IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S165 of 2011

BETWEEN

KEVIN GARRY CRUMP
Plaintiff

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AND

STATE OF NEW SOUTH WALES
First Defendant

NEW SOUTH WALES STATE PAROLE AUTHORITY
Second Defendant

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PLAINTIFF'S SUBMISSIONS

Date of Document: 1 February 2012

Filed on behalf of Plaintiff by
Legal Aid NSW
Level 1, 160 Marsden Street
Parramatta NSW 2124

Tel: 02 8688 3963
Fax: 02 8688 3895
Reference: W. Hutchins 10C091971

Part I: Publication of Submissions

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

Part II: Issues

2. These proceedings were commenced in the original jurisdiction conferred upon this Court by s 30(a) of the *Judiciary Act 1903* (Cth), which was in turn enacted in reliance upon s 76(i) of the *Constitution*. The issues arising on the pleadings, and in the proceedings generally, are as follows:

   (a) Does the Parliament of a State have the power, notwithstanding the integrated national court system contemplated by Ch III of the *Constitution*, to enact laws which operate to set aside, vary, or otherwise alter the effect of, any judgment, decree, order or sentence of the Supreme Court of that State in a "matter"?

   (b) Was the determination made by the Supreme Court of New South Wales, pursuant s 13A(4) of the *Sentencing Act 1989* (NSW), in respect of the plaintiff's existing life sentence a judgment or order of that Supreme Court in a "matter", within the meaning of s 73 of the *Constitution*?

   (c) If the answer to (a) is no and the answer to (b) is yes, is s 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW), in its purported application to the plaintiff, a State law which operate to set aside, vary, or otherwise alter the effect of, a judgment, decree, order or sentence of the Supreme Court of New South Wales in a "matter"?

Part III: Notices under section 78B of the *Judiciary Act 1903*

3. Notices under s 78B of the *Judiciary Act 1903* (Cth) have been served. The plaintiff does not consider that any further s 78B notice is required.

Part V: Material Facts

4. The relevant facts are set out in the Special Case ("**SC**"). The following is provided by way of background.

5. On 20 June 1974, following a trial in the Supreme Court of New South Wales ("**the NSW Supreme Court**"), the plaintiff and his co-accused were convicted:

   (a) of the murder of Ian James Lamb, for which, pursuant to what was then s 19 of the *Crimes Act 1900* (NSW) ("**the Crimes Act**"), they were "liable to penal servitude for life" [SC 53]; and

   (b) for conspiring to murder one Virginia Gai Morse, for which they were also sentenced to a term of life imprisonment [SC 39 at [1]].

   In the course of his sentencing remarks, the trial judge, Taylor J, said [SC 50]:

   > "I believe that you should spend the rest of your lives in gaol and there you should die. If ever there was a case where life imprisonment should mean what it says – imprisonment for the whole of your lives – this is it."

The plaintiff does not now dispute that these observations by his Honour constituted a "non-release recommendation" within the meaning of Schedule 1 to the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("**the Sentencing Procedure Act**").

6. In 1992, following:

(a) the enactment of the *Sentencing Act 1989* (NSW) ("**the Sentencing Act**"), which introduced a detailed system for the making of parole orders; and

(b) the insertion into that statute of s 13A,[1]

the plaintiff made an application to the NSW Supreme Court for a determination, pursuant to s 13A of that statute, of a minimum term for his sentence. That

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[1] Section 13A of the Sentencing Act, as originally enacted (it was inserted by the *Sentencing (Life Sentences)Amendment Act 1989* (NSW)), may be found at SC, Annexure 4. However, at the time of the plaintiff's application, s 13A relevantly provided as follows:

"(2) A persons serving an existing life sentence may apply to the Supreme Court for the determination of a minimum term and an additional term for the sentence.

(3) A person is not eligible to make such an application unless the person has served at least 8 years of the sentence concerned.

(4) The Supreme Court may, on application duly made for the determination of a minimum term and an additional term for a sentence:

(a) set both:

(i) a minimum term of imprisonment that the person must serve for the offence for which the sentence was originally imposed; and

(ii) an additional term during which the person may be released on parole (being either an additional term for a specified period or for the remainder of the person's natural life), or

(b) decline to determine a minimum term and an additional term.

...

(9) The Supreme Court, in exercising its functions under this section, is to have regard to:

(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) any relevant comments made by the original sentencing court when imposing the sentence, 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),

and may have regard to any other relevant matter."

application was dismissed by Loveday J on 10 December 1992 [SC 42 at [8]; SC 65-74], and an appeal from his Honour's decision to the Court of Criminal Appeal met with a similar lack of success [SC, 42 at [9]; SC 76-118].

7. Nonetheless, on 24 April 1997, upon a second application by the plaintiff, McInerney J, sitting in the NSW Supreme Court, determined that:

(a) for the murder of Mr Lamb, the plaintiff was sentenced to a minimum term of penal servitude of 30 years commencing on 13 November 1973 and concluding on 12 November 2003, with an additional term for the remainder of his natural life; and

(b) for the conspiracy to murder Mrs Morse, the plaintiff was sentenced to 25 years' penal servitude commencing on 13 November 1973 and concluding on 12 November 1998 ("**the Minimum Term Determination**") [SC 42 at [10]].

As McInerney J observed in his reasons, the effect of this determination was that the plaintiff would be "eligible for release on parole on 13 November 2003" [SC 179].

8. Following the repeal of the Sentencing Act, with took effect on 3 April 2000, the regime established by s 13A of that statute for the determination of minimum terms for persons serving life sentences was substantially re-enacted as Schedule 1 to the Sentencing Procedure Act,[2] subject to a change in nomenclature which saw the expression "minimum term" replaced with the phrase "non-parole period". In a similar fashion, the system of releasing prisoners on parole was retained, albeit on the terms set out in Part 6 of the *Crimes (Administration of Sentences) Act 1999* ("**the Administration of Sentences Act**").

9. Section 154A of this latter statute [SC 190], the validity of which is in issue in these proceedings, was inserted by the *Crimes Legislation Amendment (Existing Life Sentences) Act 2001* (NSW) ("**the 2001 Amending Act**"), which commenced operation on 20 July 2001. It suffices at this point to say that the effect of this provision is to deprive the second defendant ("**the Parole Authority**") of the power to make an order directing the release on parole of a "serious offender the subject of a non-release recommendation" unless it:

(a) is satisfied that the offender:

(i) is in imminent danger of dying, or is incapacitated to the extent that he or she no longer has the physical ability to do harm to any person; and

(ii) has demonstrated that he or she does not pose a risk to the community; and

(b) is further satisfied that, because of those circumstances, the making of such an order is justified.

[2] This Schedule must be read in conjunction with s 44(4) of the Sentencing Procedure Act, which provides: "Schedule 1 has effect in relation to existing life sentences referred to in that Schedule."

