IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M2 of 2017

BETWEEN:

CRAIG WILLIAM JOHN MINOGUE
Plaintiff

ANNOTATED

and

STATE OF VICTORIA
Defendant

DEFENDANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are suitable for publication on the Internet.

PART II: ISSUES

2. The Plaintiff raises two issues of statutory construction about whether s 74AAA of the *Corrections Act 1986* (Vic) (the **Act**) applies, or is capable of applying, to him and his application for parole; and, if s 74AAA does apply, a constitutional issue about whether s 74AAA (and the transitional provision in s 127A) are contrary to the constitutional assumption of the rule of law and thus invalid.

3. On the construction issues, the Defendant (the **State**) contends:

   (1) Section 127A(a) expressly makes it irrelevant that, before s 74AAA commenced operation: the Plaintiff's non-parole period ended; he had made an application for parole; and this application had been the subject of some preliminary consideration by the Adult Parole Board (the **Board**). The subject-matter and context of s 127A are such that it applies to the Plaintiff's application for parole even though he had commenced this proceeding before s 127A was enacted.

   (2) Section 74AAA(1) does not require, as a matter of express text or implication, that the prisoner have been convicted and sentenced for an offence of murder of a person where an element of the offence was that the prisoner knew or was reckless as to whether the person was a police officer. To the contrary, s 74AAA requires attention to both a person's conviction and his or her sentence. The fact that the

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murder victim was a police officer may have been an aggravating factor in sentencing a prisoner, and the reasons for sentence are made relevant by s 74AAA(3). The Plaintiff's arguments would deprive s 74AAA of any operation, because no offence in Victorian law, either at the time of the enactment of s 74AAA or now, makes an offender's state of mind concerning the identity of the victim as a police officer an element of the offence.

4. On the constitutional issue, the State contends that s 74AAA (and s 127A) are not contrary to any constitutional assumption of the rule of law.

(1) The proposition that the rule of law is an assumption on which the Constitution is based does not mean that anything that could be described as an aspect of "the rule of law" is a constitutional implication that restricts legislative power.

(2) There is no general constitutional prohibition against retrospective laws. The Commonwealth and State Parliaments can enact at least some retrospective criminal laws, and can alter the substantive law to be applied in pending judicial proceedings. Given that, there cannot be any implied constitutional limitation that would prevent a State Parliament, after a prisoner's non-parole period has ended, from altering the criteria that the prisoner must meet before a grant of parole. It makes no difference that, before the amendment commenced operation, the prisoner had made an application for parole (pursuant to an administrative policy, not pursuant to any statutory prescription), or that the process for considering that application (pursuant to an administrative policy) had begun.

(3) In any event, s 74AAA is not "retrospective" in any relevant sense. Section 74AAA changes the law to be applied by the Board at the time the Board makes future decisions as to whether a prisoner should be granted parole — that is, decisions on or after the date on which s 74AAA commenced.

PART III: SECTION 78B NOTICE

5. Notice has been given in accordance with s 78B of the *Judiciary Act 1903* (Cth).

PART IV: MATERIAL FACTS

6. The material facts are contained in the Special Case. In summary:

(1) On 24 August 1988 the Plaintiff was sentenced to life imprisonment for the murder of Angela Taylor, a police officer, with a non-parole period of 28 years. **[SCB 99-100]**

(2) On 30 September 2016 the Plaintiff's non-parole period[1] ended. [**SCB 77**, [5]]

(3) On 3 October 2016 the Plaintiff submitted a completed parole application form. [**SCB 238**]

(4) On 13 October 2016 a case management review committee decided that the Plaintiff's application met the requirements for a parole application. [**SCB 244**]

(5) On 20 October 2016 the Board decided to proceed with parole planning. [**SCB 250**]

(6) On 14 December 2016 s 74AAA of the Act commenced operation.[2]

(7) On 1 January 2017 the Plaintiff brought proceedings in this Court challenging the validity of s 74AAA. [**SCB 28**]

10 (8) On 20 December 2017 s 127A of the Act commenced operation.[3]

Judicial findings on the nature and circumstances of the Plaintiff's offending

7. The sentencing judge observed that on 27 March 1986, shortly before 1 pm, a stolen car containing a powerful explosive device was parked at the kerb, directly in front of the Russell Street Police Complex, only a few metres from an entrance to the building and directly opposite the Melbourne Magistrates' Court building. [**SCB 91-92**]

8. The explosive device was detonated a little after 1 pm. The explosion produced horrific injuries to Constable Angela Taylor, who had been on duty at the court and was crossing the roadway during her lunchbreak. Constable Taylor died of her injuries approximately four weeks later. [**SCB 92**]

20 9. The sentencing judge found that the location selected for the bombing and the time chosen for its detonation were "very powerful indicators of the underlying motivation for this activity", and that the Plaintiff and Stanley Taylor had "hatred and contempt for this society and its institutions". [**SCB 94**]

10. Evidence was led at trial of the Plaintiff's hatred of police [described at **SCB 113**]. The Full Court held that this evidence was relevant because it tended to explain why the Plaintiff might commit the crime. [**SCB 167-169**; also **SCB 174**] The Full Court stated that the crime "was a singular exercise in violence aimed at the police in general"; aimed not at a particular person but at members of a class. [**SCB 169**]

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1 At the time, this period was the "minimum term" under s 17 of the previous *Penalties and Sentences Act 1985* (Vic). Under the *Sentencing Act 1991* (Vic) this period is now the non-parole period.

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

3 *Corrections Legislation Further Amendment Act 2017* (Vic), ss 2(1) and 24.

