8 Section 175R(2) of the CS Act provides that at any time after receiving a copy of the no cooperation declaration, a prisoner may apply to the president or a deputy president of the parole board, asking them to call a meeting of the board to reconsider the board's decision to make the no cooperation declaration. The reconsideration application may state: whether the prisoner has given the police additional information; whether there has been a material change in the prisoner's capacity to cooperate satisfactorily; and any other reason why the prisoner considers it appropriate to grant the application.<sup>14</sup> The president or deputy president may only grant the reconsideration application if satisfied that the prisoner's application conformably addresses the foregoing issues or that it is otherwise in the interests of justice to reconsider the prisoner's cooperation.<sup>15</sup> The

---

8 CS Act, s 175B.

9 Section 176 of the CS Act addresses when a prisoner may apply for "exceptional circumstances parole".

10 Section 180 of the CS Act addresses when a prisoner may apply for parole.

11 CS Act, s 175P(1)-(2).

12 CS Act, s 175P(3).

13 CS Act, s 175P(4).

14 CS Act, s 175R(4).

15 CS Act, s 175S(3).



Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Gleeson J  
Jagot J  
Beech-Jones J

4.

president or deputy president may also, at any time and on their own motion, call a meeting of the board to reconsider the making of a no cooperation declaration.<sup>16</sup> In either case, the board can decide whether the prisoner has given satisfactory cooperation, and, if that is so, the no cooperation declaration will cease to have any further force and the prisoner may apply for parole pursuant to s 176 or s 180.<sup>17</sup>

9 Pursuant to s 193A of the CS Act, if a no body-no parole prisoner makes an application for parole and a no cooperation declaration is in force for that prisoner, the board must refuse the application.

10 Pursuant to s 175Q of the CS Act, if the parole board is satisfied that a no body-no parole prisoner has given satisfactory cooperation, the board must give the prisoner a written notice stating that an applicable no cooperation declaration is ended and that the prisoner may apply for parole pursuant to s 176 or, if eligible, s 180 of the CS Act.

#### *Restricted prisoner declarations*

11 Division 1 of Pt 1AB addresses the making of a "restricted prisoner declaration". Pursuant to s 175E the president of the parole board may make a restricted prisoner declaration about a "restricted prisoner". A restricted prisoner is defined in s 175D as follows:

"A prisoner is a ***restricted prisoner*** if the prisoner has been sentenced to life imprisonment for—

- (a) a conviction of murder and the person killed was a child; or
- (b) more than 1 conviction of murder; or
- (c) 1 conviction of murder and another offence of murder was taken into account; or
- (d) a conviction of murder and the person has on a previous occasion been sentenced for another offence of murder."

---

16 CS Act, s 175T.

17 CS Act, s 175U.



5.

12 At any time during the term of imprisonment of a restricted prisoner, the chief executive may give the president a restricted prisoner report about the prisoner that includes information the chief executive considers relevant to any of the following three matters: (a) the nature, seriousness and circumstances of the offence, or each offence, for which the prisoner was sentenced to life imprisonment; (b) any risk the prisoner may pose to the public if the prisoner is granted parole; and (c) the likely effect that the prisoner's release on parole may have on an eligible person<sup>18</sup> or a victim.<sup>19</sup> The chief executive must also give the president a restricted prisoner report following an application for parole by a restricted prisoner.<sup>20</sup>

13 As soon as practicable after being given a restricted prisoner report, the president must give the prisoner a written notice which, amongst other matters, informs the prisoner: of the president's receipt of the report; that the president must decide whether to make a restricted prisoner declaration; and that, if such a declaration were to be made, the prisoner would consequently not be able to apply for parole pursuant to s 180 for the period specified in the declaration.<sup>21</sup> The notice must also state that within a defined period, the prisoner has the opportunity to give the president a written submission about the making of the declaration and ask the president to consider any other material the prisoner considers to be relevant.<sup>22</sup>

14 Pursuant to s 175H the president may, having regard, amongst other things, to the restricted prisoner report and any submission from the prisoner, make a restricted prisoner declaration about the prisoner, if the president is satisfied "it is in the public interest to do so".<sup>23</sup> In considering the public interest, the president

---

18 An "eligible person" is defined to mean a person on the eligible persons register in relation to a prisoner: CS Act, s 4, Sch 4. The eligible persons register is governed by Ch 6 Pt 13 Div 1 of the CS Act.

