IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No A20 of 2019**

BETWEEN:

KMC
Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS (SA)
10 Respondent

APPLICANT'S SUBMISSIONS

I Certification

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

II Concise statement of the issue presented

2. The central issue presented by the cause removed is whether s 9(1) of the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) precludes the
20 applicant from succeeding on his appeal against sentence.

3. In particular, the questions raised are:

   (1) does s 9(1) on its proper construction apply to the applicant's appeal; and

   (2) if so, is s 9(1) inconsistent with Ch III of the Constitution, and invalid, because it impermissibly:

      (a) directs the manner or outcome of the exercise of the appellate jurisdiction of the Supreme Court of South Australia (including in the exercise of federal jurisdiction) and/or this Court;

      (b) excludes judicial review for jurisdictional error of a sentencing decision of an inferior court of record; and/or

30 (c) impairs the institutional integrity of the Supreme Court of South Australia and/or the sentencing court (being a court of a State)?

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III Notices under s 78B of the *Judiciary Act 1903* (Cth)

4. Notices have been issued in compliance with s 78B of the *Judiciary Act 1903* (Cth).[1] The applicant does not consider that further notice is necessary.

IV Citation of reasons for judgment of primary and intermediate courts

5. The cause removed had been pending before the Full Court of the Supreme Court of South Australia. There is no citation for the primary Judge's sentencing remarks.[2]

V Narrative statement of the facts

Decisional history

6. The applicant was charged in the District Court of South Australia with one count of persistent sexual abuse of a child against s 50(1) of the *Criminal Law Consolidation Act 1935* (SA) (**"the CLC Act"**) as then in force. The information[3] alleged that over a period of not less than three days the applicant committed more than one sexual exploitation of the victim, by: (1) performing cunnilingus on her; (2) causing her to perform an act of fellatio upon him; (3) inserting his penis into her anus; and (4) urinating on her.

7. The trial of the applicant was held between 26 and 28 June 2017 before Slattery DCJ and a jury.

8. The particulars were advanced on the basis not that they each identified a single alleged act of sexual exploitation, but rather that they identified four *kinds* of act. The prosecution case, and the evidence of the victim,[4] was that the applicant committed multiple acts of each kind on numerous occasions over a period of up to three years.

9. The particulars were described by the Slattery DCJ as different "types" of sexual offences.[5] His Honour directed the jury that they were to deliver a verdict of guilty if satisfied beyond reasonable doubt that the applicant had committed any two or more

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1 The applicant issued notices on 14 April 2019 (in the Supreme Court), 11 September 2019 and 19 September 2019. The Attorney-General for South Australia issued a notice on 2 September 2019.

2 The sentencing remarks appear in the Core Appeal Book (**"CAB"**), pp 29-31. The Full Court judgment dismissing the applicant's earlier appeal against conviction is *R v K, MC* [2018] SASCFC 133.

3 CAB 5.

4 The victim gave evidence by way of an unsworn interview, and was then examined and cross-examined.

5 Summing Up at [45]-[46] (CAB 14-15).

acts of sexual exploitation of any one or more of the "types" particularised in the information,[6] over a period of not less than three days.[7]

10. The jury were told that they "must be agreed ... about the same two acts that constitute a sexual offence as they are alleged and that you find proved beyond reasonable doubt".[8] This was, in effect, an "extended unanimity"[9] direction with respect to the *actus reus* of the offence. The jury were also repeatedly directed specifically to the effect that it was "not necessary for [them] to find that the prosecution has proved beyond reasonable doubt that [the applicant] committed all of the alleged acts of sexual exploitation particularised in the information".[10]

10 11. The jury delivered a unanimous verdict of guilty. Following the delivery of their verdict, the jury was discharged. They were not asked any questions as to the basis for the verdict. Consequently, the jury never identified the particular two or more sexual acts as to which they were unanimously satisfied.

12. On 17 August 2017, the applicant was sentenced to imprisonment for ten years and three days (reduced from ten years and six months to take into account time earlier spent in custody), with a non-parole period of five years.[11]

13. In sentencing, Slattery DCJ made findings of fact, referring to "three distinct occasions of sexual offending that [the victim] recalled" as well as her "evidence of other abuse that she said occurred frequently".[12] The Judge described the applicant's
20 offending as "a serious example of this type of offending involving multiple acts of penile-anal penetration, cunnilingus and fellatio and urinating upon a child".[13] That characterisation of the offending was due to the young age of the victim, the applicant's position in the family (as the stepfather of the victim) and the duration of time over which the offending occurred.

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6 Summing Up at [49] (CAB 15), [109] (CAB 24).

7 Summing Up at [62] (CAB 17), [110] (CAB 24).

8 Summing Up at [51] (CAB 15), [60]-[61] (CAB 16-17), [110] (CAB 24).

9 See *Chiro v The Queen* (2017) 260 CLR 425 at 436 [19]. The trial Judge also referred to the jury being agreed about the same two acts unanimously or "by a majority" — evidently a reference to the possibility of a "majority verdict".

