IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No. A14 of 2017**

BETWEEN:

STEPHEN JOHN HAMRA
Appellant

and

10 **THE QUEEN**
Respondent

RESPONDENT'S SUBMISSIONS

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Office of the Director of Public Prosecutions
Level 7, 45 Pirie Street
ADELAIDE SA 5000

Telephone: (08) 8207 1760
Fax: (08) 8207 2013
Email: fiona.macqueen@sa.gov.au (admin)
Email: fiona.mcdonald3@sa.gov.au (solicitor)
Ref: Fiona McDonald

Part I: INTERNET PUBLICATION

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

Part II: ISSUES ON APPEAL

2. This appeal raises three questions.

3. First, to prove an offence against s 50(1) of the *Criminal Law Consolidation Act 1935* (SA) (**CLCA**), must the prosecution prove features of the circumstances surrounding each act of sexual exploitation relied upon which are *peculiar* to that act, such that the occasion of each act can be separately identified?

4. Second, was the majority of the Full Court required to address specifically in their reasons the appellant's submissions on the topic of permission to appeal? Third, if they erred in this respect, did they err in granting permission?

5. The respondent contends that the answer to each question is "no".

Part III: SECTION 78B OF THE JUDICIARY ACT 1903

6. Notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) need not be given.

Part IV: SUMMARY OF CONTESTED FACTS

7. The appellant's single-sentence summary[1] of the alleged offending is inadequate to enable assessment of his first ground of appeal. The respondent supplements it with a brief summary of the complainant's evidence of the offending.

8. The complainant gave evidence that the appellant first touched his genitals while he was in the third bedroom[2] of the family home at Morphett Vale, when he was *"about 12, maybe 13"*.[3] He gave evidence that more of the same acts continued to occur in that bedroom.[4]

9. His evidence was that he moved into the second bedroom of that home when he was in high school.[5] He believed he was 13 at the time although it was *"possible"* he was 14.[6] His evidence was that after he moved into the second bedroom, more touching of his genitals occurred.[7] He also gave evidence that in the second

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[1] At AS [12].
[2] T132.36-133.14.
[3] T133.5.
[4] T133.25-135.21.
[5] T135.26-28.
[6] T169.26-30.
[7] T136.1-138-15.

bedroom, the appellant's conduct included touching the complainant underneath his pyjamas, with mutual fondling and ejaculation often occurring.[8] His evidence was that when he was sleeping in the second bedroom, the appellant would touch his genitals every time the appellant stayed over, which was nearly every weekend.[9]

10. The complainant gave evidence that while his parents were on a two-week trip to Fiji these incidents of touching occurred every night,[10] and on two occasions during that period the appellant placed the complainant's penis in his mouth.[11] Those were the only two occasions of fellatio.[12] His parents' trip to Fiji occurred whilst the complainant was sleeping in the second bedroom,[13] after his grandmother had moved out[14] and when he *"reckon*[ed]" he was 15.[15] Whilst he initially said that their trip *"would have been"* in 1981 *"because* [he] *reckon*[ed] [he] *was 15"*,[16] he later accepted that it *"could have been"* in 1982.[17]

11. The complainant gave evidence that there were occasions where he stayed at the appellant's parents' house in Kurralta Park, during two of which there was mutual touching of each other's genitals.[18] The appellant placed the complainant's hand on the appellant's genitals[19] and touched the complainant's genitals under his clothing.[20] On the occasions at Kurralta Park, both the appellant's and the complainant's pants remained up around their waists and became wet from ejaculation.[21]

12. The complainant's evidence was that the sexual abuse stopped when the complainant was *"probably 17, nearly 18"*,[22] after he had obtained his driver's licence (which was at the age of 16).[23]

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[8] T136.1-138-15.
[9] T138.29-139.3.
[10] T139.16-26, T143.25-30; T145.23-29.
[11] T143.33-144.18, T144.30-145.7.
[12] T144.14-18.
[13] T143.25-27.
[14] T135.23-15.
[15] T139.11-15.
[16] T139.1215.
[17] T150.34-151.4.
[18] T141.15-19.
[19] T142.28-31.
[20] T142.20-22.
[21] T142.19, T142.23-27, T142.38-143.4.
[22] T146.10-14.
[23] T146.12-20.

Part V: LEGISLATIVE PROVISIONS

13. The appellant's statement of applicable legislative provisions is accepted.

Part VI: RESPONDENT'S ARGUMENT ON APPEAL

Ground 1: Was there a case to answer?

14. Whether there was a case to answer turns upon the degree of particularity that trial evidence must possess to be capable of proving the commission of an offence against s 50(1) CLCA.

15. The strictures upon the degree of particularity required to be proved by the prosecution in a given case ordinarily derive from two sources: the elements of the offence and the requirement of the common law for sufficient particularity to enable identification of the *"particular act, matter or thing alleged as the foundation of the charge"*.[24] That common law requirement – capable of modification or abolition by statute[25] – facilitates answering the charge,[26] ensures that the jury is relevantly unanimous[27] and preserves the ability to identify manifestations of duplicity and double jeopardy.[28]

16. The actus reus of the offence in s 50(1) is performed where an adult person, over a period of not less than 3 days, commits more than one act of sexual exploitation of a particular child under the prescribed age. Acts of sexual exploitation therefore constitute an essential component of the conduct proscribed under s 50(1). Equally, proving the elements of an offence against s 50(1) entails, inter alia, proving that the accused committed acts of sexual exploitation within the meaning of s 50.

