IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No: S165 of 2011

BETWEEN

KEVIN GARY CRUMP
Plaintiff

and

STATE OF NEW SOUTH WALES
First Defendant

and

NEW SOUTH WALES STATE PAROLE AUTHORITY
Second Defendant

WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA (INTERVENING)

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PART I: Certification

1. This submission is in a form suitable for publication on the Internet.

PART II: Intervention

2. The Attorney-General for South Australia (**South Australia**) intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth).

PART III: Why leave to intervene should be granted

3. Not applicable.

PART IV: Applicable Constitutional and Statutory Provisions

4. South Australia accepts the Plaintiff's statement of applicable constitutional provisions, statutes and regulations.

PART V: ARGUMENT

The Plaintiff's contentions in brief

5. The Plaintiff contends:

> ... that as at 19 July 2001, the day before the commencement of the 2001 Amending Act which, amongst other things, inserted s154A into the Administration of Sentences Act, the effect of the Minimum Term Determination [made pursuant to s13 of the *Sentencing Act 1989* (NSW) **(the 1989 Sentencing Act)**] was that:
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> (a) on 13 November 2003, the plaintiff would, without having to satisfy any further requirements, have at the very least some prospect, however minimal, of being released on parole; and
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> (b) following the 60th day before 13 November 2003, and in the absence of an opinion having been formed by the Parole Authority for the purpose of engaging s143(2), the plaintiff would be entitled to seek relief in the nature of mandamus if the Parole Authority had, by that time, failed to give preliminary consideration as to whether a parole order should be made in relation to him.[1]

6. With the commencement of s154A of the *Crimes (Administration of Sentences) Act 1999 (NSW)*[2] **(the Administration of Sentences Act)** the Parole Board was relieved of its unqualified duty to give preliminary consideration to whether or not a serious offender the subject of a non-release recommendation should be released on parole

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1 Plaintiff's Submissions at [28].

2 20 July 2001.

60 days before the day on which the offender became eligible for release on parole.[3] Further, such offender lost the prospect of an outcome different to his continued imprisonment unless he was in imminent danger of dying or incapacitated to the extent that he no longer had the physical ability to do harm to any person.[4]

7. Thus, it is contended, s154A has worked a departure from the effect of what was ordered by McInerney J on the 24 April 1997. Section 154A has taken away a right or entitlement, namely the prospect of an outcome different to continued imprisonment, conferred by the exercise of judicial power. As a consequence, the Plaintiff contends that the alteration of those rights or entitlements constituted legislative revision, as distinct from a legislative sidelining, of McInerney J's judgment or order in a manner inconsistent with the scheme of Ch III of the *Constitution*.[5]

South Australia's contentions in brief

8. The Plaintiff's contentions hinge on the characterisation of McInerney J's order as giving rise to a right or entitlement, namely, the right or entitlement to be considered for release on parole without application. If McInerney J's order cannot be so characterised, the argument that s154A of the *Administration of Sentences Act* amounts to the legislative exercise of judicial power cannot be sustained.

9. South Australia contends that the right or entitlement contended for is a legislative consequence that selects a particular exercise of judicial power as the factum that triggers its operation. It is not an incident of the exercise of judicial power. Thus judicial power has not been exercised by the New South Wales Parliament in enacting s154A of the *Administration of Sentences Act*.

10. If the Plaintiff's argument concerning the interplay between the order made under s13A of the *1989 Sentencing Act* and s154A of the *Administration of Sentences Act* cannot be sustained, no need arises to consider the constraints on State legislative power to be derived from s73 of the *Constitution*.

Section 13A of the 1989 Sentencing Act and s154A of the Administration of Sentences Act

11. Justice McInerney's order of the 24 April 1997 made pursuant to s13A of the *1989 Sentencing Act* varied the sentence imposed by Taylor J on the 20 June 1974.[6] South Australia agrees with the Plaintiff that an order made under s13A of the 1989 Sentencing Act forming a component of the Plaintiff's sentence, involves an exercise of

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3 See s143 of the *Administration of Sentences Act* (the successor to s22C of the *1989 Sentencing Act*). As to eligibility for parole see s126 of the *Administration of Sentences Act* (the successor to s14 of the *1989 Sentencing Act*).