11. The sentencing judge found that the men and women of the Victorian Police Force "whose deaths [the Plaintiff and his co-accused] indiscriminately encompassed" perform a vital role in protecting the community, and in turn the community through its courts "must make it perfectly clear that violent actions directed against them will not be tolerated". This was a proper area for the principle of deterrence. [**SCB 96**] That finding was not challenged on appeal, in any of the Plaintiff's 34 grounds.

PART V: ARGUMENT

A. Scheme for granting parole in Victoria

12. Parole involves the release of a prisoner serving a sentence of imprisonment at the will of the executive. It is a licence or privilege granted pursuant to a statutory scheme; "it is always necessary to recognise that an offender may be required to serve the whole of the head sentence that is imposed"[4] — that is, a prisoner has no right to parole.

13. Subject to the particular provisions of the relevant statute, once sentenced the responsibility for the future of a prisoner passes to the executive branch of the government of the State.[5] The statutory scheme in Victoria for granting parole is contained in Pt 8, Div 5 of the Act and Pt 8, Div 3 of the *Corrections Regulations 2009* (Vic) (the **Regulations**).

A.1 Statutory provisions

14. The Board "may by instrument order that a prisoner serving a prison sentence in respect of which a non-parole period was fixed be released on parole at the time stated in the order (not being before the end of the non-parole period)" (s 74(1)).[6] In determining whether to make a parole order, the Board "must give paramount consideration to the safety and protection of the community" (s 73A).[7]

15. The Board may perform its functions in divisions (s 64(1)), and, under the statutory scheme, in some cases must do so. Relevantly, s 74AAB establishes a Serious Violent Offender or Sexual Offender Parole division (**SVOSO division**), which decides whether or not to release a prisoner on parole in respect of (relevantly) a "serious violent offence"

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4 *PNJ v The Queen* (2009) 83 ALJR 384 at 387 [11]; 252 ALR 612 at 615.

5 *Elliott v The Queen* (2007) 234 CLR 38 at 42 [5] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

6 The "non-parole period" is set under the *Sentencing Act 1991* (Vic), s 11 and s 14 (multiple sentences).

7 Section 73A took effect from 20 November 2013: see *Corrections Amendment (Parole Reform) Act 2013* (Vic), ss 2(1) and 11.

(s 74AAB(1)-(2)).[8] Under s 74AAB(5), the SVOSO division may only order that a prisoner be released on parole in respect of (relevantly) a serious violent offence if:

(1) another division of the Board has recommended that parole be granted; and

(2) the SVOSO division has considered the recommendation.

A.2 Administrative policy for parole applications

16. As French CJ observed in *Crump v New South Wales*, even within an unchanging statutory framework "the executive decision to release or not to release a prisoner on parole may reflect policies and practices which change from time to time".[9] Since approximately March 2015, the Board has adopted a practice that it will only consider whether to make a parole order in respect of a prisoner if the prisoner has made an application for parole. [**SCB 79**, [14]] This policy was adopted following a review of the Victorian parole system by Ian Callinan AC in 2013.[10]

17. The policy is contained in the Commissioner's Requirement 2.6.1, *Parole Application Process* (**CR 2.6.1**), as amended from time to time.[11] CR 2.6.1 states the Board will only consider parole on application by the prisoner. [**SCB 222**, [3.2]]

18. CR 2.6.1 sets out a diagram of the "parole application process flow". Once an application has been submitted, the process has four key stages. [**SCB 228**]

(1) The first stage involves an evaluation of the application by the case management review committee of the prison where the prisoner is in custody to determine whether it meets the threshold requirements for progression to parole planning. The committee is established under the Regulations,[12] but is not the Board or a committee of the Board. It provides a report to the Board (the **CMRC Parole Application Report**) for the Board's assistance. In the case of an SVOSO prisoner the prison case worker completes section 1 of the CMRC Parole Application Report,

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8 "Serious violent offence" includes murder: see para (a) of the definition of "serious violent offence" in s 3 of the Act, and *Sentencing Act*, Sch 1 cl 2(a).

9 (2012) 247 CLR 1 at 17 [28].

10 See Ian Callinan AC, *Review of the Parole System in Victoria* (July 2013), pp 88-89 (measure 2: prisoners sentenced to 3 years or more should be required to make an application for parole). <https://assets.justice.vic.gov.au/corrections/resources/11ee85a1-67c5-4493-9d81-1ce49941cce5/reviewadultparoleboardv1.pdf>

11 The special case book contains both the CR 2.6.1 as in force when the Plaintiff became eligible for parole (March 2016) (**SCB 222-228**), and also the current version at the time of the Special Case (November 2017) (**SCB 230-236**). These submissions use the March 2016 version.

12 There are one or more case management review committees in each prison: Regulations, reg 24(1).

including the Brief Review of Satisfactory Behaviour.[13] The assessment and transition coordinator completes section 2 of the CMRC Parole Application Report, and the case management review committee completes section 3 and section 4.

(2) The second stage is "APB consideration". The case management review committee sends to the Board the parole application and the CMRC Parole Application Report. The Board considers the application within 30 days and decides whether to proceed to parole planning — that is, whether to proceed with its consideration of the application for parole, which will include obtaining a Parole Suitability Assessment. The decision to proceed to parole planning is preliminary in nature and is referred to elsewhere in CR 2.6.1 as a "threshold".[14]

(3) The third stage is "Parole Suitability Assessment". A Community Correctional Services (**CCS**) parole officer is allocated to undertake a Parole Suitability Assessment. In the case of an SVOSO prisoner, the CCS officer obtains a Full Review of Satisfactory Behaviour from the prison case worker.

(4) The fourth stage is "APB decision". The Board considers the Parole Suitability Assessment, and any other relevant information, and decides whether to grant or deny parole.