17. The appellant contends that an offence against s 50(1) can only be proved by evidence which enables each occasion upon which an act of sexual exploitation is said to have been committed to be distinguished from each other occasion. This would entail proving features of the act or its surrounding circumstances which are

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[24] *Johnson v Miller* (1937) 59 CLR 467 at 489 (Dixon J); see also *S v The Queen* (1989) 168 CLR 266 at 276-277 (Dawson J), 282 (Toohey J), 286-287 (Gaurdon and McHugh JJ); *R v S* (1992) 58 SASR 523 at 526 (King CJ).
[25] *KRM v The Queen* (2001) 206 CLR 221 at [16] (McHugh J), [96] (Kirby J).
[26] *S v The Queen* (1989) 168 CLR 266 at 275 (Dawson J), 281 (Toohey J), 285-286 (Gaudron and McHugh JJ); see also *Johnson v Miller* (1937) 59 CLR 467 at 486-487 (Dixon J), 495-496 (Evatt J).
[27] *S v The Queen* (1989) 168 CLR 266 at 276 (Dawson J), 287 (Gaudron and McHugh JJ).
[28] *S v The Queen* (1989) 168 CLR 266 at 276 (Dawson J); see also at 281 (Toohey J referring to *Parker v Sutherland* (1917) 86 LJKB 1052 at 1054 (Viscount Reading CJ), 1054-1055 (Abory J)), 284 (Gaudron and McHugh JJ).

peculiar to each occasion relied upon. However, as observed by the Court below,[29] the source from which such an asserted requirement of particularity is said to derive remains elusive. The appellant does not articulate whether it is said to form part of the elements of an offence against s 50 (presumably as part of the actus reus) or whether the common law requirements for such particularity are said not to have been successfully or sufficiently modified by the terms of s 50.[30]

18. The respondent contends that a requirement for particularity of the type contended for by the appellant ordinarily derives from the common law, but that s 50 modifies that requirement such that the offence can be proved absent evidence that establishes features of circumstance peculiar to each act relied upon. That proposition derives from an orthodox construction of s 50.

Construction of s 50

19. The text, context and purpose of s 50(1) disclose that proving the commission of an act of sexual exploitation requires proof of the elements of a sexual offence, but that s 50 modifies the common law requirements of particularisation otherwise applicable for proof of such acts. The conduct proscribed by s 50(1) is relevantly[31] the same as the conduct proscribed by the applicable sexual offence, but the way in which the prosecution may prove that the conduct occurred is modified for the prosecution of offences against s 50.

20. The drafting of s 50 *"mingles two concepts"*.[32] On the one hand, it proscribes conduct, and on the other it addresses matters *"concerning particularisation"*.[33] The two concepts are distinct. The conduct proscribed by an offence cannot be defined by reference to whether evidence for use in a subsequent curial proceeding is *"properly particularised"*.[34]

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[29] In the Full Court, the source of the requirements contended for by the appellant were left "somewhat obscure": *R v Hamra* (2016) 126 SASR 374 at [34] (Kourakis CJ, Kelly, Nicholson and Lovell JJ agreeing).
[30] See AS [26](11), [27](7), [37](6) for occasions where the appellant appears to suggest it derives directly from the actus reus; see AS [25](2), [35] for occasions where he appears to suggest the common law requirements of particularity have not been relevantly abrogated.
[31] That is, the aspect of a s 50(1) offence which, in the relevant circumstances, proscribes an "act of sexual exploitation".
[32] *R v LKB* [2017] SASCFC 7 at [15] (Vanstone J, Kourakis CJ and Chivell AJ agreeing).
[33] *R v LKB* [2017] SASCFC 7 at [15] (Vanstone J, Kourakis CJ and Chivell AJ agreeing).
[34] Section 50(2); *R v LKB* [2017] SASCFC 7 at [16] (Vanstone J, Kourakis CJ and Chivell AJ agreeing).

Source of alleged requirement of particularity – elements of the offence?

21. The **text** of s 50(1) provides the actus reus of the offence.[35] The phrase, *"commits an act of sexual exploitation of a ... child"*, is given content by subs (2).

22. The conduct captured by the concept of an *"act of sexual exploitation"* is coextensive with the conduct proscribed by those offences that meet the description of a *"sexual offence"*.[36] Proving the commission of an *"act of sexual exploitation"* entails proving the same elements[37] as attend the relevant equivalent sexual offence.[38] Particulars of time, location or other circumstances peculiar to the occasion of the alleged act do not constitute *elements* of the sexual offence. They are particulars which the prosecution is ordinarily required, by the common law, to prove for the reasons already identified.[39]

23. The actus reus stipulated in subs (1) is more than one act of sexual exploitation of a particular child (by an adult) over a period of not less than 3 days.[40] The elements of a particular *"act of sexual exploitation"* are supplied by the elements of the relevant *"sexual offence"*.[41] It follows that particulars which form no part of the elements of those sexual offences necessarily form no part of the elements of their counterpart acts of sexual exploitation. It would be most improbable for an offence of persistent sexual exploitation to incorporate particulars of occasions into its *elements*, where ordinarily described sexual offences do not.

24. Thus, even without resort to the phrase *"if it were able to be properly particularised"* in subs (2), or the charging dispensations in subs (4), any suggestion that the *elements* of an offence against s 50(1) provide the source of the requirement for particularity for which the appellant contends must be rejected.

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[35] *R v M, BJ* (2011) 110 SASR 1 at [70] (Vanstone J, Sulan and White JJ agreeing).
[36] *R v LKB* [2017] SASCFC 7 at [15] (Vanstone J, Kourakis CJ and Chivell AJ agreeing). "Sexual offence" is defined for the purposes of s 50 in s 50(7).
[37] Subject to s 50(3) CLCA.
[38] For example, where the relevant equivalent sexual offence is unlawful sexual intercourse with a child pursuant to s 49(1) CLCA, the applicable elements to be established to make out an "act of sexual exploitation" would be that the accused had sexual intercourse with the complainant and that the complainant was under the age of 14 at the time.
[39] See [15] above.
[40] *R v Little* (2015) 123 SASR 414 at [8] (the Court); *R v M, BJ* (2011) 110 SASR 1 at [70] (Vanstone J, Sulan and White JJ agreeing); *R v C, G* (2013) 117 SASR 162 at [83] (the Court).
[41] *R v LKB* [2017] SASCFC 7 at [15] (Vanstone J, Kourakis CJ and Chivell AJ agreeing).