10 Summing Up at [52], [60] (CAB 16).

11 Sentencing Remarks, p 3 (CAB 31). The sentence was backdated to commence on 19 July 2017.

12 Sentencing Remarks, pp 1-2 (CAB 29-30).

13 Sentencing Remarks, p 3, (CAB 31).

14. The trial Judge referred to the decision of *R v D*,[14] which provides guidance in sentencing for "offences involving unlawful sexual intercourse with children under 12 years of age, when there are multiple offences committed over a period of time".[15]

15. On 13 September 2017, this Court delivered judgment in *Chiro v The Queen* (***Chiro***).[16] For the reasons elaborated at [71]-[73] below, the applicant submits that, but for the effect of any statutory provision, in view of the decision in *Chiro*, the jury not having been asked to identify the two or more acts about which they were satisfied, and the sentencing judge having sentenced the applicant on the basis he committed all the offences described by the victim, the sentence would be liable to be
10 set aside as manifestly excessive.

16. On 15 February 2019, the applicant applied for permission to appeal to the Full Court of the Supreme Court of South Australia (sitting as the Court of Criminal Appeal), in effect relying on *Chiro*, together with an application for an extension of time.[17]

Legislative reform

17. On 24 October 2017, the Parliament of South Australia enacted the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) ("**the Amendment Act**"). The Amendment Act came into operation on the same day.[18]

18. Section 6 of the Amendment Act repealed the former s 50 of the CLC Act and substituted a new s 50. The evident purpose of doing so was to redefine the *actus reus*
20 and to create a new offence of persistent sexual exploitation by altering the elements from the commission of "two or more unlawful sexual acts" to "maintaining a sexual relationship",[19] to do away with the requirement of jury unanimity in respect of particular unlawful sexual acts, and to enable judges to sentence on the basis of their own findings as to which sexual acts were proved beyond reasonable doubt.[20]

19. Separately, s 9 of the Amendment Act sought to apply to and in respect of proceedings conducted under the repealed version of s 50. It had two components.

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14 (1997) 69 SASR 413.

15 (1997) 69 SASR 413 at 424 (Doyle CJ).

16 (2017) 260 CLR 425.

17 CAB 33.

18 *Acts Interpretation Act 1915* (SA), s 7(1); *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128 at [52].

19 Parliament of South Australia, *Legislative Council Debates*, 19 October 2017, p 8023 (The Hon K J Maher). The new s 50(1) thus creates a true "course of conduct" offence rather than "one comprised of discrete underlying offences": cf *Chiro* (2017) 260 CLR 425 at 437 [22].

20 In that way, the new s 50 seeks to achieve, in future cases, a relation between jury verdict and sentencing that is comparable to that for which the Crown had unsuccessfully contended in *Chiro*.

20. Section 9(2) of the Amendment Act purported to apply to the sentencing, after the commencement of s 9, of persons who had been convicted of offences against the repealed s 50(1) but who had not yet been sentenced.

21. On 5 December 2018, s 9(2) was held invalid by the Full Court of the Supreme Court of South Australia (Vanstone, Lovell and Hinton JJ), on the basis that it impermissibly impaired the institutional integrity of the sentencing court (the District Court of South Australia).[21] The Director of Public Prosecutions applied for special leave to appeal to this Court against that decision but discontinued the application after the exchange of submissions but before its hearing or disposition.[22]

10 22. Section 9(1) has potential application not to part heard first instance proceedings but to appeals therefrom.

23. The applicant understands the respondent to contend that s 9(1) of the Amendment Act applies to the applicant, and prevents his appeal against sentence being allowed for the reasons that the appeal against sentence in *Chiro* was allowed.

VI The applicant's argument

Introduction

24. The decision in *Chiro* establishes that the approach of the trial Judge in this case was affected by error and also resulted in a sentence that was manifestly excessive.[23]

25. The jury's verdict established only that the jury were satisfied that the applicant had
20 committed at least two of the particularised acts. The failure of the trial Judge to question the jury about the basis for their verdict meant that it was not possible to identify the *actus reus* of the offence which the jury had found to be proved; it was not possible to identify which of the "two or more" unlawful sexual acts constituted the *actus reus* of the offence for which the applicant stood to be sentenced.

26. The course required by law in those circumstances was for the trial Judge to sentence the applicant on the basis of the "two or more unlawful sexual acts" that were most favourable to the applicant.[24] Here, that meant that the applicant ought to have been sentenced on the basis that he had committed only two individual acts of gross indecency at least three days apart.

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21 *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128.

22 High Court of Australia Action No A1 of 2019.

23 *Chiro* (2017) 260 CLR 425 at 452 [53] (Kiefel CJ, Keane and Nettle JJ).