10. Crucially, by a notice dated 12 September 2003, the Parole Authority (then known as the New South Wales Parole Board) advised the plaintiff that he was not eligible to be released on parole by reason of s 154A [SC 45 at [16]; SC 192].

11. The operation of that provision has since been clarified by amendments made to the definition of "non-release recommendation" in the Sentencing Procedure Act by item 1 of Schedule 1 to the *Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act 2005* (NSW).[3] On the assumption that s 154A of the Administration of Sentences Act is valid in its purported application to the plaintiff (which is denied), those amendments have served to confirm the plaintiff's status as "serious offender the subject of a non-release recommendation".

12. In the period since 12 September 2003, the plaintiff has not applied to be released on parole.

Part V: Reasons for judgment in the Court below

13. Not applicable.

Part VI: Plaintiff's Argument

The effect of the Minimum Term Determination

14. At the time of the plaintiff's conviction and sentence, s 463(1) of the Crimes Act provided:

> "The Governor may grant to any offender a written licence to be at large, within limits specified in the licence, but elsewhere, during the unexpired portion of his sentence, subject to such conditions indorsed on the licence the Governor shall prescribe, and while such offender continues to reside within the limits specified, and to perform the conditions so prescribed, his sentence shall be suspended."

15. It was observed in *Baker v The Queen*[4] that under this provision, "there was always the prospect of release on licence". However, s 463 was repealed by s 5 of the *Prisons (Serious Offenders Review Board) Amendment Act 1989* (NSW), thus eliminating that prospect for the plaintiff on and from 12 January 1990, the date on which this latter statute commenced operation. Nevertheless, as was noted above, the Sentencing Act introduced a system under which offenders could be released on parole, and it was within the framework of that system that the Minimum Term Determination was made.

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[3] That expression is now defined to mean:

> "in relation to an offender serving an existing life sentence ... a recommendation or observation, or an expression of opinion, by the sentencing court that (or to the effect that) the offender should never be released from imprisonment, and includes any such recommendation, observation or expression of opinion that (before, on or after the date of assent to the *Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act 2005*) has been quashed, set aside or called into question."

[4] (2004) 223 CLR 513 at 528 [28].

16. Consequently, in order to understand the effect of what was determined by McInerney J, it is necessary to look beyond s 13A of the Sentencing Act, which conferred the power exercised by his Honour, and to have regard first to s 14. Subsection (1) of that provision provided that prisoners could be "released on parole in accordance with this Act", and subsection (2) prescribed the pre-conditions to eligibility for such release, namely, that:

(a) the prisoner was subject to at least one sentence of imprisonment that had a minimum term; and

(b) the prisoner had served each such minimum term and was not subject to any other sentence of imprisonment that did not have a minimum term.

17. Significantly, the satisfaction of these pre-conditions did not entitle an offender merely to apply for release on parole. As will emerge below, the operation of the process by which a parole order was made under the terms of the Sentencing Act was not in any way dependent upon an application first having been lodged by or on behalf of the relevant offender. Put simply, there was no right to apply for parole which could be said to be engaged upon the expiration of an offender's minimum term or terms.

18. Instead, what flowed from a given offender's satisfaction of the pre-conditions stipulated by s 14(2) was that, upon such satisfaction, and without having to meet any further requirements, that offender, irrespective of how pernicious or reprobate he or she might be, would, as a matter of law, have some *prospect*, even if only slight to the point of being no more than theoretical, of being released on parole. This is not to say that he or she would be released upon satisfying the pre-conditions prescribed by s 14(2). But if eligibility for parole merely entitled one to apply for release, without there being any prospect of such release, then the very concept of eligibility for parole would be rendered wholly illusory, as would the notion that "[t]he intention of the legislature is that a minimum term is a benefit to the prisoner".[5]

19. Reference should at this point be made to Division 2 of Part 3 of the Sentencing Act (ss 16 to 23A), which was expressed, in s 16, to apply to "the making of a parole order in respect of a sentence of imprisonment of more than 3 years that has a minimum term". The centrepiece of that Division was s 17(1), pursuant to which the Parole Board ("**the Board**") was prohibited from making a parole order for a prisoner unless it had:

(a) determined that the release of the prisoner was appropriate, having regard to the principle that the public interest was of primary importance;

(b) considered relevant comments (if any) made by the court when sentencing the prisoner;

(c) considered any reports required by the regulations to be furnished to it;

(d) taken into account the antecedents of the prisoner and any special circumstances of the case;

[5] *Iddon & Crocker v The Queen* (1987) 32 A Crim R 315 at 325-326; *Bugmy v The Queen* (1990) 169 CLR 525 at 530, 536.

(e) determined that it had sufficient reason to believe that the prisoner, if released from custody, would be able to adapt to normal lawful community life; and

(f) considered any other relevant matter.

20. The process by which the Board was required, in accordance with that provision, to determine whether or not to make a parole order in respect of a serious offender[6] was then governed by Subdivision 3 of Division 2 (ss 22A to 22P), which was inserted into the Sentencing Act by the *Sentencing Amendment (Parole) Act 1996* (NSW). Pursuant to s 22C(1) of the Sentencing Act, that process relevantly commenced with the Board giving preliminary consideration as to whether a prisoner should be released on parole:

(a) at least 60 days before the day on which the prisoner became eligible for such release; or

(b) if the prisoner had not been released on parole on or after that day – within each successive year following that day if the prisoner was, at that time, so eligible.

However, s 22C(2) permitted such consideration to be deferred to a day less than 60 days (but not less than 21 days) before the day on which the prisoner became eligible for release on parole if the Board was of the opinion that it was unable to complete its preliminary consideration because it had not been furnished with a report required to be made to it or there were other matters requiring further consideration.

21. In any event, following this process of preliminary consideration, at which point the Board was required to have formed what was termed an "initial intention" as to the making of a parole order, it was obliged to take a series of additional steps which, in essence, involved inviting submissions from the victim or victims of the relevant offence and from the prisoner in question.

22. For completeness, mention should also be made of s 22P, which was inserted as part of the package of amendments to the Sentencing Act[7] that included the amendments to s 13A considered in *Baker v The Queen*.[8] Amongst other things, that provision specified a number of additional factors required to be considered by the Board in determining whether to make a parole order in relation to a person whose sentence of imprisonment for life had been the subject of a determination under s 13A(4), including "the intention of the original sentencing court" and "the need to preserve the safety of the community".

23. The Sentencing Act thus created a regime under which, as a consequence of the Minimum Term Determination, on 13 November 2003, the plaintiff was to be:

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[6] The expression "serious offender" was defined in s 4 of the Sentencing Act to have the same definition in Part 10 of the *Prisons Act 1952* (NSW). Section 59 of this latter statute, which is to be found in Part 10, relevantly defines the expression serious offender to include:

(a) a person serving a sentence of imprisonment for life; and
(b) a person serving any sentence for which a minimum term and an additional term have been set by the Supreme Court under s 13A of the Sentencing Act.