Source of alleged requirement of particularity – the common law?

25. The common law requires that, in addition to proving the elements of the offence, the prosecution evidence must supply particularity sufficient to identify the *"particular act, matter or thing alleged as the foundation of the charge"*.[42] The question is whether s 50 relevantly modifies that common law requirement.

26. The expression *"if it were able to be properly particularised"* in subs (2) establishes a direct conceptual relationship between the proof of sexual offences and the proof of acts of sexual exploitation. The relationship is one of contradistinction, the operative content of which is identified by the phrase *"properly particularised"*. That phrase refers to and fastens upon the common law requirements for particularity which ordinarily attend the proof of any sexual offence. Mobilizing that concept, the contradistinction drawn by the text of subs (2) neutralises those common law requirements where an act of sexual exploitation – as opposed to a sexual offence – is sought to be proved.[43]

27. It is essential to distinguish between the features of an act or event which exist or occur as a matter of fact, and the particular features of that act or event which must be established by evidence in a given set of curial proceedings. In a case where the offence is comprised in part of conduct (*"an act of sexual exploitation"*) which also constitutes some other offence (*"a sexual offence"*), and where the very issue in dispute is whether the particularity ordinarily required to prove a criminal offence has been relevantly modified, to commence from a premise that the first offence requires *"proof"* of the *"constituent offences"*[44] at best creates ambiguity and at worst assumes there has been no modification.

28. If what is meant by an assertion that under s 50(1) the prosecution must prove two or more *"sexual offences"*,[45] is merely that the prosecution must prove that the *conduct proscribed* by the relevant sexual offence has, as a matter of fact, been committed, then the respondent accepts as much. However, if – as seems to be the case[46] – the appellant's asserted need for the prosecution to prove *"sexual offences"* in fact imports by that phrase all the requirements of particularity which

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[42] *Johnson v Miller* (1937) 59 CLR 467 at 489 (Dixon J); see also *S v The Queen* (1989) 168 CLR 266 at 276-277 (Dawson J), 282 (Toohey J), 286-287 (Gaurdon and McHugh JJ); *R v S* (1992) 58 SASR 523 at 526 (King CJ).
[43] *R v LKB* [2017] SASCFC 7 at [15] (Vanstone J, Kourakis CJ and Chivell AJ agreeing).
[44] See AS [25](1), [26](6), [27](6).
[45] See, eg, AS [26](6) and the terms of Ground 1 of the appeal: Notice of Appeal at [2].
[46] See, eg, AS [25](2).

attend the proof of such *"sexual offences"*, then the premise contains within it an assumption that the very issue in dispute is to be answered in the appellant's favour.

29. The appellant's imprecision in language[47] betrays a conflation of the distinction which underpins the major issue on this appeal. For example, it is nonsensical to say, as the appellant does, that *"what is required for proof of the offence is the commission of specific 'sexual offences'"*.[48] The *commission* of an act *in fact*, and the *proof* of that act *in curial proceedings*, are simply not the same thing. Commission of an offence against s 50(1) necessarily involves the commission of acts[49] which also constitute sexual offences. However, the terms of subs (2) alone compel a conclusion that *"what is required for proof"* that those acts occurred[50] – such proof forming a necessary component of proving an offence against s 50(1) – is not the same as is required for the proof of a *"sexual offence"*, defined in s 50(7) and proscribed elsewhere in the CLCA.

30. The neutralising effect of subs (2) is confirmed by **contextual** features appearing in the remaining subsections of s 50. The provisions in subs (4) *"apply in relation to the charging of a person on an information for an offence against* [s 50]". This express narrowing of the application of subs (4) emphasises that it is concerned not with the actus reus (the conduct proscribed), but with the later prosecution – specifically, the charging on information – of a person for such an offence.[51] As such, it cannot affect the *elements* of an offence against s 50(1), but is instructive as to the requirements for *proof*.

31. Subsection (4)(a) imposes a new baseline of particularity for charging,[52] subject to the other provisions in subs (4). That subs (4) is addressed to the manner of *charging* the offence cannot deny its contextual relevance to the construction of subs (2) and its modification of common law requirements for particularity in *proof*.[53]

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[47] Unfortunately, an imprecision carried into the framing of the appellant's first ground of appeal: see Notice of Appeal at [2].
[48] AS [26](1).
[49] That is, "acts of sexual exploitation".
[50] In a prosecution for an offence against s 50(1) CLCA.
[51] *R v M, BJ* (2011) 110 SASR 1 at [70] (Vanstone J, Sulan and White JJ agreeing).
[52] In this, "it replaces the general requirements for a valid Information that are otherwise dealt with by ss 274, 277 and 283 of the [CLCA] and by Chapter 3 of the Supreme and District Court Criminal Rules 2014": *R v Hamra* (2016) 126 SASR 374 at [70] (Peek J).
[53] Cf AS [33], [37](4)-(5). See *Johnson v Miller* (1937) 59 CLR 467 at 488 (Dixon J).

32. The requirement in subs (4)(a) of *"sufficient particularity"* on each of the topics identified at (i)-(ii) (the *period* and the *alleged conduct*) attaches to *"the acts of sexual exploitation"*, as does the requirement in the chapeau of subs 4(b) to allege a *course of conduct*. That choice of language stands in contrast with the derogation from subs (4)(a) appearing in subs (4)(b)(i), which fastens to *"each act"*. The baseline of particularity identified in subs (4)(a) is the identification of the total period over which the collection of acts of sexual exploitation took place, and the various conduct said to have comprised those acts. This is unsurprising. The offence is one of committing *multiple acts* over a specified *minimum period*, and it is expressly contemplated that the acts in question will not be able to be *"properly particularised"*.[54]

33. In any event, any question as to the precise demands of the *"sufficient particularity"* required by subs (4)(a) is, for present purposes, entirely overtaken by the terms of subs (4)(b), to which subs (4)(a) is expressly made subject. Subsection (4)(b) is unambiguous that in charging an offence against s 50(1), the prosecution *"need not"* allege such particulars as would ordinarily attend the charging of another offence, and, critically, "*need not ... identify* ***particular acts*** *of sexual exploitation or the* ***occasions*** *on which,* ***places*** *at which or* ***order*** *in which acts of sexual exploitation occurred*".