A.3 The Board's decision to proceed to parole planning in relation to the Plaintiff

19. Consistently with the policy described above, the Plaintiff filled in a parole application form [**SCB 238**] and a CMRC Parole Application Report was produced [**SCB 240ff**].[15]

20. After considering the application and the CMRC Parole Application Report the Board decided to "proceed with parole planning". [**SCB 250**] The Board stated that it would consider the Plaintiff's "suitability for release on parole" on receipt of a Parole Suitability Assessment from CCS. [**SCB 249**] That assessment has not been completed. [**SCB 81**, [25]; **SCB 83**, [32](a)]

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13 The Brief Review of Satisfactory Behaviour prepared at the initial application stage is not always attached to the CRMC Parole Application Report: see **SCB 243**, Q6.

14 [**SCB 225**, [5.1](xiii)].

15 On the general risk of re-offending, the CRMC Parole Application Report states "never been assessed in full". [**SCB 242**] The case management review committee advice to the Board was that the Plaintiff "meets [the] requirements for [a] parole application"; and a box labelled "yes" was ticked for whether the SVOSO prisoner "has met the threshold for progression to parole planning towards their earliest eligible release date". [**SCB 244**] The reference to the committee having "supported" the Plaintiff's application is to be understood in light of its report and its function. [**SCB 247**] Cf Plaintiff's submissions (**PS**), [14].

21. Accordingly, the Board has not yet begun any substantive consideration of whether to grant the Plaintiff parole — that consideration would begin on receipt of the Parole Suitability Assessment. Rather, the case management review committee and the Board decided only that the Plaintiff's application for parole met the threshold requirements for an application.

A.4 No entitlement or accrued right to parole

22. In summary, from the end of the Plaintiff's non-parole period until the enactment of s 74AAA (from 30 September to 14 December 2016):

(1) the Act did not confer any entitlement on the Plaintiff to be granted parole, and did not set out the criteria that the Plaintiff was required to satisfy to be granted parole – the only express criterion governing the Board's decision under s 74(1) was the requirement in s 73A to give paramount consideration to the safety and protection of the community;

(2) the Act did not make any provision for the Plaintiff to apply for parole, and (apart from the "two-tier" process in s 74AAB) did not make any provision for the process that the Board might adopt in considering whether or not to grant the Plaintiff parole under s 74(1); and

(3) pursuant to a non-statutory administrative policy, the Board decided that the Plaintiff's application for parole met the threshold requirements for proceeding to parole planning. However, consistent with the threshold nature of this decision, a full assessment of the Plaintiff's general risk of re-offending, which would occur in a Parole Suitability Assessment, had not yet been undertaken.

23. In light of the nature of parole and the statutory scheme, and the stage that his application for parole had reached, the Plaintiff did not have any accrued right or legitimate expectation[16] that the Board, when it reached a point where it was able to determine his application for parole (which point has not yet been reached) would apply the Act as in

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16 Any argument based on "legitimate expectation" can be dismissed shortly. This Court has stated that the concept of legitimate expectation does not assist in determining whether there has been a breach of procedural fairness: see eg *Minister for Immigration v WZARH* (2015) 256 CLR 326 at 335 [30] (Kiefel, Bell and Keane JJ). Still less is it possible to give a "legitimate expectation" substantive force, by requiring the Board to give effect to an expectation (assuming it could otherwise be established): see *Re Minister for Immigration; Ex parte Lam* (2003) 214 CLR 1 at 10 [28] (Gleeson CJ), 21 [65]-[67], 24-25 [76]-[77] (McHugh and Gummow JJ); *Rush v Commissioner of Police* (2006) 150 FCR 165 at 186-187 [82]-[83] (Finn J); see generally Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470.

force at 13 December 2016: contra PS, [16]. Rather, the Board will be required, when deciding the Plaintiff's application for parole, to apply the law in force at the time of its decision. Nothing in the Act created any accrued right, and a non-statutory administrative policy cannot create an accrued "right".

A.5 Modifications of statutory scheme by s 74AAA

24. Section 74AAA modified the existing statutory scheme as follows:

(1) It inserted an express statutory requirement for a prisoner who comes within s 74AAA(1) to make an application for parole, or for an application to be made on the prisoner's behalf (s 74AAA(1)).

(2) It inserted a non-exhaustive statement of the material that the Board must consider: first, "[i]n considering the application", the Board is required to have regard to the record of the court in relation to the offending, "including the judgment and the reasons for sentence" (s 74AAA(3)); and second, the Board cannot make a parole order unless it is satisfied of the matters in s 74AAA(4)(a) "on the basis of a report prepared by the Secretary to the Department".

(3) It inserted a non-exhaustive, but decisive, statement of the matters of which the Board must be satisfied before it can make a parole order: the Board must not make a parole order unless the Board is satisfied of the matters in s 74AAA(4)(a) and (b) (with the effect that the Plaintiff cannot obtain parole unless he is in imminent danger of dying or is seriously incapacitated).

25. Section 74AAA is modelled on s 74AA of the Act, which applies to Julian Knight and which was held to be valid in *Knight v Victoria*.[17] Section 74AA was in turn modelled on a NSW provision upheld in *Crump*.[18]

(1) *Crump* held that a law altering the criteria which must be satisfied before a prisoner can be granted parole did not interfere with a judicial order that set a minimum term on an existing life sentence.[19]

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17 (2017) 345 ALR 560. The link between ss 74AAA and 74AA is explained in Second Reading Speech to the Justice Legislation Amendment (Parole Reform and Other Matters) Bill 2016, Legislative Assembly Debates, 6 December 2016 at 4727.

18 (2012) 247 CLR 1. The link between *Crump* and s 74AA is explained in the Second Reading Speech to the Corrections Amendment (Parole) Bill 2014 (Vic), Legislative Assembly Debates, 13 March 2014 at 746.

19 See *Crump* (2012) 247 CLR 1 at 19 [35] (French CJ), 26-27 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), 28-29 [71] (Heydon J).