[7] *Sentencing Legislation Further Amendment Act 1997* (NSW).

[8] (2004) 223 CLR 513.

(a) eligible for release on parole; and

(b) entitled to seek relief in the nature of mandamus if, at least 60 days before that date, the Board had not already given preliminary consideration to granting him a parole order, and had not formed an opinion under s 22C(2).

24. Furthermore, as has already been observed, that regime was substantially re-enacted in Part 6 (ss 126 to 161) of the Administration of Sentences Act following the repeal of the Sentencing Act in 2000. In particular, s 126(1) of the Administration of Sentences Act renders eligibility for release on parole conditional upon the relevant offender:

(a) being subject to at least one sentence for which a non-parole period has been set; and

(b) having served the non-parole period of each such sentence, and not being subject to any other sentence.

Relevantly for present purposes, cl 19(2) of Schedule 2 to the Sentencing Procedure Act provides that any minimum term determined under the Sentencing Act is taken to be a "non-parole period" determined under the terms of the former statute.

25. As for the criteria for determining whether, in a given case, a parole order should be made, s 135(1) of the Administration of Sentences Act prohibits the Parole Authority from making such an order "unless it is satisfied, on the balance of probabilities, that the release of the [relevant] offender is appropriate in the public interest". The matters to which the Parole Authority is required to have regard in applying that test are then set out in s 135(2), and include such factors which did not feature, at least expressly, in the Sentencing Act as:

(a) the need to maintain public confidence in the administration of justice; and

(b) the likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole.

26. It is significant also that pursuant to s 143(1), the Parole Authority must, for the purposes of forming an "initial intention" under s 144 of that statute, consider whether or not a serious offender[9] should be released on parole at least 60 days before that offender's parole eligibility date. As was the case under the Sentencing Act, this is subject to the possibility, provided for in s 143(2), of a deferral of such consideration until not less than 21 days before the offender's parole eligibility date if the Parole Authority is of the opinion:

(a) that it is unable to complete its consideration because it has not been furnished with a report required to be made to it; or

[9] Section 3 of the Administration of Sentences Act relevantly defines the expression "serious offender" to include:
(a) an offender who is serving a sentence for life; and
(b) an offender who is serving a sentence for which a non-parole period has been set in accordance with Schedule 1 to the Sentencing Procedure Act.

(b) that there are other relevant matters requiring further consideration.

27. Nonetheless, despite the possibility of such a deferral, s 143 recalls s 22C of the Sentencing Act in that the process prescribed by the Administration of Sentences Act for the making of a decision as to whether a serious offender should be released on parole is not initiated by an application on the part of the offender; instead, a duty is imposed upon the Parole Authority to commence that process within a particular timeframe.

28. It follows that as at 19 July 2001, the day before the commencement of the 2001 Amending Act which, amongst other things, inserted s 154A into the Administration of Sentences Act, the effect of the Minimum Term Determination was that:

(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

(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 s 143(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.

29. The plaintiff's contentions concerning the invalidity of s 154A focus attention upon the extent to which, and the manner in which, that provision operated to alter the state of affairs described in the preceding paragraph, a matter to which it will be necessary later in these submissions to consider at some length.

30. However, before embarking upon that exercise, it is worth observing that making good the plaintiff's various contentions requires that extended consideration be given to the implications for State legislative power of the scheme established by Ch III of the *Constitution*. To that issue we now turn.

The implications of Ch III of the Constitution *for State legislative power*

31. In *D'Orta-Ekenaike v Victoria Legal Aid*,[10] a majority of this Court recognised that irrespective of whether, in a given polity, the judicature is separated from the executive and the legislature, it is nonetheless "the third great department of government". As such, its "unique and essential function" is "the quelling of controversies by the ascertainment of the facts and the application of the law".[11] Moreover, it is inherent in the very notion of the quelling of controversies that such controversies, once quelled, are not to be reopened,[12] subject only to limited qualifications, principal among which is the existence of an appellate system.[13] As will become apparent in what follows, it is a matter of some significance that the category of judicial power vested by, or in accordance with, Ch III of the *Constitution* has often been described, if not defined, in terms which emphasise the quelling of

[10] (2005) 223 CLR 1 at 17 [33], quoting from Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 719.
[11] (2005) 223 CLR 1 at 20 [44]
[12] (2005) 223 CLR 1 at 17 [35].
[13] *Ibid.*

controversies,[14] whether "between individuals, between government and individuals [or] between governments, and whether relating to life, liberty or property".[15]

32. Presently, it is convenient to note that in this country, the appellate system is, at least in part, a creature of the *Constitution*, and in particular of s 73, which confers upon this Court jurisdiction to hear and determine "appeals from *all* judgments, decrees, orders and sentences" pronounced by, amongst other tribunals, "the Supreme Court of any State" (emphasis added). Crucially, the use of the word "all" in that provision, as highlighted above, must be approached with no small degree of caution. As Gummow J observed in *Kable v Director of Public Prosecutions (NSW)*,[16] in providing for the appellate jurisdiction of the High Court, s 73 also uses the expression "any matter", with the consequence that any exercise of power by a State Supreme Court which does not involve the resolution of a "matter", within the meaning of Ch III of the *Constitution*, is beyond the reach of that appellate jurisdiction.

33. However, subject only to that limitation, the effect of s 73 is to render any judgment, decree, order or sentence of a State Supreme Court amenable to being set aside or varied by the High Court, as a result of which any purported State law that provides to the contrary must, on that basis alone, be invalid.[17] In so far, then, as the setting aside or varying of the judgments or orders of State Supreme Courts is concerned, s 73 may be regarded as supplying a constitutionally prescribed, and thus irreducible, qualification upon the finality of those judgments or orders.

34. Nonetheless, given that:

(a) Ch III of the *Constitution* has been described as establishing an "integrated national court system";[18] and

(b) as mentioned above, the conception of judicial power which underpins Ch III has, at its core, an emphasis upon the quelling of controversies,

the extent to which Ch III admits of detractions from the finality of judicial determinations should be understood as limited. In other words, it is as much a part of the scheme established by Ch III that the judgments or orders of courts that exercise Commonwealth judicial power should be regarded as final, subject only to s 73 of the *Constitution*, as it is that there be a single body of common law[19] administered by those courts.