34. To suggest that s 50(1) requires proof of those matters where a requirement to frame the charge in such a way is expressly denied, is to impute a legislative intention to derogate, for no apparent purpose and to the detriment of an accused, from *"the rule ... that a conviction should have as much certainty as an information, not more certainty"*.[55] Such a construction would gratuitously empower the prosecution to withhold from the information particulars of which it must have knowledge and be intending to lead evidence at trial, and which have the potential to facilitate the accused's ability to answer the charge. If nothing else, the principle of legality would not countenance such a bizarre construction. Rather, subs (4) *"further underscore*[s]"[56] the modification of the common law requirements for particularity effected by subs (2).[57]

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[54] Section 50(2).
[55] *Johnson v Miller* (1937) 59 CLR 467 at 488 (Dixon J).
[56] *R v Hamra* (2016) 126 SASR 374 at [39] (Kourakis CJ, Kelly, Nicholson and Lovell JJ agreeing).
[57] See *R v Warsup* (2010) 106 SASR 264 at [7] (Bleby J, Duggan and White JJ agreeing); *R v C, G* (2013) 117 SASR 162 at [82] (the Court).

35. The appellant concedes that "[p]*lainly, s 50(4) has the effect of reducing the degree of specificity required to be particularised.*"[58] However, where the high watermark of the specificity ordinarily required is particularity which enables identification of the *"particular act ... alleged as the foundation of the charge"*,[59] it is hard to see the nature of the reduction to which that concession is directed. Acceptance that s 50 *"plainly"* reduces the degree of specificity required by that common law standard is irreconcilable with maintaining that each act relied upon must still be peculiarly identifiable and distinguishable from each other act.

36. To support his overarching contention, the appellant invokes subs (3),[60] the inclusion in the subs (7) definition of *"sexual offence"* of *"a substantially similar offence against a previous enactment"*,[61] and the fact that the offence is only made out where it is proved that the acts of sexual exploitation occur *"over a period of not less than 3 days"*[62] and that the complainant is under the *"prescribed age"*.[63] Each is nothing more than an observation that certain features of s 50 operate by reference to the time when each occasion of proscribed conduct was *performed.* Of course, such temporal features necessarily attend any offence which derives its criminality in part from the fact of its perpetration on a child.

37. Every act of sexual exploitation – like any act – possesses temporal precision: it occurs at a point in time. However, it does not follow that for *evidence* to be capable of satisfying these temporal features of s 50, it must possess or disclose that same temporal precision. Neither does it follow that absent such evidential particularity, these temporal features of s 50 cannot *"be sensibly engaged with"*.[64] The essential flaw in the appellant's submission derives again from a conflation of the distinction between the features of an act in fact, and the nature and extent of the evidence which may suffice to prove in curial proceedings the relevant features of that act.

38. Each of those temporal features of the provision simply operates on its terms. For example, where the prosecution evidence is unable to prove beyond reasonable

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[58] AS [35].
[59] *Johnson v Miller* (1937) 59 CLR 467 at 489 (Dixon J); see also *S v The Queen* (1989) 168 CLR 266 at 276-277 (Dawson J), 282 (Toohey J), 286-287 (Gaurdon and McHugh JJ); *R v S* (1992) 58 SASR 523 at 526 (King CJ).
[60] AS [26](10).
[61] AS [26](4), [26](7).
[62] AS [26](9).
[63] AS [26](8).
[64] Cd AS [26](10).

doubt – because of insufficient particularity or for some other reason – that the relevant acts occurred over a period of not less than 3 days, it will fail to prove the offence. Similarly, where the prosecution evidence is unable to exclude as a reasonable possibility that the relevant acts occurred after the child reached 16 years, then subject to the accused establishing the relevant reasonable belief from the time the child attained the age of 16, the exclusion in subs (3) will apply.

39. The final relevant contextual matters are subss (4)(c) and (5). These subsections ensure that an accused person is neither punished nor placed in jeopardy twice for the same criminal conduct.[65] If the requirements of particularisation for which the appellant contends persisted, the express protections appearing in subs (4)(c) and (5) would be unnecessary; common law principles regarding duplicity and double jeopardy would supply the necessary protections.

40. The common law imperative that the jury be unanimous as to the same acts[66] is then met (in jury trials) by an extended unanimity direction. Where an accused is convicted under s 50(1) and it cannot safely be inferred that the jury was unanimous as to the same acts of sexual exploitation, the conviction will not stand.[67] This requirement for extended unanimity derives from the actus reus of the offence and does not speak to, much less support, a requirement for greater particularity.[68]

41. The idea that the requisite extended unanimity is incapable of being achieved where the evidence lacks the particularity to enable the isolation of separate occasions from one another,[69] is premised on an astonishing proposition openly embraced, and indeed put, by the appellant:

> *"In short, the evidence must permit of a conclusion beyond reasonable doubt that a particular occasion occurred on which all elements of a relevant offence occurred.* ***Generalised evidence is inherently incapable of supporting such proof.***"[70] (Emphasis added)

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[65] *S v The Queen* (1989) 168 CLR 266 at 276 (Dawson J); see also at 281 (Toohey J referring to *Parker v Sutherland* (1917) 86 LJKB 1052 at 1054 (Viscount Reading CJ), 1054-1055 (Abory J)), 284 (Gaudron and McHugh JJ).
[66] *S v The Queen* (1989) 168 CLR 266 at 276 (Dawson J), 287 (Gaudron and McHugh JJ).
[67] *R v Little* (2015) 123 SASR 414 at [11]-[12], [19]-[20], [23] (the Court); *R v M, BJ* (2011) 110 SASR 1 at [70] (Vanstone J, Sulan and White JJ).
[68] Cf AS [27](5)-(7), [37](6).
[69] See *R v Johnson* [2015] SASCFC 170 at [2] (Sulan and Stanley JJ), [111], [114]-[115] (Peek J).
[70] AS [36]; see also AS [38], [43].