24 *Chiro* (2017) 260 CLR 425 at 451 [53] (Kiefel CJ, Keane and Nettle JJ), 458 [74] (Bell J).

Section 9(1) of the Amendment Act and its application to the present appeal

27. A "note" to s 9 states that, other than in Mr Chiro's case,[25] s 9 of the Amendment Act "negates the effect of" the determination of this Court in *Chiro*. In South Australia, "notes" do not form part of an Act[26] but may be considered as extrinsic material to assist in identifying the purpose or mischief of a provision.[27] Accordingly, it may be acknowledged that s 9(1) of the Amendment Act appears to have been intended to apply in cases, like the present, where a defendant had already been sentenced on the basis which *Chiro* holds to be erroneous.

28. However, the expression appearing in s 9(1)(b) — "the sentencing court sentenced
10 the person consistently with the verdict of the trier of fact" — suggests, with respect, that the Parliament misapprehended the central basis for the holding of the majority in *Chiro*. In the peculiar circumstances of s 50, if questions have not been asked of the jury, it could not be known what the verdict actually was, and thus if the sentencing judge were to find the facts at large, it could not be known whether the court *had* "sentenced the person consistently with the verdict of the trier of fact".[28]

29. Since it cannot be known in the present case whether the trial Judge "sentenced [the applicant] consistently with the verdict of the trier of fact", the condition identified in par (b) of s 9(1) is not shown to be met, and s 9(1) thus has no application to the applicant's case.[29] If that analysis is accepted, the constitutional questions does not
20 arise and there is no impediment to the applicant's sentence appeal proceeding without regard to s 9(1).

30. The remainder of these submissions proceed on the assumption that, contrary to the above submission, the words of s 9(1) are, on their proper construction, applicable to the applicant's case.

Legislative direction to court as to the manner and outcome of exercise of its jurisdiction

31. A requirement that a State Supreme Court act in accordance with a legislative direction as to the manner or outcome of the judicial process is repugnant to the

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25 Section 9(3) of the Amendment Act provides that s 9 does not apply to the particular matter that was the subject of the decision in *Chiro* itself. Mr Chiro's sentence was dealt with by the Full Court in *R v Chiro* [2017] SASCFC 144.

26 *Acts Interpretation Act 1915* (SA), s 19(2)(b) (and see also the definition of "note" in s 19(3)).

27 *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128 at [70] (Hinton J, Lovell J agreeing); *R v Roberts* (2011) 111 SASR 100 at 126-127 [102]-[103] (White J); *Golden Eagle International Trading Pty Ltd v Zhang* (2007) 229 CLR 498 at 516 [64] (Kirby and Hayne JJ, diss).

28 See *Chiro* (2017) 260 CLR 425 at 450 [51], 451 [53] (Kiefel CJ, Keane and Nettle JJ), 457 [71]-[72] (Bell J).

29 Compare *Bakewell v The Queen* (2009) 238 CLR 287.

judicial process, inconsistent with the decisional and institutional independence of the Supreme Court, and incompatible with the maintenance of its institutional integrity as a State Supreme Court and its function as a component part of the integrated judiciary for which Ch III of the Constitution provides.[30]

32. Moreover, where the jurisdiction exercised on the sentence appeal is *federal jurisdiction*, a legislative direction as to the manner or outcome of the exercise of that jurisdiction amounts to a direct interference or "impermissible intrusion" by the Parliament into the exercise of the judicial power of the Commonwealth and is, for that reason, contrary to Ch III of the Constitution.[31] In the present case, because the
10 cause has been removed into this Court, the immediate object of the legislative direction (if that is what it is) would be this Court itself.

33. It may be acknowledged that there are many and varied ways in which legislation may affect judicial process, or operate directly with reference to a judicial decision, without infringing these principles.[32] So, for example, legislation may alter substantive rights, even though it may render proceedings redundant, without necessarily being invalid.[33] Legislation may alter procedural or evidential rules purely prospectively without impermissibly directing the manner and outcome of litigation.[34] And legislation may create new rights and liabilities without requiring a court by legislative fiat to convert invalid orders of one court into valid orders of another.[35]
20 For reasons to be developed, s 9(1) of the Amendment Act is not able to be supported on those grounds, or by analogy with them.

34. The applicant's primary contention is that s 9(1) of the Amendment Act is properly to be characterised as having the purpose and substantive effect of directing an appellate

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30 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 at 560 [39] (Gummow, Hayne, Heydon and Kiefel JJ); *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at 352 [50] (French CJ), 360 [77] (Gummow and Bell JJ); *South Australia v Totani* (2010) 242 CLR 1 at 63 [132] (Gummow J); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 427 [45] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

31 *Chu Kheng Lim v Minister for Immigration and Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 36-37 (Brennan, Deane and Dawson JJ); *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 669 [47]; *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 150 [78] (Gummow, Hayne and Bell JJ); *Rizeq v Western Australia* (2017) 262 CLR 1 at 26 [61] (Bell, Gageler, Keane, Nettle and Gordon JJ).