35. This, however, is not to suggest that s 73 is of only limited significance. Two points in particular should be emphasised. The first is that s 73 must be read in conjunction with s 71, which vests the judicial power of the Commonwealth in this Court. If, therefore, for the sake of argument, the functions and jurisdiction conferred by statute upon intermediate courts of appeal in the States are put to one side, it becomes readily apparent that the act of setting aside or varying the judgments or orders of the

[14] *Fencott v Muller* (1983) 152 CLR 570 at 608.
[15] *South Australia v Totani* (2010) 242 CLR 1 at 63 [131].
[16] (1995) 189 CLR 51 at 142-143.
[17] *Peterswald v Bartley* (1904) 1 CLR 497 at 498-499.
[18] *Kable* (1996) 189 CLR 51 at 102, 112, 138.
[19] *Kable* (1996) 189 CLR 51 at 112, 138.

Supreme Courts of the States is one to which the judicial power of the Commonwealth is addressed. Indeed, s 73 may be thought of as one of a suite of provisions in the *Constitution*, including ss 75 and 76, which provide, however obliquely, some guidance as to the content of the judicial power of the Commonwealth, specifically by:

(a) describing federal jurisdiction in terms of "matters", thus casting into bold relief the proposition that judicial power is only engaged in the context of a controversy as to "some immediate right, duty or liability to be established by the determination of the Court";[20] and

(b) enumerating the range of "matters" in respect of which federal jurisdiction is, or may be, conferred.

36. Bearing in mind, then, the impermissibility of any purported vesting of Commonwealth judicial power in persons or bodies other than the courts identified in s 71 of the *Constitution*,[21] it is difficult, in light of s 73, to avoid the conclusion that the function of setting aside or varying the judgments or orders of a State Supreme Court (including any appellate division thereof) is one reserved exclusively for the supreme repository of the judicial power of the Commonwealth, namely, this Court. That conclusion is, moreover, entirely consistent with the proposition, previously advanced, that Ch III should be regarded as admitting of only a limited detraction from the finality of the judgments or orders pronounced by the integers of the unified judicial system established by that Chapter. After all, it is difficult to conceive of anything more antithetical to the finality of outcome sought to be achieved by the quelling of controversies than the possibility that State Parliaments may, by legislation, which is in turn capable of being subsequently amended, set aside or vary such judgments or orders.

37. The second point to note is that along with ss 71 and 77, s 73 provides the basis for the proposition, adverted to above, that the scheme contemplated by Ch III of the *Constitution* involves the High Court being placed "in superintendence of an integrated national court system".[22] That system has been described as being directed towards the exercise of the judicial power of the Commonwealth.[23] This may, on one reading, be taken to suggest that the integration effected by Ch III goes no further than is necessary to dispel the notion that the *Constitution* "permits of different grades or qualities of justice, depending on whether [Commonwealth] judicial power is exercised by State courts or federal courts created by the Parliament".[24]

38. However, it is an additional feature of the integrated system of law that Ch III erects that having regard to ss 73 and 74 of the *Constitution*, "Australia has a unified common law which applies in each State but is not itself the creature of any State".[25] Significantly, the common law cannot be said to be the sole preserve of courts exercising federal jurisdiction. This is particularly so when account is taken of s 80 of the *Judiciary Act 1903* (Cth). It may therefore be inaccurate to suggest that the court

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[20] *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.
[21] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270.
[22] *Gould v Brown* (1998) 193 CLR 346 at 446 [195].
[23] *Kable* (1996) 189 CLR 51 at 102; *South Australia v Totani* (2010) 242 CLR 1 at 47 [69].
[24] *Kable* (1996) 189 CLR 51 at 103.
[25] *Kable* (1996) 189 CLR 51 at 112.

systems of the States and of the Commonwealth are integrated only to the extent of the conferral of federal jurisdiction upon the courts that form the constituent parts of those respective systems.

39. It is against the background afforded by this last point that fresh consideration should be given to the otherwise trite proposition that the Parliaments of the States may not "legislate in a way that might alter or undermine the constitutional scheme set up by Ch III".[26] Since *Kable*, the implications for State legislative power that may be thought to flow from:

(a) the erection of an integrated national court system; and

(b) the necessity for that system's proper functioning of courts that are and appear to be independent and impartial tribunals,[27]

have largely, if not exclusively, been examined in the context of cases[28] concerning the conferral upon State courts of functions which are said:

(c) substantially to impair their institutional integrity and thus to be inconsistent with their role as repositories of federal jurisdiction; or

(d) to be "repugnant to a fundamental degree to the judicial process as understood and conducted throughout Australia".[29]

However, in the plaintiff's submission, there is nothing, either in logic or authority, to suggest that those implications should be confined to, or are engaged only in, circumstances where a State Parliament purports to assign some function to a State court which does not readily attract the use of the adjective "judicial".

40. Indeed, it must be recalled that what Ch III of the *Constitution* establishes is an integrated system of *courts*. Hence, whilst the legislatures of the various polities throughout Australia may create, confer jurisdiction upon and alter the constitution of, several courts (subject to the prohibition, implied in s 73, upon the abolition of the Supreme Courts of the States), those legislatures are not themselves part of the system contemplated by Ch III. It must follow, then, that just as a State Parliament may not confer upon a State court a function which is inconsistent with its role as a repository of federal jurisdiction, so may that State Parliament not arrogate to itself any part of the judicial power for which Ch III provides, a power that must, given the terms of s 73, include the power to set aside, vary, or otherwise alter the effect of, any judgment or order of a State Supreme Court in a "matter", even one pronounced otherwise than in the exercise of federal jurisdiction.

41. Of course, to advance this last proposition is not to suggest either:

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[26] *Kable* (1996) 189 CLR 51 at 115.
[27] *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29].
[28] For example, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 85 ALJR 746.
[29] *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 367 [98].

(a) that the legislature of a State may not, like the Commonwealth Parliament,[30] amend the substantive law so as to alter rights and obligations in issue in pending litigation; or

(b) that the New South Wales Parliament lacks the power, in any circumstance, to enact what was described by Kirby P in *BLF v Minister for Industrial Relations*[31] as a "legislative judgment".

In this regard, the plaintiff accepts that it is well within the power of the New South Wales Parliament to enact, say, a bill of pains or a bill of attainder, notwithstanding the postulated absence of a similar power in the Parliament of the Commonwealth.[32]

10 42. Moreover, it is no part of the plaintiff's case to deny that a State Parliament may, subject to the application of the *Kable* principle, confer upon, say, the Supreme Court of that State the power to vary or alter previous judgments or orders of that Court. This is because the exercise, in a given case, of such a power would not involve the previous judgment or order of the relevant State Supreme Court being varied or altered by a person or body outside the system of courts over which s 73 of the *Constitution* places this Court in a position of superintendence. Indeed, as was noted by the plurality in *Baker v The Queen*,[33] s 13A of the Sentencing Act is itself an example of the legislative conferral upon a State Supreme Court of a power, in effect, to vary or alter a previous judgment or order of that Court, namely, an existing life
20 sentence.