42. This startling proposition fails to appreciate the basal distinction between the degree of specificity of evidence, and the degree of specificity of a conclusion which is capable of being drawn from that evidence. The well-recognised availability of inferential reasoning, including as a valid basis for satisfaction beyond reasonable doubt,[71] means that generalised evidence (say, *"evidence of undifferentiated offending, or a pattern of offending"*[72]) is far from being *"inherently incapable"*[73] of founding a specific conclusion (say, that those patterns of offending were comprised of specific instances of offending).[74] In fact, concluding the specific from a statement of the general, where the specific necessarily comprises a subset of the general, does not even rely upon inference. In those circumstances, if the general evidence is accepted, strict deductive reasoning supplies (in fact compels) acceptance of the specific.

43. The possibility that a complainant's evidence may be accepted in its entirety provides one simple illustration of the fallacy of inferring, from[75] the requirement for extended unanimity, a need for particularity of the extent for which the appellant contends.[76] Such a possibility demonstrates that compliance with the requirement for extended unanimity may be achieved despite the absence of particularity enabling the isolation of distinct occasions of acts. The evidence in the present case, where there are identifiable clusters of acts upon which a jury might agree, provides another.[77]

44. Finally, the **purpose** of s 50 is notorious. As with several provisions elsewhere in Australia,[78] it is designed to overcome the difficulties in prosecuting the recurrent sexual abuse of children which derive from the combination of the common law requirements for particularity and the difficulties of specificity in a complainant's recall which inhere in abuse which is necessarily pervasive and necessarily

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[71] See, eg, *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521 at 536 (Gibbs CJ and Mason J); *R v Bilick & Starke* (1984) 36 SASR 321 at 337 (King CJ, Mohr J agreeing).
[72] AS [38].
[73] AS [36].
[74] Cf AS [36].
[75] Or, indeed, the proposition now put by the appellant: that somehow a requirement for particularity of the type advanced by the appellant "is the premise for the extended unanimity requirement": AS [37](6).
[76] See *R v Hamra* (2016) 126 SASR 374 at [37]-[38] (Kourakis CJ, Kelly, Nicholson and Lovell JJ agreeing).
[77] See further the example given in the Court below: (2016) 126 SASR 374 at [36]-[37] (Kourakis CJ, Kelly, Nicholson and Lovell JJ agreeing).
[78] See s 47A *Crimes Act 1958* (Vic); s 66EA *Crimes Act 1900* (NSW); s 321A *Criminal Code* (WA); s 229B *Criminal Code* (Qld); s 125A *Criminal Code* (Tas); s 131A *Criminal Code* (NT), s 56 *Crimes Act 1958* (ACT).

perpetrated on a child.[79] It seeks to redress the *"perverse paradox"*[80] that otherwise pertains: that the more persistently and pervasively an offender sexually abuses the child, the more readily that offender will evade prosecution. That evident legislative purpose further reinforces a construction already reached by analysis of text and context. The common law requirement for particularity which enables each occasion upon which the proscribed conduct occurs to be identified distinctly from each other such occasion, has been abrogated for the purposes of proving an offence against s 50(1).

45. Such a modification will in some cases affect an accused's ability to answer the case.[81] However, it is open to Parliament to strike a new balance between that interest and the public interest in facilitating the prosecution of the pervasive sexual abuse of children:[82]

> *The declaration of the balance of public interest devolves on the court when the Parliament is silent, but once Parliament has spoken, it is the voice of the Parliament that declares where the balance of the public interest lies.*[83]

Here, the Court's declaration appears in *S v The Queen*.[84] For offences against s 50(1), the Parliament has now spoken. The modification by s 50 to those common law requirements embodies the new balance so struck between the competing public interests at stake. It is unremarkable that a policy decision of that nature may create forensic difficulties for one party, whilst alleviating those otherwise faced by another.[85]

Other Authorities: *KBT*, *KRM* and *SLJ*

46. The provisions considered in each of *KBT v The Queen*,[86] *KRM v The Queen*[87] and *R v SLJ*[88] are structured, framed and articulated in materially different ways from s 50. It is not profitable to attempt to transpose the reasoning in those

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[79] See South Australia, *Parliamentary Debates*, House of Assembly, 25 October 2007 at 1473-1474 (The Hon M J Atkinson).
[80] *R v Johnson* [2015] SASCFC 170 at [2] (Sulan and Stanley JJ).
[81] AS [26](10), [28](1)-(2), [31]. *S v The Queen* (1989) 168 CLR 266 at 275 (Dawson J), 281 (Toohey J), 285-286 (Gaudron and McHugh JJ); see also *Johnson v Miller* (1937) 59 CLR 467 at 486-487 (Dixon J), 495-496 (Evatt J).
[82] See *Nicholas v The Queen* (1998) 193 CLR 173 at [37]-[38] (Brennan CJ), [160] (Gummow J), [164] (Kirby J), [233], [238] (Hayne J).
[83] *Nicholas v The Queen* (1998) 193 CLR 173 at [38] (Brennan CJ).
[84] (1989) 168 CLR 266.
[85] See, eg, *Police v Dunstall* (2015) 256 CLR 403; *Nicholas v The Queen* (1998) 193 CLR 173.
[86] *KBT v The Queen* (1997) 191 CLR 417, which considered s 229B of the *Criminal Code* (Qld).
[87] *KRM v The Queen* (2001) 206 CLR 221, which considered s 47A of the *Crimes Act 1958* (Vic).
[88] *R v SLJ* (2010) 24 VR 372, which considered s 47A of the *Crimes Act 1958* (Vic).

authorities, and certainly any such attempt requires utmost caution.[89] The present case simply invites an orthodox construction of s 50 itself.