(2) Similarly, *Knight* held that a minimum term only sets the period before which a prisoner must not be granted parole.[20] Whether the prisoner is granted parole after that period has expired is wholly a matter for the executive government.[21] There is no intersection between the law altering the criteria which must be satisfied before parole can be granted, and the judicial order imposing the minimum term or non-parole period.[22]

26. It is true, but irrelevant, that the legislative amendments considered in *Knight* and *Crump* were made before the prisoners in question became eligible for parole: contra PS, [28]. That fact played no part in the reasoning of this Court in either decision.[23]

27. Heydon J stated in *Crump* that the question of what a successful parole application might require after Mr Crump became eligible for parole "was a question to be answered in the light of whatever the legislation required at the relevant time".[24] The "relevant time" is to be understood as the time of the parole body's decision, not the time at which the Plaintiff made his (non-statutory) application for parole, nor the time at which the Board commenced considering that application: contra PS, fn 9.

B. Plaintiff's accrued right and retrospectivity arguments should be rejected

28. The Plaintiff's first statutory argument has three main threads.

B.1 Section 127A makes clear that 74AAA applies to the Plaintiff

29. First, as a matter of statutory construction, the Plaintiff says that s 74AAA does not apply to him or his application for parole because, before s 74AAA commenced on 14 December 2016:

(1) the Plaintiff's non-parole period ended (on 30 September 2016);

(2) the Plaintiff had made an application for parole (on 3 October 2016); and

(3) the Board had decided to proceed with parole planning (on 20 October 2016).

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20 See *Knight* (2017) 345 ALR 560 at 566 [27] (the Court).

21 *Crump* (2012) 247 CLR 1 at 26 [58]-[59] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Elliott v The Queen* (2007) 234 CLR 38 at 41-42 [5] (the Court).

22 See *Knight* (2017) 345 ALR 560 at 567 [28]-[29] (the Court).

23 It is impermissible to limit *Knight* or *Crump* on the basis of a narrower path of reasoning that the Court might have adopted, when those decisions rest on a broader principle: see *Victoria v The Commonwealth* (*The Industrial Relations Act Case*) (1996) 187 CLR 416 at 484-485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

24 (2012) 247 CLR 1 at [70] (emphasis added).

The Plaintiff says that those matters gave him an "accrued right", which is presumed not to be affected by a legislative amendment:[25] see PS, [43(b)], [53]-[56].

30. Regardless of whether the Plaintiff had any "accrued right" (which is disputed), s 127A(a) of the Act expressly provides that s 74AAA applies to a prisoner, regardless of whether before the commencement of s 74AAA:

(i) the prisoner had become eligible for parole; or

(ii) the prisoner had taken any steps to ask the Board to grant the prisoner parole; or

(iii) the Board had begun any consideration of whether the prisoner should be should be granted parole.

This clear language overcomes any presumption that s 74AAA did not affect any "accrued right" arising by virtue of one or more of those circumstances.

B.2 Section 127A applies even though the Plaintiff had commenced this proceeding

31. The Plaintiff contends that s 127A does not have the effect of applying s 74AAA to him because, before s 127A commenced operation, the Plaintiff had brought proceedings in this Court to challenge the application to him (and validity) of s 74AAA: PS, [57]-[60].

32. It is well settled that a State law can validly alter the substantive law applicable in pending judicial proceedings.[26] Moreover, the presumption against altering the law in pending judicial proceedings can be displaced by sufficiently clear language[27] — there is no requirement for Parliament to expressly address the question of pending actions.[28] In no sense is s 74AAA (which makes it more difficult for certain prisoners to obtain parole[29]) concerned with the "criminal justice process":[30] contra PS, [58].

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25 See *Interpretation of Legislation Act 1984* (Vic), s 14(2)(e). The Plaintiff also relies on the equivalent common law presumption.

26 See eg *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 563-564 [19]-[20] (the Court); *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at 98 [26] (French CJ, Kiefel, Bell and Keane JJ), 101-102 [42] (Gageler J).

27 See *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456 at 481 [98] (Spigelman CJ, with Hidden and Latham JJ agreeing); *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 134 [28]-[29], 135-136 [32] (French CJ, Crennan and Kiefel JJ): the issue is what constructional choices are open according to the established rules of interpretation.

28 See eg *Victoria v Robertson* (2000) 1 VR 465 at 471-472 [20]-[21] (Batt JA, with Callaway and Buchanan JJA agreeing); *Lodhi v The Queen* (2006) 199 FLR 303 at 312-313 [40] (Spigelman CJ, with McClellan CJ at CL agreeing on this point, and Sully J agreeing); *Madafferi v Minister for Immigration* (2002) 118 FCR 326 at 347 [71]-[72] (French, O'Loughlin and Whitlam JJ).

29 See the description of s 74AA in *Knight* (2017) 345 ALR 560 at 567 [29] (the Court).

33. In this case, the text and context of s 127A of the Act displace the presumption against a law altering the applicable law in judicial proceedings.

34. First, s 127A is expressed to be "for the avoidance of doubt". That statement is a strong textual indication that s 127A is a declaratory provision, operating from the date that s 74AAA commenced.[31] Contrary to the Plaintiff's submissions (PS, [59]), s 127A did not expand the operation of s 74AAA.[32]

(1) Section 74AAA expressly applies to a prisoner convicted and sentenced before that section came into operation (s 74AAA(1)). From the commencement of s 74AAA, the Board "must not" grant parole to a prisoner who comes within s 74AAA(1), unless the Board is satisfied of the matters in s 74AAA(4). As already explained, a prisoner did not have any "accrued right" to have a pre-existing parole application determined under the law as it stood before the enactment of s 74AAA. Thus the better view is that s 74AAA applied to the Plaintiff from its commencement, even without s 127A.