4 Plaintiff's Submissions at [53]-[54].

5 Plaintiff's Submissions at [57].

6 *Baker v The Queen* (2004) 223 CLR 513 [33] (McHugh, Gummow, Hayne and Heydon JJ).

judicial power, answers the description of a judgment, decree, order, or sentence, within the meaning of s73 of the *Constitution*, and answers the description of a 'matter' within the meaning of ss75 & 76 of the *Constitution*.[7]

12. Justice McInerney's task was to consider whether or not it was appropriate to set a minimum term and an additional term and, if it was, to determine what those terms should be.[8] As to the approach to this task, s13A(9) of the *1989 Sentencing Act* provided:

> (9) The Supreme Court, in exercising its functions under this section, is to have regard to:
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> (a) the knowledge of the original sentencing court that a person sentenced to imprisonment for life was eligible to be released on licence under section 463 of the *Crimes Act 1900* and of the practice relating to the issue of such licences, and
> (b) any report on the person made by the Review Council and any other relevant reports prepared after sentence (including, for example, reports on the person's rehabilitation), being in either case reports made available to the Supreme Court, and
> (c) the need to preserve the safety of the community, and
> (d) the age of the person (at the time the person committed the offence and also at the time the Supreme Court deals with the application),
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> and may have regard to any other relevant matter.

13. No greater guidance is given as to the purpose of the minimum and additional terms and what other relevant factors are to be taken into account in the exercise of what is quite clearly a discretion. Regard must then be had to the scope and purpose of the *1989 Sentencing Act*.[9]

14. Whatever the correct approach to the exercise of the power contained in s13A(4) be,[10] it is clear that if the Court determines that a minimum term should be imposed, that minimum term, being the period which the offender must serve for the offence for which the sentence was originally imposed, will be the minimum period that the judge considers that the crime committed warrants. In this regard the words contained in s13A(4)(a)(i) of the *1989 Sentencing Act* resonate with the decisions of this Court in *Power v The Queen,*[11] *Deakin v The Queen*[12] and *Bugmy v The Queen*[13] as to the purpose of, and approach to the determination of, a non-parole period.

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7 Plaintiff's Submissions at [49]-[51].

8 Section 13A(4) 1989 Sentencing Act.

9 *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 (Mason CJ, Brennan, Dawson and Gaudron JJ) and the authorities cited therein.

10 On this there was disagreement in the Court of Appeal.

11 *Power v The Queen* (1974) 131 CLR 623 at 628, 629 (Barwick CJ, Menzies, Stephen and Mason JJ).

12 *Deakin v The Queen* (1984) 58 ALJR 367.

13 *Bugmy v The Queen* (1990) 169 CLR 525 at 531 (Mason CJ and McHugh J), 536, 538 (Dawson, Toohey and Gaudron JJ).

15. Importantly questions of when and whether an offender should be released on parole form no part of the Supreme Court's task under s13A.[14] That is the role of the Parole Board.[15] There is a clear demarcation of functions.

> Accordingly, although the fixing of a minimum term confers a benefit on the prisoner, it serves the interests of the community rather than those of the prisoner: *Attorney-General v. Morgan and Morgan* (1980) 7 A Crim R 146. In that case Jenkinson J., with whom Kaye J. agreed, pointed out (at p 155) that considerations relevant to the interests of the community which the imprisonment of offenders is designed to serve, as well as circumstances which mitigate punishment, will be taken into account in determining the head sentence and, again, in fixing the minimum term. At that stage the various interests of the community "will be balanced against the advantages to the community which release on parole is thought likely in the particular circumstances to confer, and against whatever degree of mitigation mercy to the offender may claim without injustice".[16]

16. The benefit to the offender lies in providing him or her with a basis for hope of earlier release and an incentive for rehabilitation.[17] However, in the Plaintiff's case the fact is the sentence remains one of life imprisonment.[18]

17. The benefit accruing to an offender in relation to whom a minimum period has been set under s13A of the *1989 Sentencing Act* is derived from his or her eligibility for parole as legislatively provided for.[19] An order setting a minimum term under s13A is merely the trigger for the parole regime, which in this case is that contained in the *Administration of Sentences Act*. The trigger is not a judicial determination as to when consideration should be given to releasing an offender on parole, rather it is the passing of the minimum period of imprisonment that the judge considers that the crime committed warrants. In general a legislature can select whatever factum it wishes as the trigger of a particular statutory consequence.[20]