47. To the extent that some South Australian authorities have found the interstate provisions to be relevantly analogous,[90] this has been with respect to the requirement for extended unanimity. As already observed,[91] that requirement derives from the actus reus of the offence. The actus reus of each offence created by those provisions is broadly analogous to that in s 50(1). In contrast, the differences in legislative approach to the issue of particularisation are marked. It is unexceptional that such different approaches might interact differently with the common law principles engaged. It is this contrasting legislative approach adopted by the South Australian legislature that Kourakis CJ remarked *"more effectively remedied"*[92] the mischief.

48. Thus in each of *KBT*, *KRM* and *SLJ*, the only common law requirements of particularity of proof that were ameliorated by legislation were the need to prove the date and the *"exact circumstances"* of the offence. As McHugh J observed, *obiter*, in *KRM*, the obligation to particularise and prove the *general circumstances* of *each act* had not been ameliorated; it was consequently necessary to prove those circumstances in sufficient detail to identify *each occasion*.[93] That highlights the essential difference with s 50.

Application of s 50 in this case

49. If the Court accepts that the common law requirements for particularity have been modified in the way for which the respondent contends, there can be no doubt that the evidence in this case was sufficient to establish a case to answer for an offence against s 50(1).

50. The complainant's evidence as to the repeated touching of genitals in both the third and second bedrooms of the Morphett Vale home is alone sufficient to establish the requisite case to answer. Those incidents were said to have commenced in the third bedroom when the complainant was *"about 12, maybe 13"*,[94] to have continued when he moved to the second bedroom at age 13 or

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[89] See *R v Hamra* (2016) 126 SASR 374 at [42] (Kourakis CJ, Kelly, Nicholson and Lovell JJ agreeing).
[90] *R v Little* (2015) 123 SASR 414; *R v M, BJ* (2011) 110 SASR 1.
[91] See [40] above.
[92] *R v Hamra* (2016) 126 SASR 374 at [42] (Kourakis CJ, Kelly, Nicholson and Lovell JJ agreeing).
[93] *KRM v The Queen* (2001) 206 CLR 221 at [16]-[17] (McHugh J).
[94] T133.5.

possibly 14, and to have occurred in the second bedroom nearly every weekend.[95]

51. The complainant's evidence regarding the nightly incidents of sexual interference while his parents were on a two-week trip to Fiji,[96] including two occasions where the appellant placed the complainant's penis in his mouth,[97] also supply a case to answer. The complainant's initial evidence that the trip would have been in 1981 was articulated by him as being reasoned from the fact of his having been 15 at the time.[98] It is necessarily implicit in his evidence that the trip occurred before his birthday[99] in the relevant year. The complainant's later acceptance that the relevant year *"could have been"* 1982 did not cast doubt on that feature of his evidence, i.e., that the trip had occurred before his birthday. Indeed, it was supported by his reference point of distinction that he had been 17 when his parents had taken him to Fiji, he having turned 17 in (November) 1982. The evidence in its totality was capable of establishing beyond reasonable doubt that the incidents that occurred while the complainant's parents were in Fiji occurred before the complainant turned 17 (and therefore while he was under the prescribed age), even if it was a possibility that this had occurred in 1982.[100]

Ground 2: Was it an error not to address the appellant's submission as to permission?

52. Ground 2 alleges error arising from a failure on the part of the Full Court *"to address the appellant's submission"*[101] on the issue of permission to appeal.

53. The judgment in which the majority joined referred expressly[102] to the application for permission. Justice Nicholson expressly agreed *"with the Chief Justice's proposed disposition of the application for permission for the reasons given by the Chief Justice"*; that is, for the reasons going to the merits of the appeal.[103] The minority judgment discussed the appellant's submissions on the topic and the

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[95] T138.29-139.3.
[96] T139.16-26, T143.25-30; T144.26-145.29.
[97] T143.33-144.18, T144.30-145.7.
[98] T139.12-15.
[99] Which is 1 November 1965: T150.37-38.
[100] Cf AS [41](3).
[101] Notice of Appeal at [3].
[102] *R v Hamra* (2016) 126 SASR 374 at [2] (Kourakis CJ).
[103] *R v Hamra* (2016) 126 SASR 374 at [135] (Nicholson J), see also the further discussion of permission at [136] (Nicholson J).

relevance of double jeopardy at length.[104] Unlike in *Malvaso v The Queen*,[105] where no determination of the application for leave was made and the question was consequently one of jurisdiction, the Court here granted permission expressly.[106] There can be no doubt that the issue of permission was one to which the whole of the Court had regard.

54. The complaint, then, can only be one of sufficiency of reasons for granting an application for permission in the exercise of a discretion. The insufficiency is said to arise only from failing to address a submission of one party.[107] However, this being a discretionary question, it was not necessary to detail each factor identified by the parties.[108]

55. The basis of the discretionary decision to grant permission was in any event apparent from the published reasons: the majority granted permission on account of the particular error of law identified; double jeopardy considerations did not outweigh this. The reasons were not required to go further.[109] This ground fails.

56. The appellant's submissions further address whether permission was properly granted. That is a necessary step only in the event that error is disclosed by the Court not having addressed a particular submission. The appellant relies on three matters:

    i. the impact of principles of double jeopardy as emphasised by Peek J, who departed from the majority on the appropriate *terms* of a grant of permission;

    ii. the *"prominence"* given by Peek J to the possibility that the trial judge may have acceded to a verdict of not guilty in any event; and

    iii. the conduct of the DPP.