19 CS Act, ss 175F(1) and 175H(2).

20 CS Act, ss 175F(2) and 193AA(2)(b).

21 CS Act, s 175G(3)(a)-(c).

22 CS Act, s 175G(3)(d).

23 CS Act, s 175H(1).



Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Gleeson J  
Jagot J  
Beech-Jones J

6.

must have regard to the three matters about which relevant information may be included in the restricted prisoner report as set out above.<sup>24</sup>

- 15 If a restricted prisoner declaration is made it must relevantly state:<sup>25</sup>
- (a) the reasons for the decision; and
  - (b) the day the declaration takes effect; and
  - (c) the day the declaration ends (which must not be later than 10 years after the day the declaration takes effect); and
  - (d) that the restricted prisoner may not apply for parole under s 180 while the declaration is in force.

- 16 Pursuant to s 193AA, if a restricted prisoner makes an application for parole the board must defer considering the application, and, if the president then makes a restricted prisoner declaration about the prisoner, "the application is taken to have been refused by the parole board on the day the declaration is made".

*Former section 193A*

- 17 Former s 193A of the CS Act, introduced by the *Corrective Services (No Body, No Parole) Amendment Act 2017* (Qld), conferred on the parole board a requirement to refuse parole in circumstances similar to those which now found the making of a no cooperation declaration pursuant to s 175L. It was replaced with the present s 193A by the *Police Powers and Responsibilities and Other Legislation Amendment Act 2021* (Qld) ("the PPRA Act"). That Act also introduced Pt 1AB of Ch 5 of the CS Act. It is unnecessary to set out former s 193A as, for the reasons given below, its application does not arise for consideration.

---

24 CS Act, s 175H(2).

25 CS Act, ss 175I(1) and 175I(3).



7.

*The parole board*

18 The parole board comprises a president, who must be a former judge or someone with qualifications, experience or standing equivalent to a judge,<sup>26</sup> and other members with suitable qualifications, experience or standing or who represent the Queensland community.<sup>27</sup>

19 Pursuant to s 180(1) of the CS Act, a prisoner may apply to the board for parole if they have reached their parole eligibility date. However, this is relevantly subject to s 180(2)(c)-(d), which provide that a prisoner cannot apply to the board for parole:

"(c) if the prisoner is a restricted prisoner and a restricted prisoner declaration is in force for the prisoner; or

(d) if the prisoner is a no body-no parole prisoner and a no cooperation declaration is in force for the prisoner".

20 Pursuant to s 176 of the CS Act, a prisoner may (subject to ss 176B and 176C) apply for exceptional circumstances parole at any time. Section 176B relevantly provides that a no body-no parole prisoner may not apply for exceptional circumstances parole under s 176 if a no cooperation declaration is in force for the prisoner. In contrast, a restricted prisoner in respect of whom a restricted prisoner declaration is in force may apply for exceptional circumstances parole. However, the board must refuse such parole unless, pursuant to s 176A(2), it is satisfied that:

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

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

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

---

26 CS Act, s 222(1).

27 CS Act, s 221(1).



Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Gleeson J  
Jagot J  
Beech-Jones J

8.

- (b) the prisoner has demonstrated that the prisoner does not pose an unacceptable risk to the public; and
- (c) that the making of the parole order is justified in the circumstances."

## Facts

21 The facts are set out in the agreed special case. In 2002, the plaintiff was convicted, following trial by jury in the Supreme Court of Queensland, of two counts of murder. He was sentenced to life imprisonment for each count. The sentencing judge ordered that the plaintiff not be released from imprisonment until he had served a minimum of 20 years in gaol (unless released sooner under exceptional circumstances parole). An appeal against conviction was unsuccessful.<sup>28</sup> The body of one of the murder victims has never been found. Accordingly, it is accepted that the plaintiff is a no body-no parole prisoner within the meaning of s 175C of the CS Act. It is also accepted that the plaintiff is a restricted prisoner within the meaning of s 175D of the CS Act.