(2) A potential doubt over the operation of s 74AAA arguably arose because other amendments to the Act, inserted at the same time, were covered by a transitional provision (s 127 of the Act[33]), but s 74AAA was not so covered and because the Plaintiff had alleged in his Statement of Claim that s 74AAA did not apply to him. Section 127A resolves this doubt, by clarifying the intended operation of s 74AAA.[34]

35. Second, s 127A(a) refers expressly to the three factors that the Plaintiff had identified in his amended statement of claim as meaning that s 74AAA did not apply to him.

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30 Cf *R v JS* (2007) 230 FLR 276 at 289-290 [45]-[46], cited in PS, fn 56. *JS* concerned a provision for the Crown to appeal against a directed verdict of acquittal: see 285-286 [22]. This provision modified "a fundamental principle of the criminal justice process": at 290 [46] (Spigelman CJ).

31 A "declaratory" section that makes clear the operation of a statutory provision, for the avoidance of doubt, is presumed to operate from the date of the earlier provision: see eg *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 373-375 (Isaacs J); Herzfeld, Prince and Tully, *Interpretation and Use of Legal Sources* (2015) at [25.1.2370].

32 In addition, the Explanatory Memorandum for the Corrections Legislation Further Amendment Bill 2017 says that "New section 127A only operates to clarify the point from which section 74AAA of the **Corrections Act 1986** operates, spelling out more clearly what was always the intended position in relation to section 74AAA. New section 127A does not extend the operation of section 74AAA." A similar statement was made in the Second Reading Speech to the Corrections Legislation Further Amendment Bill, Legislative Assembly Debates, 7 September 2017 at 2696-2697.

33 Section 127 provides that, without limiting their application, the amendments made by Pt 3, Div 1 of the *Justice Legislation Amendment (Parole Reform and Other Matters) Act* (dealing with so called "no body" cases) apply to an application for parole made, but not determined, before that Division comes into operation.

34 See *Seafarers' Retirement Fund Pty Ltd v Oppenhuis* (1999) 94 FCR 594 at [15] (Merkel J).

B.3 The Plaintiff did not have any accrued right

36. In any event, and putting to one side s 127A, the Plaintiff did not at 13 December 2016 have any "accrued right" to have his application for parole determined under the law as then in force: see [14]-[23] above. The cases cited in PS, [56] do not suggest any different result (noting that care must be taken in relying on cases from other jurisdictions involving different constitutional systems, different approaches to administrative law and different statutory contexts).

(1) The Plaintiff seeks to rely on *Ford v National Parole Board*,[35] a Canadian decision of a single judge. There the relevant Act and Regulations conferred a statutory duty on the parole board to conduct, at prescribed times, a review into whether an inmate who was sentenced for 2 years or more should be granted parole and, if so, the date on which parole should commence.[36] Walsh J held that, although the grant of parole itself was a privilege and not a right, the making of a review "at times required by the Act and Regulations" was a right.[37] The Act and Regulations in Victoria do not contain any similar provisions that would create a "right".

(2) The Plaintiff also seeks to rely on *Flynn v Her Majesty's Advocate*,[38] a decision of the Privy Council. The issue in that case was whether certain transitional provisions were compatible with the European Convention on Human Rights. Lord Rodger was prepared to assume that the appellants had a legitimate expectation amounting to a vested right to a parole board hearing on or about a particular date, but observed that such an assumption was "somewhat generous".[39] In the Australian context no such assumption could be made given this Court's approach to legitimate expectations (see fn 16, above).

(3) Finally, the Plaintiff seeks to rely on *Bakker v Stewart*,[40] a decision of the Supreme Court of Victoria. That case did not concern parole; it concerned whether an amendment to the penalty for a criminal offence only applied to offences committed after the amendment commenced operation. The Court held that it did. There is no comparison between a law that alters the penalty for a criminal offence,

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35 (1976) 73 DLR (3d) 630.

36 See the provisions set out in *Ford* (1976) 73 DLR (3d) 630 at 631-633.

37 See *Ford* (1976) 73 DLR (3d) 630 at 633.

38 2004 SC (PC) 1.

39 *Flynn* 2004 SC (PC) 1 at 21 [68].

40 [1980] VR 17 at 23 (Lush J).

and a law that alters the criteria that must be met before parole will be granted in the future (albeit for persons who are already serving prison terms).[41]

37. The Plaintiff seeks to distinguish *Telford v Severin*,[42] a decision of the Supreme Court of South Australia. The Court there rejected an argument that a prisoner was entitled to apply for release on home detention under the law applicable at the time of sentence. This was because there was no "right" to release on home detention — it was not a component of the sentence, but rather at the absolute discretion of the executive.[43] As the Court observed, "no statutory right was conferred on the plaintiff who possessed nothing more than a hope or expectation that the power to release on home detention might be exercised in his favour. The plaintiff cannot lay claim to an accrued or acquired right within the meaning of s 16(1)(c)" of the *Acts Interpretation Act 1915* (SA).[44] There was no suggestion that the prisoner in *Telford* would have had an accrued "right" if, before the amendment, he had served the minimum period of imprisonment required under the pre-amendment law before he could be released on home detention: contra PS, [56](d).

38. The reasoning in *Telford* is consistent with this Court's decisions in *Elliott, Baker, Crump* and *Knight* and applies equally to the Victorian statutory regime.

B.4 It is not possible to reinterpret s 74AAA pursuant to Charter, s 32

39. Second, the Plaintiff contends that s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) requires that s 74AAA be interpreted as not applying to a prisoner if the Board has begun determining the prisoner's application for parole.