57. As to the first consideration identified by the appellant, where a prosecution right of appeal by permission is expressly provided, double jeopardy principles are relevant to the discretion to grant permission to appeal against acquittal.[110] So much can be accepted from an analogy with prosecution appeals against

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[104] *R v Hamra* (2016) 126 SASR 374 at [113]-[121] (Peek J).
[105] (1989) 168 CLR 227.
[106] Notice of Final Determination at [1].
[107] Notice of Appeal at [3].
[108] *Housing Commission of NSW v Tatmar Pastoral Co* [1983] 3 NSWLR 378 at 386 (Mahoney JA).
[109] *Soulemezis v Dudley (Holdings) P/L* (1987) 10 NSWLR 247 at 272-273 (Mahoney JA).
[110] *R v Brougham* (2015) 122 SASR 546 at [9], [29] (Peek J).

sentence.[111] On appeals against acquittals by magistrates, double jeopardy speaks more strongly where the acquittal is based on a lack of satisfaction of guilt, as opposed to a demonstrated error of law.[112] On an error of law, the Court may be more willing to interfere.[113]

58. Similar considerations apply to the discretion that attends the question of a grant of permission under s 352(1)(ab)(i).[114] The consequences of different errors of law may vary greatly; the strength of the prosecution case is highly material.[115]

59. The question of permission can therefore be viewed through the lens of a continuum, signposted by, for example: (a) whether the complaint is that the trial judge should not have found a reasonable doubt;[116] or (b) whether the complaint is of error of law; and (c) if so, how serious an error, such as exclusion of a minor, significant or critical piece of evidence or, even more fundamentally, whether the trial judge misconstrued the offence-creating section. This last either constitutes jurisdictional error or at the very least approaches that difficult line between jurisdictional error and error in the exercise of jurisdiction.[117] In either case, it fundamentally compromises the very function of the criminal trial.

60. The prosecution was successful on appeal on the basis that the trial judge had misconstrued s 50, erroneously importing a requirement that an offence against s 50(1) cannot be proved unless the acts of sexual exploitation are shown to have occurred in circumstances so peculiar that each occasion of abuse can be separately identified.[118] That misconstruction amounted to or at least approached jurisdictional error by an inferior court, in that the trial judge misconceived the nature of his function,[119] albeit that this was capable of being corrected by a legislated appeals process. For present purposes, it had the effect that the

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[111] *R v Brougham* (2015) 122 SASR 546 at [5]-[6] (Peek J); referring to *Everett v The Queen* (1994) 181 CLR 295 at 299 (Brennan, Deane, Dawson and Gaudron JJ).
[112] *R v Brougham* (2015) 122 SASR 546 at [49] (Peek J), referring to *Thorogood v Warren* (1979) 20 SASR 156 at 159 (Zelling J); *Weinel v Rojas* (unreported, Supreme Court, SA, Olsson J, 10 June 1994).
[113] *Police (SA) v Murphy* (unreported, Supreme Court, SA, Debelle J, No S5421, 9 January 1996), referred to in *R v Brougham* (2015) 122 SASR 546 at [51] (Peek J).
[114] *R v Brougham* (2015) 122 SASR 546 at [65]-[66] (Peek J).
[115] *R v Brougham* (2015) 122 SASR 546 at [77] (Peek J).
[116] *R v Brougham* (2015) 122 SASR 546 at [69] (Peek J).
[117] *Craig v South Australia* (1995) 184 CLR 163 at 177-178 (the Court).
[118] *R v Hamra* (2016) 126 SASR 374 at [34], [43], [51], [53] (Kourakis CJ, Kelly, Nicholson and Lovell JJ agreeing).
[119] *Craig v South Australia* (1995) 184 CLR 163 at 177-178; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [72], [74] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

appellant had not been put on his trial for the offence as legislated by Parliament or his trial was otherwise affected by a fundamental error of law.[120]

61. As to the second consideration, the appellant relies[121] on Peek J's minority view that the trial judge had alluded to there being some bases for reasonable doubt of the offence in any event, and that it was *"quite possible that he may have accepted the not proven submission if it had been fully argued on both sides."*[122] That fails to acknowledge that any such allusion was necessarily premised on the misconstruction of the section. The trial judge emphasised that his conclusion *"did 'not reflect adversely on the credibility of B, they reflect the fact that the evidence was simply too generalised and non-specific to enable a jury to properly return a verdict of guilty'."*[123] That conclusion says nothing about the prospects of conviction on a correct construction.

62. As to the third consideration, the conduct of the DPP was irrelevant. In a trial before a District Court judge, it would be inappropriate to refer a question of law as to the *"applicability"* of a unanimous Full Court judgment. It was the trial judge's ordinary role to decide how *Johnson* bore on the instant case. A referral would do no more than seek an advisory opinion on whether such a binding authority should be distinguished or not; this is highlighted by the appellant's observation that *"a referral would have permitted an answer to that question to inform the forensic decisions to be made at trial"*.[124]

63. Following the acquittal, the DPP requested that the Full Court convene a bench of five on the basis that it wished to challenge the correctness of *Johnson*. The DPP's *"conduct"* amounted to nothing more than taking an orthodox approach to the then-existing state of authority on the interpretation of s 50.

64. The appellant submits here[125] that the availability of the reference procedure in Part 11, Division 2 of the CLCA requires consideration of whether such a procedure should be engaged in preference to an appeal against acquittal. This

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[120] Even Peek J emphasised that the error in question was an error of law and that this was not a case where the prosecution case was quite weak and an acquittal may be called for in any event: *R v Hamra* (2016) 126 SASR 374 at [108], [120] (Peek J).
[121] AS [49].
[122] (2016) 126 SASR 374 at [131] (Peek J).
[123] *R v Hamra (No.2)* [2016] SADC 8 at [28] (Tilmouth DCJ).
[124] AS [51].
[125] AS [50].

may rely on remarks by Peek J in *R v Brougham*.[126] Justice Peek drew on no authority in support of such a proposition. It cannot be accepted as a matter of statutory interpretation or principle.