32 See, eg, P Gerangelos, "The Separation of Powers and Legislative Interference in Pending Cases" (2008) 30 *Sydney Law Review* 61.

33 See, eg, *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88; *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547; *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117.

34 See, eg, *Williamson v Ah On* (1926) 39 CLR 95; *Nicholas v The Queen* (1998) 193 CLR 173.

35 See, eg, *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 178 [25], 203 [115], 232 [208], 286 [367].

court in relation to the manner and/or outcome of its appellate jurisdiction. In particular, s 9(1) operates so as to direct an appellate court that it is to hold that:

(1) a sentence which is, by hypothesis,[36] affected by error of a particular kind, is not affected by error; and

(2) a sentence which may well be manifestly excessive, is not manifestly excessive (irrespective of whether it is or is not in reality manifestly excessive).

35. The issue to which s 9(1) is, in terms, directed, is whether a sentence, imposed by a court exercising criminal jurisdiction (usually the District Court), and subject to appeal, is "taken" not to be "affected by error" or "manifestly excessive". Those are issues which are, ordinarily, determined exclusively by courts in the exercise of judicial power (normally an appellate court, but potentially also a superior court exercising judicial review jurisdiction). The very subject matter of s 9(1) thus reveals that it is concerned peculiarly with the exercise of judicial power.

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36. Section 9(1) does not purport to limit or withdraw the *jurisdiction* of the appellate court. The Court retains its jurisdiction to hear and determine an appeal.[37] Section 9(1) is directed to the determination of an *issue* that arises *in* the exercise of appellate jurisdiction, not to the exclusion of the jurisdiction itself. Indeed, by preserving the Full Court's jurisdiction, but dictating the outcome of the applicant's grounds of appeal, the provision tends to cloak the legislatively desired result (the preservation of the original sentence) with the appearance of judicial (appellate) approval.[38]

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37. Nor can s 9(1) be characterised as employing the legislative device of simply altering rights and liabilities for the future by reference to a *factum* constituted by an earlier judicial order or act.[39] Section 9(1) does not purport legislatively to fix a new legal state of affairs by reference to the content of the existing judicial order, so that it is the new legislative command itself that has operative effect. Rather, it is clear that s 9(1) contemplates and intends that the original sentence itself will continue to have effect *as a sentence*, supporting the continued imprisonment of the person to whom it

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36 Having regard to the content of pars (a) and (b) of s 9(1) of the Amendment Act.

37 The grant of jurisdiction is implicit in the right of appeal conferred and defined by ss 150 and 157(1)(a)(iii) of the *Criminal Procedure Act 1921* (SA). A statutory provision will not be construed as cutting down or limiting the jurisdiction of a superior court in the absence of clear words: see, eg, *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 185, 205; *Owners of Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404 at 420-421; *CDJ v VAJ* (1998) 197 CLR 172 at 201 [110].

38 See, eg, *South Australia v Totani* (2010) 242 CLR 1 at 172 [479] (Kiefel J).

39 Cf *South Australia v Totani* (2010) 242 CLR 1 at 64 [136] (Gummow J), referring to *Re Macks; Ex parte Saint* (2000) 204 CLR 158.

relates, and even being the subject of a potential appeal for error, subject to the stipulation that it is taken not to be affected by error of the particular identified kind.

38. The only *legal significance* of a proposition that a sentence is taken "not to be affected by error" or is taken not to be "manifestly excessive" is in connection with judicial proceedings themselves (appellate or judicial review). It is thus plain that the true purpose, as well as the legal and practical effect, of s 9(1) is to direct (in part) the manner or outcome of the exercise of judicial power, by compelling an appellate court to hold that a sentence affected by error of the kind identified in pars (a) and (b) of s 9(1) (ie, error of the kind identified in *Chiro*) is not affected by error.

10 39. Section 9(1) is cast in the passive voice. Ultimately, however, the use of the passive rather than the active is purely a matter of expression and cannot itself be decisive of the validity of s 9(1): it would make a mockery of constitutional principle to conclude that a provision which explicitly stated that, on an appeal, the appellate court must determine that a sentence having particular characteristics is not affected by error involved a direction to a court, but that a provision having precisely that substantive operation was nevertheless valid simply because it was cast in the passive voice, rather than as a direction in the active voice.

40. It is submitted that it would not be an accurate characterisation of what s 9(1) does to describe it as altering the content of the body of substantive law to be applied, so as to

20 change the law applicable to sentencing such that what the sentencing court did was (retrospectively) permitted or required by law, for the following reasons.

(1) First, s 9(1) is not cast in terms as a retrospective change to the law applicable to sentencing. It does not, in terms, purport to have any effect on the law to be applied by the sentencing court, nor does it in terms purport to have any operation from a point in time earlier than its commencement.