43. Nor is it any part of the plaintiff's case to make a submission to the effect that State Parliaments may not "reverse the outcome of particular litigation by enacting retrospective general legislation which effectively renders the decision irrelevant by altering the legal rights and obligations upon which it is based".[34] That State Parliaments may legislate in that manner must follow from the decision in *Re Macks; Ex parte Saint*.[35] That case confirmed the validity of State legislation which had been enacted in order to overcome the consequences of what had previously been decided in *Re Wakim; Ex parte McNally*,[36] not by purporting to reverse that decision, but rather by:

30 (a) declaring the rights and obligations of all persons to be the same, and enforceable, as if each "ineffective judgment" of the Federal Court and the Family Court had been a valid judgment of the Supreme Court of the relevant State; and

(b) providing for a "right of appeal" in relation to such "judgments" of the relevant Supreme Court.

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[30] *Australian Building Construction Employees' and Builder Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96.
[31] (1986) 7 NSWLR 372 at 394.
[32] *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 536, 647, 721.
[33] (2004) 223 CLR 513 at 529 [33].
[34] G Winterton, "The Separation of Judicial Power as an Implied Bill of Rights" in G J Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 192 at 1999.
[35] (2000) 204 CLR 158.
[36] (1999) 198 CLR 511.

Needless to say, it will be the plaintiff's contention, developed further below, that s 154A of the Administration of Sentences Act does not fall within this category of legislation, as it operates directly upon rights or entitlements *created* by a judgment or order of the NSW Supreme Court, as distinct from some right or obligation which has an existence independent of that judgment or order.

44. It should also be emphasised that while s 73 of the *Constitution* features prominently in the plaintiff's argument, the vice in the impugned legislation is not said to arise as a consequence of any asserted interference by it with the actual or possible exercise of this Court's appellate jurisdiction. Accordingly, the fact that there was not, and there is not currently pending, an appeal to this Court from the Minimum Term Determination is of little, if any, moment for the purposes of the disposition of these proceedings. Rather, the plaintiff focuses upon s 73 as the basis for a contention concerning the exclusivity of the conferral upon this Court of the power to set aside or to vary the judgments, decrees, orders or sentences of the Supreme Courts of the States, subject, as outlined above, to the role of the appellate divisions of those Courts.

45. Given that the plaintiff's argument thus rests upon a series of propositions concerning the intersection of State legislative power with the judicial power of both the States and the Commonwealth, something further should be said about the reasoning in *BLF v Minister for Industrial Relations*.[37] In that case, the Court of Appeal in New South Wales dismissed a challenge to the validity of a State Act which had been passed during the pendency of an appeal from a decision of the NSW Supreme Court (Lee J). That decision had in turn involved the rejection of a challenge to the validity of steps taken by the Minister for Industrial Relations to deregister the Building Construction Employees and Builders' Labourers Federation of New South Wales ("**the BLF**"). The legislation in question, the *Builders Labourers' Federation (Special Provisions) Act 1986* (NSW) ("**the Special Provisions Act**"), provided as follows in s 3:

> "(1) The registration of [the BLF] under the Industrial Arbitration Act 1940 shall, for all purposes, be taken to have been cancelled on 2 January 1985 by the operation of, and pursuant to, the Industrial Arbitration (Special Provisions) Act 1984.
>
> (2) In addition, the action of the Minister administering the Industrial Arbitration (Special Provisions) Act 1984 in giving or purportedly giving, before the commencement of this Act, a certificate referred to in that Act shall (to the extent, if any, that that action was invalid) be treated, for all purposes, as having been valid, and the certificate shall correspondingly be treated, for all purposes, as having been validly given from the time it was given or purportedly given.
>
> (3) The provisions of subsections (1) and (2) have effect notwithstanding that any proceedings were instituted before the commencement of this Act in relation to any certificate given or purportedly given, or any declaration made or purportedly made, under the Industrial Arbitration (Special Provisions) Act 1984, and any associated matters, and have effect notwithstanding any decision in any such proceedings.

[37] (1986) 7 NSWLR 372.

(4) Except in so far as the parties to any such proceedings (being proceedings pending immediately before the commencement of this Act) otherwise agree, the costs of or incidental to the proceedings incurred by a party to the proceedings shall be borne by the party, and shall not be the subject of any contrary order of any court."

46. It is immediately apparent, even upon a casual perusal of this provision, that the Special Provisions Act did not merely operate, as it could validly have done, to alter substantive rights which were, at the time of its enactment, in issue in pending litigation; rather, it appears to have taken effect as a direction that the deregistration of the BLF was to be treated, for all purposes, as valid. It was on this basis that Street CJ regarded that statute as amounting to "an exercise by the New South Wales Parliament of judicial power"[38] and "a legislative interference with the judicial process of this Court".[39] In a similar vein, albeit on the basis of its ad hominem nature and its "disclosed purpose", namely, "to remove doubts which had arisen in the argument of the case before Lee J", Kirby P described the Special Provisions Act as being, in effect, a legislative judgment.[40] And yet, despite this, their Honours joined the other members of the Court in holding that statute to be valid, proceeding upon the premise that the separation of judicial power, at the level of the Commonwealth, effected by Ch III of the *Constitution* had no analogue or equivalent in New South Wales.[41]

47. Nevertheless, if Street CJ was correct in suggesting that the terms of the Special Provisions Act could "be characterised more accurately as directive rather than substantive",[42] then it is difficult to see how the decision in *BLF* could survive the following observation by Gummow, Hayne, Heydon and Kiefel JJ in *Gypsy Jokers Inc v Commissioner of Police*:[43]

> "As a general proposition ... legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals."

As a consequence, the circumstance that the Special Provisions Act was held in *BLF* to be valid, notwithstanding that it arguably constituted a purported exercise by the New South Wales Parliament of judicial power in its appellate aspect with respect to the decision of Lee J, cannot be taken as lending authoritative support to the proposition that a State Parliament may legislate as if deciding upon an appeal from a judgment or order of the Supreme Court of that State.

48. On the contrary, what was said in *Gypsy Jokers* had, as its doctrinal basis, the integrated national court system postulated by the text and structure of Ch III of the *Constitution*. As should have emerged from the earlier analysis of Ch III in these submissions, it is precisely that system which now affords the basis upon which the plaintiff's position in this litigation proceeds. The extent to which the outcome in

[38] (1986) 7 NSWLR 372 at 378.
[39] (1986) 7 NSWLR 372 at 379.
[40] (1986) 7 NSWLR 372 at 395.
[41] (1986) 7 NSWLR 372 at 381, 398-401, 415-420.
[42] (1986) 7 NSWLR 372 at 378.
[43] (2008) 234 CLR 532 at 560 [39].

BLF is at odds with the approach articulated in *Gypsy Jokers* is thus indicative of a similar infirmity in any suggestion that State Parliaments may, by legislation, set aside or vary pronouncements of State Supreme Courts of the sort identified in s 73 of the *Constitution*. It therefore follows that the suggestion by Street CJ in *BLF* that "Parliament in this State has power to adjudicate between parties by an exercise of judicial power equally as has Parliament in England"[44] cannot stand without qualification.