40. Section 32(1) of the Charter provides that "[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights". However, s 32(1) has a "limited" operation, in that it applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.[45] Accordingly, if the words of a statute are clear, the court must give them that meaning. Even if it is not otherwise possible to ensure that the human right in question is not defeated or diminished, "it is impermissible for a court to attribute a

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41 See *Baker* (2004) 223 CLR 513 at 520-521 [7] (Gleeson CJ): "legislative and administrative changes to systems of parole and remissions usually affect people serving existing sentences. The longer the original sentence, the more likely it is that an offender will be affected by subsequent changes in penal policy."

42 (2007) 98 SASR 70.

43 *Telford* (2007) 98 SASR 70 at 76 [23] (Duggan J, with White and Kelly JJ agreeing).

44 *Telford* (2007) 98 SASR 70 at 77 [30].

45 *Slaveski v Smith* (2012) 34 VR 206 at 215 [23] (the Court); *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1 at 12-13 [25] (Nettle JA); cf 61-62 [188]-[190] (Tate JA).

meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment".[46]

41. Here, the language of s 74AAA is clear — the Board "must not" make an order for parole in respect of a prisoner who comes within s 74AAA(1) unless the Board is satisfied of the matters in s 74AAA(4)(a) and (b). Section 74AAA was enacted by the Victorian Parliament after the Minister had expressly identified that s 74AAA could be thought to limit the human rights in ss 10(b) and 22(1) of the Charter.[47] Therefore, this is not a case where reinterpretation of a provision is required to avoid an inadvertent incursion on human rights.[48]

10 42. There is nothing in the text of s 74AAA to support the Plaintiff's proposed interpretation.[49] Far from avoiding or minimising the encroachment on human rights by s 74AAA in its general operation, the Plaintiff's interpretation would leave the provision to operate for others, but exclude him — and him alone — from the operation of s 74AAA simply because, before s 74AAA commenced operation, he had initiated a non-statutory process, and the Board had taken some preliminary steps under that non-statutory process. The Charter does not permit an individualised reinterpretation of that kind.[50] The Plaintiff's interpretation is inconsistent with both the grammatical meaning and apparent purposes of s 74AAA.

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46 *Slaveski* (2012) 34 VR 206 at 215 [24]; *Carolan v The Queen* (2015) 48 VR 87 at 103-104 [46] (the Court); *Momcilovic v The Queen* (2011) 245 CLR 1 at [566] (Crennan and Kiefel JJ): s 32(1) does not require "the language of a section to be strained to effect consistency with the Charter. When a provision cannot be construed consistently with the Charter, the provision stands."

47 Statement of Compatibility for the Justice Legislation Amendment (Parole Reform and Other Matters) Bill 2016 (Vic), Legislative Assembly Debates, 6 December 2016 at 4724-4725.

48 See, in relation to the principle of legality, *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19] (Gleeson CJ): courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms "unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment."

49 Cf the transitional provision considered in *Flynn* 2004 SC (PC) 1, which required the court to make an order specifying what would have been specified as the punishment part if the amended provision had applied to the prisoner at the time he was sentenced: see 10-11 [29]. The Privy Council held that this provision could be interpreted as not excluding factors that became known after the time of sentence, thus taking into account progress that the prisoners made under the previous, non-statutory system for progressing parole: see 17 [54]-[55] (Lord Hope), 23 [75], 24 [81] (Lord Rodger), 29-30 [101]-[102] (Baroness Hale), 30 [107] (Lord Carswell).

50 As Lord Rodger observed in *Flynn* 2004 SC (PC) 1 at 21 [69], when considering the issue of reinterpretation of legislation in light of rights under the European Convention, the court cannot "pick and mix among the provisions enacted by the Parliament so as to concoct a special scheme to meet the appellants' particular situation".

43. It is immaterial that s 74AAA, unlike s 74AA, does not expressly exclude the Charter: contra PS, [48]. Whether or not s 74AA(4)-(5) are necessary, those provisions can be explained by the fact that s 74AA applies only to an identified individual (Julian Knight), whereas s 74AAA applies to a class of prisoner.

C. Section 74AAA(1) is not confined to the elements of the offence

44. The Plaintiff's other statutory argument is that he does not come within the terms of s 74AAA(1), because the offence for which he was convicted and sentenced (murder) did not include as an element that the Plaintiff knew, or was reckless as to whether, the murder victim was a police officer: PS, [30]-[41].

C.1 The text of s 74AAA does not support the Plaintiff's construction

45. The Plaintiff's argument is contrary to the clear words of s 74AAA, which:

(1) in sub-s (1), refers to a person "convicted and sentenced for" a particular offence (emphasis added); and,

(2) in sub-s (3), requires the Board to have regard to (among other things) the reasons for sentence in considering an application for parole by a prisoner who comes within s 74AAA(1).[51]

46. Those matters could not be relevant to whether the prisoner is incapacitated or in imminent danger of dying, or whether he or she is no longer a danger to the community, as required by s 74AAA(4). Rather, part of the Board's "consideration" of an application under s 74AAA(3) involves determining whether a prisoner comes within s 74AAA(1): contra PS, [32]. In its terms, s 74AAA directs the Board's attention beyond the elements of the offence.

C.2 Plaintiff's construction would deprive s 74AAA of any operation

47. The Plaintiff's argument would also mean that s 74AAA had no operation at all, either at the time it was enacted or now.[52] There is no offence in Victorian law that contains as an element that a murder victim was a police officer.

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51 Explanatory Memorandum to Justice Legislation Amendment (Parole Reform and Other Matters) Bill 2016 (Vic), p 2: the reasons for sentence may include findings in relation to whether the prisoner knew, or was reckless as to whether, the person who was murdered was a police officer. The fact that a murder victim was a police officer was an aggravating factor in sentencing law: see [48] below.