(2) Secondly, s 9(1) does not identify or supply any actual content to the body of law applicable to sentencing, or to a sentence appeal.

(3) Thirdly, s 9(1) is concerned with *characterisation* of an existing sentence as "affected by error" or "manifestly excessive": matters peculiarly within the

30 province of an appellate court. The question of whether a sentence once passed is "affected by error" or is "manifestly excessive" relates to the *quality of the sentence once imposed*, rather than the law applicable in relation to sentencing. In other words, rather than stating that the law is changed in such a way as that it will have authorised the sentencing judge to do what he or she did, it is saying that, *despite there being no change to the content of the law that was to be*

applied by the sentencing judge, the sentence is to be *taken* not to be, and never to have been, affected by error.[40] A proposition that a sentence or decision is or is not affected by error is a *conclusion* or *outcome* reached by the application of the judicial process itself; a process involving comparison between the substantive law applicable to the sentencing of the offender and the approach adopted, and sentence imposed, in fact by the sentencing court. Likewise, a holding that a sentence is manifestly excessive is not itself a proposition concerning the *content* of the law *per se*, but rather a *conclusion* reached or *characterisation* applied by a court in the exercise of judicial power, via a process involving comparison between the range of acceptable sentences and the particular sentence in fact imposed.

(4) Fourthly, that s 9(1) was not intended to, and does not, make a general change to the substantive law applicable in sentencing is apparent from the fact that it applies *only* where the conditions in pars (a) and (b) are satisfied — that is, it applies only where a sentence passed was imposed which was in reality affected by error. Section 9(1) has no application persons who were *correctly* sentenced in accordance with the decision in *Chiro*.

(5) Fifthly, and relatedly, the narrowness of the class of cases to which s 9(1) applies, and the fact that that class is defined by reference to the characteristics of the very sentence itself (which can only be determined *after* the sentence has passed), deny s 9(1) the character of a change to the content of the body of substantive law governing the punishment of offenders.

41. If, contrary to the above submissions, s 9(1) is thought to purport to alter the substantive law applicable to sentencing, the applicant submits that it is invalid for the alternative reasons advanced in [58]-[67] below.

Precluding review for jurisdictional error

42. It is beyond the power of a State Parliament "to take from a State Supreme Court power to grant relief on account of jurisdictional error"[41] because the "supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and

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40 Contrast *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at 98 [27]: "[cl 35 of Pt 13 of Sch 4 to the *Independent Commission Against Corruption Act 1988* (NSW)] does not purport to give a direction to a court to treat as valid that which the legislature has left invalid."

41 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [100].

mandamus (and habeas corpus) was, and is, a defining characteristic of those courts".[42]

43. The effect of s 9(1) of the Amendment Act is to require the Supreme Court to treat decisions which were and are, in reality, affected by error due to the adoption of the approach identified in pars (a) and (b) of s 9(1), as decisions that are not affected by error. In so doing, s 9(1) purports to exclude the capacity of the Supreme Court of South Australia to review the decision of the District Court for error of that kind. It follows that, if proceeding in the manner identified in s 9(1) is properly characterised as involving jurisdictional error on the part of the sentencing court, s 9(1) is invalid.

10 44. It need hardly be said that a State Parliament cannot circumvent the limits on legislative power imposed by *Kirk* (or those implied by s 75(v) of the Constitution) by the device of stating that orders or decisions of a particular class, which were in reality in excess of jurisdiction when made, are "taken" not to be, and never to have been, affected by error. While a "no-invalidity clause" may define limits of a power in advance of its exercise,[43] *re*-defining what constitutes error *after* a decision has been made is another thing entirely; it strikes at judicial review of the power, rather than directly operating upon the exercise of power, which has already occurred.

45. The District Court of South Australia is established as an inferior court of record.[44] An inferior court falls into jurisdictional error if it:[45]

20 (1) "misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist";

(2) "makes an order or decision ... which is based on ... a misconception or disregard of the nature or limits of jurisdiction";

(3) "while acting wholly within the general area of its jurisdiction, [does] something which it lacks authority to do"; or

(4) "misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case".

46. These descriptions are "not to be seen as providing a rigid taxonomy of jurisdictional error",[46] but are sufficient for present purposes. There is a "need to focus upon the

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42 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [98].

43 See, eg, *Federal Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146.

44 *District Court Act 1991* (SA), ss 4-5.

45 *Craig v South Australia* (1995) 184 CLR 163 at 177; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 573-574 [72].

46 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 574 [72].

limits of the body's functions and powers. Those limits are real and are to be identified from the relevant statute establishing the body and regulating its work."[47]

47. The criminal jurisdiction of the District Court is conferred by s 9 of the *District Court Act*. Section 9(2) provides that the Court "has jurisdiction to convict and sentence, or to sentence, a person found guilty on trial, or on his or her own admission, of [an offence other than treason, murder or conspiracy to commit treason or murder]".