65. The reference procedure is potentially available in respect of any acquittal. The facility of appeal against acquittal by permission lies only in the case of a trial by judge alone or directed acquittal. The CLCA subordinates neither facility to the other. Each has a different function. The appeal function under s 352(1)(ab) recognises a public interest beyond simply determining a question of law for future reference; it recognises that there is a public interest in a second trial with an opportunity for conviction, but not such that would outweigh the import of a jury verdict. The reference procedure, directed to a different legislative end, has no bearing on the discretion.

66. The prosecution appeal in this case asserted error in the form of a fundamental misconstruction of s 50 that went to the heart of its operation. That error had the effect that the appellant was not put on his trial for the offence as legislated.

67. In those circumstances, while there remained a discretion, the *"underlying idea"*[127] of the *"concept"*[128] of double jeopardy was not engaged, albeit that it cannot be said that by the filing of the Information, the appellant was not placed in jeopardy on the charge.[129] Rather, finality has not been achieved in any meaningful sense. Further, any call of oppression ignores that this fundamental error *was* the appellant's defence case, hence the no case submission. In those circumstances, it was not an error for the Full Court to grant permission, as it did, on the basis of the merits of the appeal.

68. Alternatively, to the extent that double jeopardy considerations identified by the appellant remained pertinent, they were, for the reasons identified above, entirely subordinated to the fundamental and compromising nature of the error. Permission was properly granted.

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[126] (2015) 122 SASR 546 at [79]ff.
[127] *Pearce v The Queen* (1998) 194 CLR 610 at [10] (McHugh, Hayne and Callinan JJ).
[128] *Pearce v The Queen* (1998) 194 CLR 610 at [66] (Gummow J).
[129] Compare *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328 at [19]ff (Gleeson CJ, Heydon and Crennan JJ).

Part VII: RESPONDENT'S ARGUMENT ON NOTICE OF CONTENTION

69. The respondent contends that the orders in which the majority of the Full Court joined should be affirmed for the reasons given by Kourakis CJ (and submitted above), save for his Honour's conclusion that the decision in *R v Johnson*[130] (***Johnson***) *"does not touch the question of principle"*[131] raised in the present case. The Full Court erred in failing to find that *Johnson* was wrongly decided.[132]

70. *Johnson* was an appeal against conviction for several offences. Relevantly, Count 3 was a charge of persistent sexual exploitation against s 50(1) CLCA. The conviction for that count was appealed on several grounds, one of which (Ground 9) was that the jury's verdict was unreasonable.[133] The Court unanimously allowed the appeal against the conviction on Count 3 on that basis, holding that the evidence in that case was, as a matter of law, incapable of supporting the jury's guilty verdict for an offence against s 50(1).[134] For that reason, a judgment of acquittal was entered in its place. The evidence led in support of Count 3 is reproduced within the Court's judgment.[135]

71. The appellant's contention in that case was, relevantly, *"that the evidence* [there was] *simply too sparse for the jurors to delineate, and agree with each other as to, any two occasions on which vaginal sexual intercourse occurred ..."*.[136] The sole basis upon which the Court in that case upheld Ground 9, and entered an acquittal on Count 3, was the lack of particularity in the complainant's evidence.[137] This, it was unanimously held, made it *"impossible for the jurors who returned the verdict of guilty to have agreed that the same pair of offences had been proved beyond reasonable doubt, simply because it was impossible for them to delineate any such pair of offences."*[138]

72. If the respondent's construction of s 50(1) CLCA is accepted, it follows that the Court's conclusion in *Johnson* – that the lack of particularity in the evidence in that

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[130] [2015] SASCFC 170.
[131] See *R v Hamra* (2016) 126 SASR 374 at [49] (Kourakis CJ, Kelly, Nicholson and Lovell JJ agreeing).
[132] Notice of Contention at [1].
[133] See Notice of Appeal in that case, reproduced at *R v Johnson* [2015] SASCFC 170 at [17] (Peek J).
[134] *R v Johnson* [2015] SASCFC 170 at [1]-[2] (Sulan and Stanley JJ), [115]-[116] (Peek J).
[135] See *R v Johnson* [2015] SASCFC 170 at [102] (Peek J).
[136] *R v Johnson* [2015] SASCFC 170 at [110] (Peek J).
[137] See *R v Johnson* [2015] SASCFC 170 at [114]-[115] (Peek J, Sulan and Stanley JJ agreeing at [1]).
[138] *R v Johnson* [2015] SASCFC 170 at [115] (Peek J, Sulan and Stanley JJ agreeing at [1]).

case necessarily precluded a finding of guilt – was wrong. However, even absent acceptance of the respondent's construction, the contention that the Court's *reasoning* to that conclusion was wrong, is unassailable.

73. The Court's conclusion in that case derived directly from the premise that a jury was required to be unanimous as to the same two or more acts upon which any conviction of the offence was to be based.[139] However, as already observed,[140] the (undisputed) requirement for such *"extended unanimity"* does not derive from,[141] nor discloses, a requirement for particularity of the type demanded by the appellant. The requirement for extended unanimity derives from the actus reus of the offence. It does not inform, much less answer, questions regarding the particularity of proof mandated under s 50 CLCA.

74. On this issue, neither the reasoning nor the result in *Johnson* can be maintained. The Court below erred in failing to hold it to have been wrongly decided.

Orders sought

75. The appeal should be dismissed.

Part VIII: TIME ESTIMATE

76. The respondent estimates that 2 hours will be required for its oral argument.

Dated: 29 May 2017

C D Bleby SC
Solicitor-General for South Australia
T: 08 8207 1616
F: 08 8207 2013
E: chris.bleby@sa.gov.au

F J McDonald
Counsel
T: 08 8207 1760
F: 08 8207 2013
E: fiona.mcdonald3@sa.gov.au

[139] See *R v Johnson* [2015] SASCFC 170 at [111], [114]-[115] (Peek J, Sulan and Stanley JJ agreeing at [1]).
[140] See [40]-[43] above.
[141] Cf AS [37](6).