18. Section 154A relevantly performs two functions; first it removes the duty imposed upon the Parole Board by s143 in respect of serious offenders the subject of a non-release recommendation. Such function does not remove the benefit derived from eligibility under s126. Second, it alters the criteria to be satisfied before a serious offender subject of a non-release recommendation may be released on parole by the Parole Board. This substantially alters the value of the benefit to such offender and reflects a policy decision made by the Parliament, but the position remains that the

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14 *Power v The Queen* (1974) 131 CLR 623 at 627 (Barwick CJ, Menzies, Stephen and Mason JJ).

15 See the submissions of the First Defendant at [11]-[15].

16 *Bugmy v The Queen* (1990) 169 CLR 525 at 531 (Mason CJ and McHugh J).

17 *Bugmy v The Queen* (1990) 169 CLR 525 at 536-7 (Dawson, Toohey and Gaudron JJ).

18 *Bugmy v The Queen* (1990) 169 CLR 525 at 536-7 (Dawson, Toohey and Gaudron JJ); *PNJ v The Queen* (2009) 83 ALJR 384 at [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

19 Section 126 of the *Administration of Sentences Act* (the successor to s14 of the *1989 Sentencing Act*).

20 *Baker v The Queen* (2004) 223 CLR 513 at [8]-[10] (Gleeson CJ), [43] (McHugh, Gummow, Hayne and Heydon JJ); *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [25] (Gleeson CJ), [107] (McHugh J), [208] (Gummow J); *South Australia v Totani* (2010) 242 CLR 1 at [71] (French CJ), [369] (Heydon J), [420] (Crennan and Bell JJ).

passing of the non-parole period comprises one of the steps that must be satisfied before the parole of a serious offender subject of a non-release recommendation may be considered.

19. To be accepted the Plaintiff's argument must demonstrate some infringement by s154A of the exercise of judicial power in the setting of a minimum period. As indicated the contention is that s154A impermissibly interferes with a right or entitlement created by the exercise of judicial power.[21]

20. That the Commonwealth Parliament may not itself exercise the judicial power of the Commonwealth is settled.[22] Similarly, that neither the Commonwealth Parliament nor the Parliament of a State or Territory may direct their courts as to the manner and outcome of the exercise of their jurisdiction is also settled.[23] Neither proposition is invoked in this case. Here the Plaintiff asserts that the Parliament of a State may not revise the dispositive order of a State court given in the exercise of State judicial power. Thus authorities concerning the power of the legislature to alter rights in issue in ongoing legal proceedings are not to the point.[24] Further, the Plaintiff does not assert that release on parole is a function exclusively judicial.[25] Rather the focus is upon the effect of s154A on the particular order made by McInerney J pursuant to s13A of the *1989 Sentencing Act*.

21. It is a hallmark of judicial power that its exercise determines existing rights, liabilities and entitlements in the course of quelling controversies.[26] It may also be accepted that Ch III gives the judiciary power "not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy - with an understanding that 'a judgment conclusively resolves the case' because the judicial power is one to render dispositive judgments".[27] Thus the Federal Parliament could not by retrospective legislation declare that the law in a particular case was something

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21 Plaintiff's Submissions at [43].

22 *R v Kirby & Ors; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

23 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 36-7 (Brennan, Deane and Dawson JJ); *Nicholas v The Queen* (1998) 193 CLR 173 at [15] (Brennan CJ), [73] (Gaudron J), [146] (Gummow J); *International Finance Trust Company Ltd & Anor v New South Wales Crime Commission* (2009) 240 CLR 319 at [50] (French CJ). See also *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at [47]-[48] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

24 For example, *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495; *R v Humby; Ex parte Rooney* (1973) 129 CLR 231; *Australian Building Constructions Employee's and Builders Labourers Federation v The Commonwealth* (1988) 161 CLR 88.

25 The grant of parole or release on licence has never been considered exclusively judicial; *R v Maclay* (1990) 19 NSWLR 112 at 115-122 (The Court); *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11-2 (Jacobs J).

26 *Waterside Workers Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 442-3 (Griffiths CJ), 463 (Isaacs and Rich JJ); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189 (The Court); *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at [152]-[153] (Crennan and Kiefel JJ).