22 In 2022 and some months before the expiration of his 20 years of imprisonment, the plaintiff applied for parole. In 2023, the parole board made a no cooperation declaration in respect of the plaintiff. Save for the plaintiff's constitutional challenge to s 175L, he does not in this proceeding otherwise seek to impugn the validity of that declaration. Again, subject to the plaintiff's challenge in this special case, it is otherwise accepted that by reason of the no cooperation declaration the parole board was obliged to refuse the plaintiff's application for parole and that the plaintiff is precluded from applying again for parole unless:

- (a) the parole board is satisfied that the plaintiff has given satisfactory cooperation and gives a notice to that effect under s 175Q or s 175U of the CS Act; or
- (b) the plaintiff ceases to be a no body-no parole prisoner under s 175P(4) of the CS Act.

---

28 *R v Cherry* [2004] QCA 328.



23 Whilst the plaintiff is also a restricted prisoner, as defined in the CS Act, the president of the parole board has neither made, nor considered whether or not to make, a restricted prisoner declaration in relation to the plaintiff.

### Questions for determination

24 The special case poses the following questions for determination:

- "(a) Is s 175L of the [CS Act] invalid because it enables the Queensland Executive to impermissibly interfere with the exercise of judicial power by State Courts, contrary to the principle established in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51?
- (b) Is s 175E of the [CS Act] invalid because it enables the Queensland Executive to impermissibly interfere with the exercise of judicial power by State Courts, contrary to the principle established in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51?
- (c) If the answer to Question (a) is 'yes', does s 193A of the [CS Act] as in force before the commencement of the amendments made by pt 3 of the *Police Powers and Responsibilities and Other Legislation Amendment Act 2021* (including omissions and substitutions) apply to the plaintiff?
- (d) Who should pay the costs of the proceeding?"

### The plaintiff's case

25 The plaintiff's case relevantly turns upon an application of the principle to be derived from *Kable*. The plaintiff's reliance upon *Kable* was founded upon two propositions. The first was that one of the defining characteristics of a State Supreme Court is that the punishments imposed by it consequent upon the adjudgment of criminal guilt are final and conclusive unless set aside upon appeal. The second was that ss 175L and 175E empower the executive to alter punishments imposed by the Supreme Court of Queensland. It followed, it was said, that each provision was enacted for the purpose of imposing additional punishment on a prisoner, in the traditional sense of a sentence imposed by the sentencing judge upon adjudgment of criminal guilt, and that this offended the *Kable* principle because each operated to amend the sentence originally determined by the Supreme Court, thereby substantially impairing the institutional integrity of that Court. This was the premise of the plaintiff's case. The plaintiff supported that premise in two ways.



Gageler CJ  
 Gordon J  
 Edelman J  
 Steward J  
 Gleeson J  
 Jagot J  
 Beech-Jones J

10.

26 First, it was said that each provision does not merely restrict the conditions for the grant of parole; each denies the power to grant parole completely. Indeed, by reason of s 180(2)(c)-(d), neither a no body-no parole prisoner nor a restricted prisoner is eligible to apply for parole when respectively a no cooperation declaration or a restricted prisoner declaration has been made. In that respect, it was submitted, this Court's earlier decisions in *Crump*, *Knight* and *Minogue* were all distinguishable. In those three cases (which are addressed in greater detail below), the prisoner was eligible to apply for parole and the respective parole boards had the power to grant parole, albeit in extremely limited circumstances. Those cases had identified the non-parole period, which a sentencing judge determines, as the "factum" which a system of parole, which can change from time to time, may fix upon.<sup>29</sup> Here, it was said, the impugned legislation nullified the factum (a minimum period of imprisonment of 20 years) by denying it any operative effect.

27 Second, it was submitted that the text and context of ss 175L and 175E indicated that the object of each of the no cooperation and the restricted prisoner declarations is to punish prisoners more severely by reason of their past offending. In the case of s 175L, it was said that Parliament had determined that a prisoner warrants harsher punishment when the prisoner bears culpability for the inability to find a victim's body. Parliament's purpose in that respect was said to be recorded in the Explanatory Notes for the *Corrective Services (No Body, No Parole) Amendment Bill 2017* (Qld), which introduced the predecessor to s 175L (i.e. former s 193A). The Explanatory Notes state:<sup>30</sup>

"The review report states that, 'a punishment is lacking in retribution, and the community would be right to feel indignation, if a convicted killer could expect to be released without telling what he did with the body of the victim. The killer's satisfaction at being released on parole is grotesquely

---

29 *Crump* (2012) 247 CLR 1 at 26 [60] per Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Knight* (2017) 261 CLR 306 at 323-324 [29] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ; *Minogue* (2019) 268 CLR 1 at 17 [16] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.