52 Cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] (McHugh, Gummow, Kirby and Hayne JJ): the court should strive to give effect to every word of a provision. Moreover, s 74AAA was enacted with at least 3 sentenced prisoners in mind, thus identifying the existing mischief to which the provision was addressed: see Second Reading Speech to the Justice Legislation

48. Further, since 2014 it has been a special aggravating factor under s 3(2)(a) of the *Crimes Act 1958* (Vic) that the court, in determining sentence, is satisfied that the prosecution has proved beyond reasonable doubt that: (i) the person murdered was an "emergency worker" on duty (including a police officer[53]); and (ii) at the time of carrying out the conduct the accused "knew or was reckless as to whether that person was … an emergency worker".[54]

49. The Plaintiff's argument would mean that, despite s 3(2)(a) of the *Crimes Act*, s 74AAA(1) of the Act would not apply to a prisoner who had been convicted of murder and then sentenced on the basis that the murder victim was a police officer, and the prisoner had been reckless as to whether the victim was a police officer. Moreover, putting aside the position of the Plaintiff, the Plaintiff's argument would mean that s 74AAA would not apply even to a prisoner who plainly knew the murder victim was a police officer, such as when the prisoner had murdered a police officer who was trying to apprehend him or her.[55]

C.3 Section 74AAA requires the Board to determine whether the prisoner knew, or was reckless as to whether, the murder victim was a police officer

50. The State contends that s 74AAA applies if the Board determines that:

(1) the prisoner was convicted and sentenced for the murder of a person; and

(2) as a matter of fact, the prisoner either knew that, or was reckless as to whether, the murdered person was a police officer as defined in s 74AAA(6).

51. As noted, s 74AAA(3) requires the Board to have regard to the record of the court in relation to the offending, "including the judgment and the reasons for sentence". The court orders will determine whether the prisoner was convicted and sentenced for murder. The reasons for sentence would usually set out the circumstances of the offence, from which the Board can infer whether the prisoner knew that, or was reckless as to whether, the murdered person was a police officer as defined. However, s 74AAA(3) is not

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Amendment (Parole Reform and Other Matters) Bill 2016 (Vic), Legislative Assembly Debates, 6 December 2016 at 4727.

53 *Crimes Act*, s 3(3) and *Sentencing Act*, s 10AA(8) (definition of "emergency worker").

54 The "standard sentence" in that situation is 30 years, whereas the standard sentence in any other case of murder is 25 years: *Crimes Act*, s 3(2). On common law aggravation, see *Nguyen v The Queen* (2016) 256 CLR 656 at 672 [43] (Bell and Keane JJ), 678 [66] (Gageler, Nettle and Gordon JJ).

55 See the facts of *In the matter of a Minimum Term Application pursuant to s 18A of the Penalties and Sentences Act 1985 by Peter Alan Reid* [1989] VicSC 346 (Nathan J, 28 July 1989): the prisoner shot a motorcycle policeman who had called for the prisoner to pull over. See also the facts of *DPP v Roberts and Debs* [2003] VSC 30 at [3]-[8] (Cummins J): the prisoners shot two police officers who were attempting to apprehend them.

exhaustive, and the Board could have regard to other relevant information, such as correspondence provided to it by the prisoner as part of the parole application process.[56]

52. The Plaintiff contends that looking beyond the elements of the offence would cause inconvenience, because determining a prisoner's state of mind would require lengthy proceedings on the circumstances of the offending before the Board, and would lead to challenges on judicial review: PS, [40](a). This argument greatly overstates the difficulty of the Board determining whether a prisoner came within s 74AAA(1), which could often be determined solely from the reasons for sentence. In this case, for example, the Plaintiff was convicted on the basis of a joint enterprise which involved placing a large bomb directly outside a police station. The bomb killed a police officer who was on duty that day. The sentencing judge and the Full Court found that the offending was motivated by hatred of police: see [7]-[11] above. From those facts alone, the Board could reasonably conclude that the Plaintiff was at least reckless as to whether the murder victim was a police officer, and that Constable Taylor was a "police officer" as defined in s 74AAA(6) (that is, she was either performing a duty of a police officer at the time of the murder, or her murder arose from or was connected with her role as a police officer).

53. There is a separate issue between the parties as to whether the matters in s 74AAA(1) are jurisdictional facts (as the Plaintiff contends), or are matters to be established to the reasonable and lawful satisfaction of the Board (as the State contends). That is a question of statutory construction, and the lack of express reference to the Board's opinion in s 74AAA(1) is not determinative: cf PS, [31].[57] In any event, the question whether the matters in s 74AAA(1) are jurisdictional facts is relevant only in relation to the role of a court on judicial review of a decision made by the Board. Whether or not the matters in s 74AAA(1) are jurisdictional facts, they are not confined to the elements of the offence and are capable of applying to the Plaintiff on the basis of his conviction or his sentence.

54. The State's approach does not involve the Board "going behind" the conviction and sentence: contra PS, [70]. The conviction and sentence remain unchallenged and provide a factum on which s 74AAA operates. The prisoner's state of mind at the time of the offending is a further factum upon which s 74AAA operates. An inquiry into that state of

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56 In this case, for example, the Plaintiff's submission dated 25 October 2016 stated that his co-accused had a desire to bomb police headquarters, and a series of steps were taken towards that end. The Plaintiff described his role as being "to store the explosive and the stolen car and to provide a location for the bomb to be made". **[SCB 256]** Accordingly, even on the Plaintiff's version of events, there was a deliberate plan against the police of which he was aware and in which he played a role.