27 *Plaut v Spendthrift Farm Inc* 514 US 211 (1995) at 218-9; *Nicholas v The Queen* (1998) 193 CLR 173 at [51] (Toohey J).

other than the courts said it was.[28] Such principle is derived from the operative effect of the separation of powers. The separation of powers does not apply to the States,[29] hence the Plaintiff's argument relies upon an extension of the *Kable*[30] principle and implications to be drawn from s73 of the *Constitution*. Assuming for the moment that the State Parliaments are constrained in the same way as the Commonwealth Parliament, does s154A amount to an exercise of judicial power in that it works to revise a dispositive order of the Supreme Court of New South Wales?

22. Section 154A does not operate to revise the order made by McInerney J on the 24 April 1997. The inherent nature of the order - the sentence - remains. The sentence is life imprisonment with a minimum term of 30 years, commencing 13 November 1973, in relation to the murder of Mr Lamb, and 25 years, commencing 13 November 1973, in relation to the conspiracy to murder Mrs Morse. The parole regime continues to operate in acknowledgement of these sentences.[31] The benefit upon which the Plaintiff's argument hinges forms no part of these sentences. There is no exercise of judicial power, no review or revision of judicial power, no usurpation of the judicial power. This can be tested as follows; an incident of the exercise of judicial power is that the order made is binding, authoritative and immediately enforceable of its own effect.[32] If the benefit accruing to the Plaintiff were an incident of the exercise of judicial power it would be enforceable by the enforcement of the Supreme Court's order, but it is not. Rather mandamus would lie against the Parole Board compelling it to discharge its duty under the *Administration of Sentences Act* not pursuant to any order of the Supreme Court. This is because s154A speaks to the Parole Board, not to the Supreme Court. As stated, the Supreme Court's order is merely the factum upon which the legislative consequence provided for in the *Administration of Sentences Act* operates.

23. In *Nicholas v The Queen*[33] Gummow J provided an example of what would not involve the exercise of judicial power as being "the declaration of what thereafter [that is, after the exercise of judicial power] ought be the respective rights and liabilities of parties to a civil dispute". The declaration alters the general law but not the dispositive order consequent upon the exercise of judicial power in a particular case. Section 154A operates similarly. It alters the law relating to parole, but not the dispositive orders, being the sentences imposed upon serious offenders the subject of a non-release recommendation. It alters the legislative consequences that attach to the

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28 *Plaut v Spendthrift Farm Inc* 514 US 211 (1995) at 227.

29 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 67 (Brennan CJ), 77-8 (Dawson J), 92-4 (Toohey J), 109-110 (McHugh J); *South Australia v Totani* (2010) 242 CLR 1 at [66] (French CJ).

30 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

31 *Power v The Queen* (1973) 131 CLR 623 at 628-9 (Barwick CJ, Menzies, Stephen and Mason JJ).

32 *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at [158]-[159] (Crennan and Kiefel JJ); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258-9 (Mason CJ, Brennan and Toohey JJ).

33 *Nicholas v The Queen* (1998) 193 CLR 173 at [141].

Supreme Court's orders by virtue of a legislative act. The record is not altered or deemed to be what it is not. Judicial power is not exercised or interfered with.

24. To similar effect it has been determined in the United States that a law that alters the law underlying a dispositive order of a court that has an executory aspect with the consequence that the effect of the order is altered, does not encroach upon the judicial power.[34] Here, if the order of McInerney J does give rise to some right or entitlement, it is one dependant upon the underlying law. The general alteration of the underlying law does not result in the revision of the exercise of judicial power.[35]

25. As s154A does not infringe the exercise of judicial power, the large question as to whether a State Parliament may pass a law that revises a dispositive order of a State court exercising State jurisdiction becomes an abstract question the answer to which will not determine any right, entitlement or interest in this case. It should not, therefore, be considered.[36]

Date: 22 February 2012

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34 *Miller v French* 530 US 327 (2000); *Pennsylvania v Wheeling & Belmont Bridge* Co 18 How 421 (1836).

35 See also *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1913) 16 CLR 245.

36 *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266-7 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *R v Hughes* (2000) 202 CLR 535 at [66] (Kirby J).