48. The delivery of the verdict (or, perhaps more accurately, the court's acceptance of the verdict and the formal finding of guilt consequent upon it[48]) involves the exercise of judicial power[49] — in the familiar expression, it is the "adjudgment" aspect of "adjudgment and punishment of criminal guilt". Subject to appeal, the court's acceptance of the verdict conclusively determines the accused's guilt of the particular criminal acts found by the jury. Upon the court's acceptance of the verdict or plea of guilty, the liability of the defendant to be punished for the particular criminal acts unanimously found by the jury as constituting the *actus reus* of the offence "merged in the conviction",[50] effecting "the "substitution of a new liability"[51] and establishing a "new charter"[52] by reference to which that issue was to be determined for the future, including for the purposes of punishment.

49. The powers of the District Court with respect to sentence are defined by the *Sentencing Act 2017* (SA). The provisions of that Act make clear that the power of the District Court to sentence for a criminal offence is a power to impose a sentence only "for" the particular offence of which the defendant has been found (or to which he or she has pleaded) guilty.[53] Section 10(1)(d) of the *Sentencing Act* expressly requires that a court sentencing for an offence must apply "the common law concepts

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47 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 574 [72].

48 Indeed, even in the case of a guilty plea, the judicial function is squarely engaged in determining whether to accept the plea of guilty: *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1 at 24 [44].

49 *Brown v The Queen* (1986) 160 CLR 171 at 196 (Brennan J): "[T]he issues joined between the Crown and the accused are determined by the verdict of a jury and, once the verdict is accepted, the judgment of the court is founded on and conforms with that verdict[.]"

50 *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 106 (Dixon J); *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128 at [138] (Hinton J, Lovell J agreeing).

51 *R v Wilkes* (1948) 77 CLR 511 at 519 (Dixon J).

52 Cf *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 (Kitto J). See also *Nicholas v The Queen* (1998) 193 CLR 173 at 187 [18].

53 *Sentencing Act*, ss 3, 4(1), 9, 10(1), 11(1), 11(4), 13(1), 15(2), 18(1), 19(1), 21(1), 28(1), 37(2), 38(2), 39(4), 40(1), 40(5), 42(1), 43(1), 45(2), 47(2), 47(5), 54(1), 54(2). There was previously a specific power for a sentencing court to take into account additional offences with which the accused had been charged, when both the prosecution and the accused agreed to that course: repealed ss 31-35.

reflected in … the rule that a defendant may not be sentenced on the basis of having committed an offence in respect of which the defendant was not convicted".

50. "The starting point in any consideration of the imposition of criminal punishment must be that it is imposed for the offence for which the offender has been convicted."[54] It is a "fundamental principle" that "no one should be punished for an offence of which the person has not been convicted".[55] Consequently:[56]

> One of the *limits* imposed upon a sentencing judge is that the offender must be sentenced on a basis that is consistent with the verdict. There are two elements to that requirement … The second requirement is that *the offender must not be sentenced for an offence of which he or she has not been convicted or to which he or she has not entered a guilty plea.*

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51. In *R v Isaacs*, Gleeson CJ, Mason P, Hunt CJ at CL, Simpson and Hidden JJ described the requirement that "the facts adopted by the judge for the purpose of sentence must be consistent with the verdict of the jury" as "[t]he primary *constraint on the power* and duty" of determining a sentence.[57] Likewise, in *Veen v The Queen (No 2)*, albeit in a somewhat different context, Deane J spoke of "the *power* of a person in the exercise of judicial office to order the imprisonment of another person who has been convicted of a crime" being "*limited* to what is *justified as punishment for the crime itself*".[58]

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52. The District Court has no power to impose a sentence that is greater than appropriate punishment *for* the particular offences of which the accused has been "found guilty on trial, or on his or her own admission". As *Chiro* held, "an accused is not to be sentence for an offence which the jury did not find the accused to have committed".[59]

53. However, as is also apparent from *Chiro*, where a sentencing court does not know the acts that formed the basis for the jury's verdict, it faces the problem that it cannot be sure that it is imposing sentence for acts the jury found proved. The requirement that the court sentence in accordance with the view of the *actus reus* that is most

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54 *Elias v The Queen* (2013) 248 CLR 483 at 493-494 [26]. See also *Al-Kateb v Godwin* (2004) 219 CLR 562 at 650 [265] (Hayne J, Heydon J agreeing), referring to H L A Hart, *Punishment and Responsibility* (1968), pp 4-5: "Punishment exacted in the exercise of judicial power is punishment *for* identified and articulated wrongdoing." (Emphasis in original.)

55 *Nguyen v The Queen* (2016) 256 CLR 656 at 667 [29] (Bell and Keane JJ); *Huang v The Queen* (2018) 96 NSWLR 743 at 752 [48] (Beazley P).