The nature of the power exercised in making the Minimum Term Determination

49. The nature of the power conferred by s 13A of the Sentencing Act was considered at some length in *Baker v The Queen*.[45] Of that provision, McHugh, Gummow, Hayne and Heydon JJ said:

> "Section 13A was an illustration of legislation which performed a double function of creating new rights and conferring jurisdiction to administer a remedy. These rights and that remedy were subsequent to, and independent of, the determination of the criminal guilt of the appellant and the imposing of the sentences by Taylor J. Undoubtedly, the earlier steps had appertained exclusively to the exercise of judicial power.
>
> The effect of an order under s 13A, setting for an existing life sentence both a minimum term of imprisonment and an additional term during which the prisoner might, by the exercise of statutory authority given a non-judicial body, be released on parole, is to alter or vary the order of the sentencing judge. Accordingly, the new jurisdiction conferred by s 13A may readily be seen as attracting the exercise of judicial power."

50. It follows from these observations that there is no basis for concluding that the Minimum Determination falls outside the category of those judgments, decrees, orders and sentences from which "an appeal invokes an exercise of judicial power".[46] Nor is there any basis for suggesting that the subject matter of the plaintiff's application failed to answer the description of a "matter".

51. That conclusion is not, in the plaintiff's submission, affected by the circumstance that any minimum term determined under the Sentencing Act is taken now to be a non-parole period determined under the Sentencing Procedure Act.[47]

The effect of s 154A of the Administration of Sentences Act

52. The text of s 154A of the Administration of Sentences Act is set out at SC 190. It should be stated at the outset that the plaintiff does not contend for the invalidity of s 154A in its purported application to offenders in respect of whom no minimum term or non-parole period was determined or set prior to the date on which that provision commenced operation.

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[44] (1986) 7 NSWLR 372 at 381.
[45] (2004) 223 CLR 513.
[46] *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 312.
[47] Subclause 19(2) of Schedule 2 to the Sentencing Procedure Act.

53. In so far as the effect of s 154A in its purported application to the plaintiff is concerned, the following points should be made. First, in relation to serious offenders the subject of a non-release recommendation, subsection (1) of s 154A relieves the Parole Authority of its unqualified duty to give preliminary consideration to whether or not an offender should be released on parole. Rather, the duty so to consider is only enlivened upon an application for that purpose by or on behalf of the offender in question. Thus, upon its enactment, s 154A deprived the plaintiff of what was previously his entitlement – admittedly a contingent one – to seek mandamus upon a failure by the Parole Authority to discharge its duty under s 143 of the Administration of Sentences Act.

54. Secondly, it must be borne in mind that under the regime that prevailed prior to the enactment of s 154A, the determination of a minimum term or a non-parole period entitled an offender, upon the expiration of that term or period, and without having to satisfy any further requirements, to the prospect of being released on parole. Whether an offender was in fact released on parole was, of course, dependent upon the Parole Authority being satisfied, on the balance of probabilities, that this was appropriate in the public interest. Nonetheless, this did not detract from the circumstance that even if the Parole Authority were ultimately not so satisfied in a given case, the relevant offender enjoyed, at the point of the expiration of his or her minimum term or non-parole period, and as a matter of law, some prospect of a different outcome occurring. Consequently, at the risk of some repetition, it was the effect of the Minimum Term Determination that the plaintiff would come into receipt of this prospect merely upon the clock striking one second past midnight on 13 November 2003.

55. Nonetheless, under s 154A of the Administration of Sentences Act, the plaintiff would only be in a position to enjoy that prospect if, following the expiration of his non-parole period, he were in imminent danger of dying or incapacitated to the extent that he or she no longer has the physical ability to do harm to any person. It cannot be said that this is anything but a departure from the effect of what was ordered by McInerney J, sitting in the NSW Supreme Court, on 24 April 1997.

56. Nor can it be said that s 154A, in its legal operation, did no more than retrospectively to alter the substantive law or the substantive rights and obligations upon which the Minimum Term Determination was based so as overcome the effect of that judgment or order. As was submitted at some length above, the terms of s 13A effect the conferral of a power upon the NSW Supreme Court to adjust an existing liability (namely, a life sentence) and to create a new entitlement in favour of the relevant offender (that is, eligibility to be released on parole on the expiration of his or her minimum term).

57. In other words, in making the Minimum Term Determination, McInerney J did not merely give judicial recognition to pre-existing rights or entitlements enjoyed by the plaintiff. Rather, to the extent that the Minimum Term Determination affected any rights or entitlements of the plaintiff, it did so by creating those rights or entitlements, chief among which was the prospect, arising automatically upon the expiration of the plaintiff's minimum terms or non-parole periods, that he might be released on parole. Thus, by rendering that prospect further conditional upon the extreme ill health of the plaintiff, s 154A operated directly upon certain rights or entitlements of the plaintiff which had no existence independent of a judgment or order of the NSW Supreme Court. As a consequence, any alteration of those rights or entitlements constituted a

legislative revision, as distinct from a legislative sidelining, of that judgment or order in a manner inconsistent with the scheme of Ch III of the *Constitution*.

58. This is not to say, however, that the New South Wales Parliament could not, in relation to persons in the position of the plaintiff (that is, persons who, notwithstanding non-release recommendations by the original sentencing court, have had minimum terms or non-parole periods determined in respect of their sentences), alter the criteria for determining whether or not a parole order should be made, particularly with a view to reducing the chances of such an order being made. For example, the Administration of Sentences Act could validly have been amended, prior to 13 November 2003, to include a provision to the effect that in relation to serious offenders the subject of a non-release recommendation, there is a presumption against release on parole, which may in turn be displaced if the offender can establish special circumstances warranting such release, including (without limitation) the circumstance that he or she is dying or incapacitated to the point of not physically being able to do another person harm. Such a provision would have significantly diminished the plaintiff's prospects of being released on parole, but it would also have preserved the position created by the Minimum Term Determination, namely, that upon the expiration of the plaintiff's non-parole periods, and without any further requirements having to be satisfied, he was to enjoy some prospect, however slight, of being so released.

59. Alternatively, it is at least arguable that the Parliament of New South Wales could have sought to enact a provision conferring upon the NSW Supreme Court the power:

(a) on the application of, say, the Attorney-General of that State;

(b) upon the satisfaction of certain criteria sufficiently objective to answer the description of legal standards; and

(c) in accordance with the judicial process,

to order, in relation to a "serious offender the subject of a non-release recommendation", in respect of whom a non-parole period has been determined but either:

(d) a specified term has not been set for his or her sentence; or

(e) if set, the specified term is the remainder of the offender's natural life,

that his or her non-parole period is amended or varied so as to expire on such a date when the offender can show that he or she is either dying or incapacitated.