30 Queensland, Legislative Assembly, *Corrective Services (No Body, No Parole) Amendment Bill 2017*, Explanatory Notes at 1, quoting Queensland, *Parole System Review: Final Report* (2016) at 234-235.



11.

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

28 In the case of s 175E, the concern about additional punishment was said to be evident in the factors the parole board must consider pursuant to s 175H(2). These included the nature, seriousness and circumstances of the offence and the likely effect of the prisoner's release on an eligible person or victim. These were said to be the type of considerations a sentencing judge would consider and revealed a real concern with retribution. In that respect, the plaintiff also relied upon the second reading speech for the *Police Powers and Responsibilities and Other Legislation Amendment Bill 2021* (Qld) ("the PPRA Bill"), which introduced Pt 1AB of Ch 5 of the CS Act. The Minister for Police and Corrective Services stated that the government has always acted to "condemn the perpetrators of the worst crimes".<sup>31</sup>

29 In contending that the purpose of ss 175L and 175E was punitive, the plaintiff also relied upon the following observations of Edelman J in *Minogue*:<sup>32</sup>

"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".

30 The plaintiff submitted that, for the foregoing reasons, each of ss 175L and 175E comprised legislation in the same category as Edelman J's hypothetical example.

---

31 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 September 2021 at 2765.

32 (2019) 268 CLR 1 at 23 [41].



Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Gleeson J  
Jagot J  
Beech-Jones J

12.

31 For the reasons set out below, the plaintiff has misconceived the applicable statutory scheme and its evident purpose.

***Crump, Knight and Minogue***

32 The plaintiff did not challenge the correctness of the decisions of this Court in *Crump, Knight and Minogue*. Rather, the plaintiff submitted that each of *Crump, Knight and Minogue* is distinguishable from the present matter. An examination of each of those cases will show that the provisions there held not to be inconsistent with *Kable* are not materially different from the impugned provisions in the present case.

***Crump***

33 In *Crump*, the plaintiff was convicted of murder and ultimately sentenced to life imprisonment with a minimum term of 30 years' imprisonment. Subsequently, s 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW) was enacted. This greatly limited the power of the New South Wales Parole Authority to grant release on parole for a "serious offender".

34 The plaintiff, who was a serious offender, contended that, in its application to him, s 154A was invalid because it constituted an impermissible legislative alteration of the judicial decision of the Supreme Court of New South Wales which had rendered him eligible for parole. That contention was rejected. Gummow, Hayne, Crennan, Kiefel and Bell JJ said that the determination of a minimum term of imprisonment of 30 years did not "create any right or entitlement in the plaintiff to his release on parole".<sup>33</sup> Instead, that determination was simply the "factum" by reference to which the parole system was to operate.<sup>34</sup> They concluded:<sup>35</sup>

"Section 154A did not impeach, set aside, alter or vary the sentence under which the plaintiff suffers his deprivation of liberty."

---

33 (2012) 247 CLR 1 at 26 [60].

34 (2012) 247 CLR 1 at 26 [60].

35 (2012) 247 CLR 1 at 27 [60].



*Knight*

35 In *Knight*, the plaintiff had been convicted of seven counts of murder and 46 counts of attempted murder and had been sentenced to life imprisonment with a non-parole period fixed at 27 years. Shortly before he became eligible for parole, the *Corrections Act 1986* (Vic) was amended to insert s 74AA. This greatly limited the availability of parole for the plaintiff on an *ad hominem* basis.

36 The plaintiff contended that s 74AA interfered with the sentence imposed upon him; a party-specific judicial judgment about his eligibility for parole, it was said, had been replaced with a "party-specific legislative judgment about the same matter".<sup>36</sup> *Crump* was said to be distinguishable because s 74AA targeted the plaintiff and no one else. Alternatively, the plaintiff sought to reopen *Crump*.