56 *Cheung v The Queen* (2001) 209 CLR 1 at 28 [76] (Gaudron J, dissenting in the result).

57 (1997) 41 NSWLR 374 at 377-378 (emphasis added), quoted with approval in *Cheung v The Queen* (2001) 209 CLR 1 at 12-13 [14] (Gleeson CJ, Gummow and Hayne JJ), 54 [170] (Callinan J).

58 (1988) 164 CLR 465 at 491. (Emphasis added.)

59 *Chiro* (2017) 260 CLR 425 at 448 [44]. See also *De Simoni v The Queen* (1981) 147 CLR 383 at 389 (Mason and Murphy JJ agreeing), 395-396 (Wilson J, diss), 405 (Brennan J, diss).

favourable to the accused is "a solution to [that] problem"[60] which ensures that the punishment imposed does not exceed the outer limit fixed by the verdict of the jury.[61]

54. Identifying the *actus reus* is thus critical to identifying the particular offence of which the accused has been found guilty[62] — and thus the outer limit on the power of the Court to punish the accused. As Hinton J rightly observed in *Question of Law Reserved (No 1 of 2018)*, "the *power to punish* exercisable by the sentencing court was *bounded* by the verdict of the jury".[63]

55. It follows that the District Court, when sentencing for a criminal offence following a verdict of guilty delivered by a jury, misapprehends the limits of its powers if it imposes a sentence on the basis of criminal acts *which are different from, and justify greater punishment than*, what can be identified as the *actus reus* found by the jury and reflected in the verdict. Critically, s 9(1) of the Amendment Act purports to apply to cases where the trial judge never addressed the question of what acts were found by the jury at all, and instead made his or her *own* findings of fact as to the criminal acts for which the accused was to be punished.

56. Consistently with the limits of the sentencing function identified above, it was said in *Kirk* that the Industrial Court (unlike the District Court, a *superior* court of record) had no power to convict or *to pass sentence on* the defendants without identifying the "particular act or omission, or set of acts or omissions" for which they were to be sentenced.[64] Other instances of judges misapprehending the nature or limits of their powers in sentencing have also been held to be jurisdictional errors.[65] In the present case, the trial Judge did identify (albeit in broad terms) the acts for which he was imposing sentence, but the identification of the acts reveal that the Judge both misapprehended and exceeded the limits of the power to sentence.

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60 *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128 at [41] (Vanstone J).

61 *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128 at [113] (Hinton J, Lovell J agreeing).

62 *Chiro* (2017) 260 CLR 425 at 448 [44].

63 [2018] SASCFC 128 at [140]. (Emphasis added.)

64 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 575 [74].

65 See, eg, *Re Magistrate Bromfield; Ex parte Carratti* [2016] WASC 147 at [30]; *Firth v County Court (Vic)* (2014) 244 A Crim R 374; *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1 at 14 [30]-[31], 18 [52]-[54] (Nettle JA, Osborne JA agreeing), 78-9 [238]-[240] (Tate JA, Osborne JA agreeing); *Director of Public Prosecutions v Edwards* (2012) 44 VR 114 at 128-129 [54]-[59], 131 [67] (Warren CJ), 145 [146] (Weinberg JA and Williams AJA); *Collier v Director of Public Prosecutions (NSW)* [2011] NSWCA 202 at [46] (Hodgson JA, Campbell JA and Latham J agreeing). Unsurprisingly, it is also jurisdictional error for an inferior court to impose a sentence for an offence which exceeds the maximum penalty fixed by statute for that offence: see, eg, *R v Hannan; Ex parte Abbott* (1986) 29 A Crim R 178; *Attorney-General (NSW) v Dawes* [1976] 1 NSWLR 242.

57. Any sentence imposed by the District Court[66] following the process described in pars (a) and (b) of s 9(1) of the Amendment Act will, by hypothesis, have involved the Court misapprehending and exceeding the limits of its powers with respect to sentencing. A sentencing judge who has acted on his or her own view as to which criminal acts were committed by the defendant, without knowing whether it corresponds to the *actus reus* of the offence reflected in the jury's verdict, has misapprehended the limit of his or her powers.

If s 9(1) does change the law applicable to sentencing, it is inconsistent with Chapter III

58. The function of an appellate court on an appeal against sentence is to determine whether the sentence under appeal was affected by error. If, contrary to the submissions above, s 9(1) effects a change to the law of sentencing, such that what occurred in fact is *not* affected by error, then it must be a change that involves either:

    (1) authorising the imposition of sentence for acts found by the judge to be proved beyond reasonable doubt, *instead of* for acts found by the jury following a trial at which issue was joined as to the proof of such facts, and reflected in its verdict; or

    (2) authorising the imposition of sentence on the basis that the acts found by the jury to have been committed, and reflected in its verdict, and thus for which the accused was liable to be sentenced, were to be *taken to be* the same as the acts which the trial Judge later found to be proved beyond reasonable doubt.