60. Subject to being able to survive scrutiny by reference to the *Kable* principle, such a provision would stand in the same position, in relation to s 13A of the Sentencing Act, as that provision did in relation to s 19 of the Crimes Act. That is, to adapt what was said in *Baker* concerning s 13A, the effect of an order under the posited provision "is to alter or vary the order" of the judge who determined the non-parole period required to be served by the offender. And given that the life sentence initially imposed upon an offender is not disturbed by the subsequent determination of a non-parole period in circumstances where either:

(a) there is no specified term set for the sentence; or

(b) the set specified term is the remainder of the offender's natural life,

there can be no suggestion that the posited provision or an order made under it would render the offender's sentence "more punitive or burdensome to liberty".[48]

61. More importantly, if the posited provision were otherwise valid, an order made under it would well be capable of supplying the subject matter for an exercise of the appellate jurisdiction conferred upon this Court by s 73 of the *Constitution.*

62. There was thus a range of permissible legislative options available to the Parliament of New South Wales if its object had indeed been to reduce the plaintiff's prospects of being released on parole, and as outlined above, these options would have involved no attempt on the part of the Parliament directly to alter the rights or entitlements created by the Minimum Term Determination.

63. However, it was precisely such an attempt that was sought to be made by the purported application of s 154A of the Administration of Sentences Act to the plaintiff. In that purported application, then, s 154A constitutes a legislative variation to, or alteration of, a judgment or order of the NSW Supreme Court, and is for that reason, invalid.

Part VII: Applicable constitutional provisions, statutes and regulations

64. The applicable constitutional provisions are ss 71 and 73 of the *Constitution*, which are set out in the Schedule to these submissions.

65. The following legislation is included in the SC:

(a) ss 19 and 463 of the Crimes Act (repealed) [SC 53-55];

(b) s 19A of the Crimes Act (repealed) [SC 58];

(c) s 13A of the Sentencing Act, as enacted [SC 61-63];

(d) Schedule 1 to the Sentencing Procedure Act, as enacted [SC 83-87];

(e) s 154A of the Administration of Sentences Act [SC 190]; and

(f) Schedule 1 to the Sentencing Procedure Act, as currently in force [SC 195-200].

66. Those provisions which govern for system for release on parole, to which reference has been made in these submissions, are set out in the Schedule.

Part VIII: Orders sought

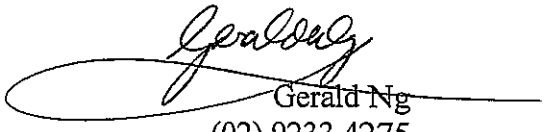
67. The questions stated for the Full Court's consideration should be answered as follows:

1. Yes.

[48] *Baker* (2004) 223 CLR 513 at 528 [29].

2. The defendants.

Date: 1 February 2012



	Bret Walker		Gerald Ng
Phone	(02) 8257 2527	Phone	(02) 9233 4275
Fax	(02) 9221 7974	Fax	(02) 9221 5386
Email	maggie.dalton@stjames.net.au	Email	gng@selbornechambers.com.au

SCHEDULE
APPLICABLE CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

Section 71 of the *Constitution*

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

Section 73 of the *Constitution*

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:

(i) of any Justice or Justices exercising the original jurisdiction of the High Court;

(ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;

(iii) of the Inter-State Commission, but as to questions of law only;

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

Sentencing Act 1989 (NSW)

Part 3 Parole

Division 1 Release on parole

14 Eligibility for release on parole

(1) Prisoners may be released on parole in accordance with this Act.

(2) A prisoner is eligible for release on parole only if:

(a) the prisoner is subject to at least one sentence of imprisonment that has a minimum term, and

(b) the prisoner has served each such minimum term and is not subject to any other sentence of imprisonment that does not have a minimum term.

(3) Nothing in this Act authorises the release of a prisoner who is required to be kept in prison in relation to an offence against a law of the Commonwealth.

15 Parole order necessary for release

A prisoner eligible for release on parole is entitled to be released on parole only if a parole order directing the release of the prisoner has been made and takes effect.

Division 2 Parole orders—sentences of more than 3 years

Subdivision 1 General

16 Application of this Division

This Division applies to the making of a parole order in respect of a sentence of imprisonment of more than 3 years that has a minimum term.

17 General duty of the Board

(1) The Board may not make a parole order for a prisoner unless the Board has:

(a) determined that the release of the prisoner is appropriate, having regard to the principle that the public interest is of primary importance, and

(b) considered relevant comments (if any) made by the court when sentencing the prisoner, and

(c) considered any reports required by regulations made for the purposes of this section to be furnished to it, and

(d) taken into account the antecedents of the prisoner and any special circumstances of the case, and

(e) determined that it has sufficient reason to believe that the prisoner, if released from custody, would be able to adapt to normal lawful community life, and

(f) considered any other relevant matter.

(2) In making a decision under this section, the Board is not to take into account whether a prisoner, if released on parole, may become liable to be deported.

Subdivision 3 Serious offenders

22A Application of this Subdivision

This Subdivision applies only to prisoners who are serious offenders.

...

22C Preliminary consideration by Board

(1) The Board is required to give preliminary consideration as to whether a prisoner should be released on parole:

(a) at least 60 days before the day on which the prisoner becomes eligible for release on parole, and

(b) if the prisoner has not been released on parole on or after that day—within each successive year following that day if the prisoner is then eligible for release on parole, and

(c) if the prisoner has been released on parole on or after that day but the parole order has been revoked and a further parole order has not been made for the prisoner after that revocation—within each successive year following that revocation if the prisoner is then eligible for release on parole.

(2) Despite subsection (1) (a), the Board may defer giving preliminary consideration to a day less than 60 days (but not less than 21 days) before the day on which the prisoner becomes eligible for release on parole if it is of the opinion that it is unable to complete its preliminary consideration because it has not been furnished with a report required to be made to it or there are other relevant matters requiring further consideration.

(3) Despite subsection (1) (c), the Board is not required to give preliminary consideration until the person concerned is returned to the prison system following revocation of the parole order. If the person is at large for the whole of one or more years following the revocation, the Board may decline to consider its decision at all in relation to that year or those years.

(4) Despite the above provisions of this section, the Board may decline to consider the case of a prisoner for up to but not exceeding 3 years at a time after it last considered the grant of parole to the prisoner under this Division.

22D Formulation of Board's initial intention

On or immediately after giving its preliminary consideration as to whether a prisoner should be released on parole, the Board is required to formulate and record its initial intention either:

(a) to make a parole order in relation to the prisoner, or

(b) not to make such a parole order.