37 The plaintiff's submissions were rejected by the entire Court. The application to reopen *Crump* was rejected<sup>37</sup> and the attempt to distinguish *Crump* was held to rely upon "a distinction without a difference".<sup>38</sup> Whether the plaintiff would or would not be able to secure release on parole:<sup>39</sup>

"was simply outside the scope of the exercise of judicial power constituted by imposition of the sentences. The sentences imposed by [the sentencing judge] could not, and did not, speak to that question."

38 Making a grant of parole more difficult thus did not contradict the non-parole period that had been fixed. Moreover, s 74AA did not replace a judicial judgment with a legislative judgment. As such s 74AA did not "intersect at all with

---

36 (2017) 261 CLR 306 at 322 [23] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.

37 (2017) 261 CLR 306 at 323 [25] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.

38 (2017) 261 CLR 306 at 323 [25] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.

39 (2017) 261 CLR 306 at 323 [28] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.



Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Gleeson J  
Jagot J  
Beech-Jones J

14.

the exercise of judicial power that ha[d] occurred".<sup>40</sup> Importantly, the Court decided that s 74AA did not make the plaintiff's sentence of imprisonment "more punitive or burdensome to liberty".<sup>41</sup>

### *Minogue*

39 In *Minogue*, the plaintiff had been convicted of murdering a police constable and had been sentenced to life imprisonment with a non-parole period of 28 years. When he became eligible to do so, the plaintiff applied for parole. Shortly after that, but before the Victorian Adult Parole Board had made any decision, s 74AAA was inserted into the *Corrections Act*. This limited the grant of parole in a similar way to s 154A of the *Crimes (Administration of Sentences) Act* (considered in *Crump*) and s 74AA of the *Corrections Act* (considered in *Knight*), relevantly, for a prisoner who had been convicted of murdering a police officer. In *Minogue v Victoria*,<sup>42</sup> this Court held that s 74AAA did not apply to the plaintiff.

40 Shortly after the handing down of that decision the *Corrections Act* was again amended to insert s 74AB. This greatly limited the possibility of parole for the plaintiff on an *ad hominem* basis (like the provision considered in *Knight*). The plaintiff commenced further proceedings in this Court challenging s 74AB and relevantly contended that s 74AB was contrary to Ch III of the *Constitution* insofar as the substantive operation and practical effect of the provision was to impose an additional or separate punishment in addition to the punishment imposed by the Supreme Court of Victoria at the time of sentencing "by extending the non-parole period or by increasing the severity of the plaintiff's punishment".<sup>43</sup> This argument was again rejected.

---

40 (2017) 261 CLR 306 at 324 [29] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.

41 (2017) 261 CLR 306 at 324 [29] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ. See also *Baker v The Queen* (2004) 223 CLR 513 at 528 [29] per McHugh, Gummow, Hayne and Heydon JJ.

42 (2018) 264 CLR 252.

43 (2019) 268 CLR 1 at 13 [6] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.



41 Kiefel CJ, Bell, Keane, Nettle and Gordon JJ confirmed the well-established distinction between a judge exercising judicial power in sentencing, and the executive determining whether an eligible prisoner may be given parole. Once a person is sentenced, the judicial power is "spent" and the responsibility for a prisoner's future release "passes to the executive branch".<sup>44</sup> In *Minogue*, s 74AB did not in any way touch upon or affect the plaintiff's sentence, which remained, at all times, life imprisonment. At best the fixing of a non-parole period, being the "factum" upon which a regime for the grant of parole might apply, gave a prisoner no more than the "hope" of earlier conditional release.<sup>45</sup> Importantly, their Honours accepted that it was valid for a legislative regime regarding the grant of parole to be varied from time to time.<sup>46</sup> Also importantly, it was again affirmed that a law that made parole more difficult to secure did not constitute a form of punishment, let alone additional punishment.<sup>47</sup> As Gageler J observed in agreeing with Kiefel CJ, Bell, Keane, Nettle and Gordon JJ:<sup>48</sup>

"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".

42 Edelman J also upheld the validity of s 74AB. His Honour characterised the essential purpose of that provision as "the prospective protection of the public" rather than as a form of additional punishment.<sup>49</sup> His Honour then said:<sup>50</sup>

"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

---

44 (2019) 268 CLR 1 at 15-16 [14] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.

45 (2019) 268 CLR 1 at 16-17 [16] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.

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

47 (2019) 268 CLR 1 at 18 [21] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.