57 See *QBE Insurance (Australia) Ltd v Miller* [2013] NSWCA 442 at [30] (Basten JA, with Ward JA and Young AJA agreeing).

mind does not involve "going behind" the conviction or sentence. As *Crump* and *Knight* establish, s 74AAA does not intersect with the exercise of judicial power at all: see [25]-[26] above. As in *Crump* and *Baker*, a State law may choose any matter (including the circumstances of a prisoner's offending) as the "factum" that determines the circumstances in which the prisoner may be granted parole.[58]

D. Sections 74AAA and 127A are constitutionally valid

55. The Plaintiff's constitutional argument is that if ss 74AAA and 127A apply to him they are contrary to the constitutional assumption of the rule of law and invalid.

D.1 No general constitutional prohibition against retrospective laws

56. To say that the rule of law is an assumption on which the Constitution is based does not mean that "the rule of law" is a constitutional implication that restricts legislative power. There is a "critical difference between an implication and an unexpressed assumption upon which the framers proceeded in drafting the Constitution. The former is a term or concept which inheres in the instrument and as such operates as part of the instrument, whereas an assumption stands outside the instrument."[59]

57. Rather, judicial statements that the Constitution is framed against an assumption of the rule of law should be understood as recognising that the "rule of law" is given practical effect by Ch III of the Constitution.[60] One such practical manifestation is that the courts must be able to review the legality of government action (both legislative and executive).[61] But it would be going much further to give the values arguably (and contestably) reflected in the rule of law — such as a strong preference for rules to operate prospectively — "immediate normative operation" absent any textual or structural basis.[62] The rule of law is a notoriously imprecise concept, used to describe a number of different, and sometimes conflicting, values.[63]

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58 *Crump* (2012) 247 CLR 1 at 26-27 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Baker* (2004) 223 CLR 513 at 532 [43] (McHugh, Gummow, Hayne and Heydon JJ).

59 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 135 (Mason CJ) (footnote omitted).

60 *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61] (Gummow and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1 at 62-63 [131] (Gummow J), 91 [233] (Hayne J), 156 [423] (Crennan and Bell JJ).

61 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 512-513 [102]-[103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Graham v Minister for Immigration* (2017) 91 ALJR 890 at 901-902 [40]-[44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

62 *Re Minister for Immigration; Ex parte Lam* (2003) 214 CLR 1 at 23 [72] (McHugh and Gummow JJ).

63 Goldsworthy, "Legislative Sovereignty and the Rule of Law" in Campbell, Ewing and Tomkins (eds), *Sceptical Essays on Human Rights* (2001) 61 at 64-65.

58. In the present case the Plaintiff's argument appears to be that ss 74AAA and 127A are impermissibly retroactive in their operation. He contends that the rule of law requires that laws "generally be prospective rather than retroactive", that laws be "relatively stable", and that laws be accessible and "so far as possible intelligible, clear and predictable": PS, [65] (emphasis added). But even these statements make it clear that the rule of law does not require an absolute prohibition against retrospective laws.

59. That position is confirmed in the Australian constitutional context by at least two well-established principles.

(1) First, Ch III of the Constitution does not preclude either the Commonwealth Parliament or the State Parliaments from enacting retrospective laws, including at least some retrospective criminal offences.[64]

(2) Second, both the Commonwealth and State Parliaments have power to alter the substantive law that applies to pending or even completed judicial proceedings.[65] It must follow that there is no implied constitutional limit that would prevent a State Parliament, once a prisoner's non-parole period ended, from altering the criteria that must be satisfied before the prisoner can be granted parole through an executive decision-making process.

60. Contrary to the Plaintiff's argument, the fact that a prisoner has become eligible for parole (or has commenced a non-statutory process for applying for parole) has no constitutional significance. The Plaintiff's argument would require the Board to administer a different system of parole, depending on the eligibility dates of each prisoner. That arrangement would be both unworkable, and contrary to proper prison management.[66]

D.2 Section 74AAA is not retrospective

61. In any event, s 74AAA is not properly described as "retrospective". Section 74AAA only applies to decisions of the Board made after its commencement. As explained above, a prisoner did not have any "accrued right" before the commencement of s 74AAA to have the Board apply the law as in force at any earlier time. Therefore, s 74AAA does not

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64 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501; *R v Kidman* (1915) 20 CLR 425.

65 See, in relation to the Commonwealth, *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88; *Australian Education Union* (2012) 246 CLR 117. See, in relation to the States, fn 26 above.

66 See, by analogy, *Leeth v The Commonwealth* (1992) 174 CLR 455 at 479 (Brennan J): it is impracticable for Commonwealth and State prisoners in the same prison to have different arrangements for parole.

purport to alter rights or liabilities that had accrued before it came into force; rather, s 74AAA operates prospectively, in relation to a privilege or licence that may be granted after its enactment, albeit by taking into account antecedent facts and circumstances as a basis for future prescription.[67]

E. Answers to questions in special case

62. The questions in [37] of the Special Case [**SCB 84-85**] should be answered as follows:

(1) Yes. Section 74AAA is capable of applying to the Plaintiff notwithstanding the matters in [37](a) of the Special Case.

(2) Yes. Section 74AAA is capable of applying to the Plaintiff notwithstanding that it was not an element of the offence for which the Plaintiff was convicted that the Plaintiff knew or was reckless as to whether the deceased was a police officer.

(3) No. Sections 74AAA and 127A are not invalid in their application to the Plaintiff by reason of the constitutional assumption of the rule of law.

(4) The Plaintiff should pay the State's costs.

PART VII: ESTIMATE OF TIME FOR ORAL ARGUMENT

63. The State estimates that it will require approximately 1.5 hours for the presentation of oral submissions in this matter.

Dated: 16 April 2018

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[67] *R v Roussety* (2008) 24 VR 253 at 264-265 [18] (Nettle JA); *Robertson v City of Nunawading* [1973] VR 819 at 824 (the Court); *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 309 [57]-[58] (McHugh and Gummow JJ).