22E General procedure following formulation of Board's initial intention

(1) The Board is to decide, in accordance with this Subdivision, to make or not to make a parole order, on the following principles:

(a) the Board will confirm its initial intention to make a parole order if there are no victim submissions or if it is not required to seek victim submissions,

(b) the Board will reconsider its initial intention to make a parole order if there are victim submissions and will in that event take into account any prisoner submissions,

(c) the Board will confirm its initial intention not to make a parole order if there are no prisoner submissions,

(d) the Board will reconsider its initial intention not to make a parole order if there are prisoner submissions and will in that event take into account any victim submissions.

(2) Submissions are to be disregarded unless they are made in accordance with this Subdivision.

(3) The Board is required to consider all submissions made in accordance with this Subdivision.

...

22P Matters to be considered concerning certain serious offenders

(1) This section applies to a person whose sentence of imprisonment for life has been the subject of a determination under section 13A (4).

(2) The Board, in exercising its functions under this Part in relation to a person to whom this section applies:

(a) must have regard to and give substantial weight to any relevant recommendations, observations and comments made by the original sentencing court when imposing the sentence concerned, and

(b) must give consideration to adopting or giving effect to their substance and the intention of the original sentencing court when making them, and

(c) must, to the extent that it declines to adopt or give effect to those matters, state its reasons for doing so.

(3) The Board, in exercising its functions under this Part in relation to a person to whom this section applies, must in particular have regard to the need to preserve the safety of the community.

Crimes (Administration of Sentences Act) 1999 (NSW)

Part 6

Division 1 Release on parole

125 Application of Part

This Part applies to:

(a) an offender who is serving a sentence by way of full-time detention, and

(b) (Repealed)

(c) an offender who is serving a sentence by way of home detention.

126 Eligibility for release on parole

(1) Offenders may be released on parole in accordance with this Part.

(2) An offender is eligible for release on parole only if:

(a) the offender is subject to at least one sentence for which a non-parole period has been set, and

(b) the offender has served the non-parole period of each such sentence and is not subject to any other sentence.

(3) Nothing in this Part authorises the release of an offender who is required to be kept in custody in relation to an offence against a law of the Commonwealth.

(4) An offender is not eligible for release on parole if the offender is the subject of a continuing detention order or an interim detention order under the *Crimes (Serious Sex Offenders) Act 2006*.

127 Parole order necessary for release

An offender who is eligible for release on parole may not be released on parole except in accordance with a parole order directing the release of the offender.

...

Division 2 Parole orders for sentences of more than 3 years

Subdivision 1 General

134 Application of Division

This Division applies to the making of a parole order for a sentence of more than 3 years for which a non-parole period has been set.

135 General duty of Parole Authority

(1) The Parole Authority must not make a parole order for an offender unless it is satisfied, on the balance of probabilities, that the release of the offender is appropriate in the public interest.

(2) In deciding whether or not the release of an offender is appropriate in the public interest, the Parole Authority must have regard to the following matters:

(a) the need to protect the safety of the community,

(b) the need to maintain public confidence in the administration of justice,

(c) the nature and circumstances of the offence to which the offender's sentence relates,

(d) any relevant comments made by the sentencing court,

(e) the offender's criminal history,

(f) the likelihood of the offender being able to adapt to normal lawful community life,

(g) the likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole,

(h) any report in relation to the granting of parole to the offender that has been prepared by or on behalf of the Probation and Parole Service, as referred to in section 135A,

(i) any other report in relation to the granting of parole to the offender that has been prepared by or on behalf of the Review Council, the Commissioner or any other authority of the State,

(ia) if the Drug Court has notified the Parole Authority that it has declined to make a compulsory drug treatment order in relation to an offender's sentence on the ground referred to in section 18D (1) (b) (vi) of the *Drug Court Act 1998*, the circumstances of that decision to decline to make the order,

(j) such guidelines as are in force under section 185A,

(k) such other matters as the Parole Authority considers relevant.

(2A) Without limiting subsection (2) (k), if the offender has provided post-sentence assistance, the Parole Authority may have regard to the nature and extent of the

assistance (including the reliability and value of any information or evidence provided by the offender) and the degree to which the offender's willingness to provide such assistance reflects the offender's progress to rehabilitation.

(2B) In subsection (2A):

post-sentence assistance means assistance in the prevention, detection or investigation of, or in proceedings relating to, any offence, provided by an offender to law enforcement authorities after the offender was sentenced and that was not taken into account or considered by the sentencing court.

(3) Except in exceptional circumstances, the Parole Authority must not make a parole order for a serious offender unless the Review Council advises that it is appropriate for the offender to be considered for release on parole.

...

Subdivision 3 Serious offenders

142 Application of Subdivision

This Subdivision applies to serious offenders.

143 Consideration of parole when serious offender first eligible for parole

(1) The Parole Authority must consider whether or not a serious offender should be released on parole at least 60 days before the offender's parole eligibility date.

(2) Despite subsection (1), the Parole Authority may defer consideration of an offender's case until not less than 21 days before the offender's parole eligibility date if it is of the opinion:

(a) that it is unable to complete its consideration because it has not been furnished with a report required to be made to it, or

(b) that there are other relevant matters requiring further consideration.

...

144 Formulation of Parole Authority's initial intention

On or immediately after giving its preliminary consideration as to whether or not a serious offender should be released on parole, the Parole Authority must formulate and record its initial intention either:

(a) to make a parole order in relation to the offender, or

(b) not to make such a parole order.

...

148 Principles on which Parole Authority's final decision to be made

(1) The Parole Authority is to make its final decision as to whether or not to make a parole order on the following principles:

(a) that the Parole Authority will confirm its initial intention to make a parole order if there are no submissions to the contrary or if it is not required to seek victim submissions,

(b) that the Parole Authority will reconsider its initial intention to make a parole order if there are submissions to the contrary, and will in that event take into account any offender submissions,

(c) that the Parole Authority will confirm its initial intention not to make a parole order if there are no offender submissions,

(d) that the Parole Authority will reconsider its initial intention not to make a parole order if there are offender submissions, and will in that event take into account any other submissions.

(2) The Parole Authority must consider all submissions made in accordance with this Subdivision and, subject to section 185 (2), must disregard all other submissions.

...

154 Matters to be considered concerning certain serious offenders

(1) This section applies to a serious offender whose sentence for life is the subject of a determination under Schedule 1 to the *Crimes (Sentencing Procedure) Act 1999*.

(2) The Parole Authority, in exercising its functions under this Part in relation to a serious offender to whom this section applies:

(a) must have regard to and give substantial weight to any relevant recommendations, observations and comments made by the sentencing court, and

(b) must give consideration to adopting or giving effect to any such recommendations, observations and comments and to the intention of the sentencing court when making them, and

(c) to the extent that it declines to adopt or give effect to any such recommendations, observations and comments, must state its reasons for doing so,

and must, in particular, have regard to the need to preserve the safety of the community.