48 (2019) 268 CLR 1 at 20-21 [31]. See also *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12 [17] per Gleeson CJ.

49 (2019) 268 CLR 1 at 25 [45].

50 (2019) 268 CLR 1 at 27 [48] (footnotes omitted).



Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Gleeson J  
Jagot J  
Beech-Jones J

16.

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, if all of the amendments to the parole regime were directed only at the plaintiff, 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* and in *Knight v Victoria*, it is a legislative exercise of only legislative power."

43 Consistently with *Minogue*, and for the sake of completeness, in *R v Hatahet*<sup>51</sup> Gordon A-CJ, Steward and Gleeson JJ (with whom Jagot and Beech-Jones JJ agreed) reaffirmed the distinction between the judicial sentencing of an offender and the executive function of determining whether an offender should be released on parole. Because that distinction is so fundamental, the "general principle is that the prospect of securing release on parole or of obtaining remissions is not relevant to the judicial task of sentencing".<sup>52</sup>

### **The validity of s 175L**

44 Like s 154A of the *Crimes (Administration of Sentences) Act* and ss 74AA and 74AB of the *Corrections Act* (which fell for consideration by this Court in *Crump*, *Knight* and *Minogue* respectively), s 175L of the CS Act does not alter, or in any way set aside or increase, the plaintiff's sentence. The making of the no cooperation declaration did not impose any additional punishment on the plaintiff. Four propositions support these conclusions and the validity of s 175L.

45 First, like the provisions considered in *Crump*, *Knight* and *Minogue*, the fixing by the sentencing judge of a minimum term of imprisonment of 20 years was simply the factum upon which Queensland's parole laws were to apply.

---

51 (2024) 98 ALJR 863; 418 ALR 520.

52 (2024) 98 ALJR 863 at 869 [21] per Gordon A-CJ, Steward and Gleeson JJ; 418 ALR 520 at 526.



Alterations to those laws did not here result in any additional punishment.<sup>53</sup> The making of the no cooperation declaration did not change the plaintiff's sentence (being at all times one of life imprisonment); nor did it increase it. The plaintiff's eligibility for parole has always been dependent on the applicable legislative scheme, which may validly be amended from time to time. Indeed, it is open for a State Parliament to abolish the availability of parole entirely, a proposition which the plaintiff accepted. Moreover, as *Crump*, *Knight* and *Minogue* make clear, legislative amendments to a parole system that impose strict limiting conditions upon the exercise of the executive power to release a prisoner "may be said to have altered a statutory consequence of the sentence" and yet not to have altered the legal effect of a prisoner's sentence.<sup>54</sup>

46       Second, the plaintiff's attempt to distinguish *Crump*, *Knight* and *Minogue* on the basis that he is not eligible to apply for parole by reason of s 180(2)(d) is a distinction without a difference. As a matter of substance – and it is the substance that matters – there is no difference between a law which limits the conditions for a grant of parole and a law which limits the eligibility of a prisoner to apply for parole, no matter the extent of the limitation. Practically, the consequence is the same: it is to confine the power of the board to grant parole to a prisoner.

47       Third, the observation of Edelman J in *Minogue*, set out above at [29], does not apply to s 175L. That provision does not purport to adjust the factum of the plaintiff's minimum period of imprisonment in any way. It remains 20 years. Nor, for the reasons set out below, can it be said that s 175L was enacted for the purposes of imposing additional punishment on the plaintiff.

48       Fourth, the purpose of s 175L is to encourage a prisoner to cooperate with the State in recovering the body or remains of a victim of murder. Recovery of the victim's body or remains serves the public interest in providing some comfort and certainty to the families and friends of the victim. That is plainly a legitimate

---

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

54   *Crump* (2012) 247 CLR 1 at 19 [35] per French CJ. See also (2012) 247 CLR 1 at 19 [36] per French CJ, 26-27 [60] per Gummow, Hayne, Crennan, Kiefel and Bell JJ, 29 [72]-[74] per Heydon J; *Knight* (2017) 261 CLR 306 at 323-324 [28]-[29] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ; *Minogue* (2019) 268 CLR 1 at 17 [19] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.



Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Gleeson J  
Jagot J  
Beech-Jones J

18.

purpose for a State to pursue in calibrating a regime for the grant of parole. It is not a purpose that is punitive in any sense relevant to Ch III of the *Constitution*.

49 Such a non-punitive purpose is discernible from the language of the CS Act itself. No cooperation declarations may only be made in respect of a no body-no parole prisoner, which, as set out above, is confined to a prisoner convicted of a homicide offence where the body or remains of the victim have not been located. Such a declaration may only then be made when the parole board is satisfied that the prisoner has failed to give satisfactory cooperation about locating a victim's body or remains. If the prisoner does give satisfactory cooperation, or the victim's body or remains are otherwise located, the declaration ceases and they may become eligible for parole.

50 Whilst the Explanatory Notes for the *Corrective Services (No Body, No Parole) Amendment Bill 2017* (Qld) (which introduced former s 193A, being the predecessor to s 175L) did refer to a punishment lacking in retribution if a convicted killer were to be released without telling where the victim's body might be found, that is a description of a consequence that might have arisen but for the enactment of that predecessor provision. But it is not a description of the purpose of that provision or its successor. That purpose is to encourage cooperation in identifying the location of the body or remains of a victim. The plaintiff's submissions in this respect ignore other passages in those notes that describe the non-punitive purpose of former s 193A. Thus, the following appears in the passage immediately before that relied upon by the plaintiff:<sup>55</sup>

"The [Queensland Parole System Review Report] expressly acknowledged that in the case of homicide offences, withholding the location of a victim's body or remains prolongs the suffering of the families and all efforts should be made to attempt to minimise this sorrow."

51 This non-punitive purpose is also confirmed by the Explanatory Notes for the PPRA Bill (which introduced s 175L). They state as follows:<sup>56</sup>

---

55 Queensland, Legislative Assembly, *Corrective Services (No Body, No Parole) Amendment Bill 2017*, Explanatory Notes at 1.

56 Queensland, Legislative Assembly, *Police Powers and Responsibilities and Other Legislation Amendment Bill 2021*, Explanatory Notes at 7-8.



"No Body, No Parole (NBNP) laws were enacted by the *Corrective Services (No Body, No Parole) Amendment Act 2017*, which commenced on 25 August 2017. No Body, No Parole refers to the principle that a prisoner convicted of a homicide offence who refuses to adequately assist police in locating a victims' remains should not be granted parole. Withholding the location of a body extends the suffering of victims' families and all efforts should be made to attempt to minimise this sorrow.

As such, a primary focus of NBNP is to encourage cooperation from these prisoners by denying them parole release until such time as the Board is satisfied the prisoner has satisfactorily cooperated in identifying the location or last known location of the victim's remains."

52 As for the plaintiff's reliance upon the second reading speech for the PPRA Bill, it is misconceived. The Minister's general proclamation about condemning perpetrators of the worst crimes was not a statement about the purpose of s 175L, but an expression of governmental motivation expressed in the most abstract terms. In that respect, it should be observed that the PPRA Act addressed multiple other topics, such as reducing knife crime.<sup>57</sup>

53 For the foregoing reasons s 175L is not an invalid law. It did not in any way operate to alter the plaintiff's sentence, or impose upon him additional punishment.

### **The validity of s 175E**

54 The president has not made a restricted prisoner declaration concerning the plaintiff, and there is no agreed fact that the president will ever do so. In these circumstances, the appropriate prudential approach to answering questions in a special case concerning the constitutional validity of a law is for the Court to decline to answer the hypothetical question concerning s 175E.<sup>58</sup>

---

57 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 September 2021 at 2765-2766.

58 *Luna Park Ltd v The Commonwealth* (1923) 32 CLR 596 at 600 per Knox CJ; *Lambert v Weichelt* (1954) 28 ALJ 282 at 283; *Knight* (2017) 261 CLR 306 at 324-325 [32]-[33] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ;



*Gageler* CJ  
*Gordon* J  
*Edelman* J  
*Steward* J  
*Gleeson* J  
*Jagot* J  
*Beech-Jones* J

20.

### **Former s 193A of the CS Act**

55           As s 175L is a valid law, it is unnecessary to answer the question posed concerning former s 193A of the CS Act.

### **Disposition**

56           The special case questions should be answered as follows:

- (a)   No.
- (b)   No answer is required.
- (c)   No answer is required given the answer to question (a).
- (d)   The plaintiff.