59. In substance, what is involved is the legislature authorising and requiring the courts to proceed on the basis that a trial process conducted by a court, and which resulted in a verdict of guilt delivered by a jury and accepted by the court, produced a conviction with a legal operation and effect different from that which it actually had.

60. Importantly, this is not merely a case of conferring the power to adjudge the guilt of the accused on a judge instead of a jury. The sentencing judge in a case to which s 9(1) of the Amendment Act applies will never him or herself have conducted a judicial trial of the applicant's guilt in any ordinary sense. Such a judge will only ever have purported to exercise the function of sentencing, and to have made findings of fact (supposedly consistent with the jury's existing verdict) for the purpose of sentencing. None of the safeguards normally associated with a criminal trial by a judge (eg, the application of the rules of evidence; the requirement to provide

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[66] It seems unnecessary to decide whether s 9(1) could apply in the rare case where the Supreme Court itself sentenced for an offence against s 50(1) of the CLC Act. It may be noted, however, that in that case an appeal would lie to this Court pursuant to s 73 of the Constitution.

adequate reasons for the verdict; even the capacity of the judge to acquit the accused[67]) will have applied to the fact finding function performed by such a judge.

61. In *Question of Law Reserved (No 1 of 2018)*, s 9(2) of the Amendment Act was held invalid. Hinton J (with whom Lovell J agreed) described the effect of s 9(2), as construed by him, in terms which included the following:[68]

> Where the power to punish exercisable by the sentencing court was bounded by the verdict of the jury, that verdict is now no more than a trigger for the court to determine which of the acts of sexual exploitation particularised were proved to the court's satisfaction beyond reasonable doubt.
>
> 10 Importantly, in [this] case, s 9(2) operates where the judicial power has already been deployed in the usual manner to determine both guilt and the acts of sexual exploitation for which [the defendant] is to be punished. The outcome of that exercise of judicial power is that [the defendant] was to be punished in accordance with the High Court's decision in *Chiro* because the jury was not asked which acts of sexual exploitation it was agreed had been proved beyond reasonable doubt. However, s 9(2), in effect, instructs a sentencing judge to ignore the previous determination of those acts of sexual exploitation and repeat the exercise without the involvement of the jury.

62. Hinton J held that the sequential steps in the exercise of judicial power in a criminal prosecution — the determination of guilt and the imposition of punishment — were
20 "inextricably linked".[69] The effect of s 9(2) was that Parliament had commanded that the controversy resolved by the verdict of the jury be re-opened and retried,[70] the practical effect being "that the initial exercise of judicial power, which sets the boundary to the subsequent of judicial power to punish is ... dispensed with".[71] This undermined the legitimacy of the judicial process and the exercise of judicial power. Hinton J said:[72]

> It is true that in a sense s 9(2) leaves the verdict intact. However, that is to focus on form and overlook substance. In the case of a verdict of guilt returned on a charge of persistent sexual exploitation of a child, the verdict has a content or meaning despite the fact that without questioning the jury it will not be known (assuming more than two
> 30 acts of sexual exploitation are particularised). To the extent that undertaking the exercise prescribed in s 9(2) results in a conclusion that certain acts were proved to the satisfaction of the sentencing court beyond reasonable doubt, that task is, as I have

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67 A sentencing judge will necessarily have proceeded on the basis that the accused must be treated as guilty of at least two acts of sexual exploitation.

68 [2018] SASCFC 128 at [140]-[141].

69 [2018] SASCFC 128 at [168].

70 [2018] SASCFC 128 at [169].

71 [2018] SASCFC 128 at [173].

72 [2018] SASCFC 128 at [170].

> said, a repeat of the task undertaken at trial. Further the outcome may differ to the true content of the verdict.

63. The applicant respectfully adopts the above analysis. Adapting it to the operation of s 9(1): in cases to which s 9(1) applies, the trial judge has already in reality (though erroneously) treated the jury's verdict as no more than a "trigger" for the determination of a sentence, unbounded by the jury's actual verdict. If s 9(1) is said to have changed the law in the way identified in [58(1)] above, then the Parliament has authorised the sentencing judge to proceed in that way, ignoring the previous determination by the jury and endorsing the repetition of the exercise without the
10 jury, in a way that ignores the earlier judicial determination of the issue.

64. If the District Court cannot, consistently with Ch III of the Constitution, be empowered prospectively to undertake the function of re-determining which acts, potentially constituting the *actus reus* of the offence for which an accused is to be sentenced, are proved beyond reasonable doubt, it is difficult to see how by a fiction it can effectively be empowered, retrospectively, to have done so.

65. Moreover, if legislation conferring that task on the District Court is apt to undermine the legitimacy of the judicial process[73] and is antithetical to the exercised of judicial power,[74] legislation requiring an appellate court to treat such an exercise as resulting in a sentence that is unaffected by error must have the same consequence. To suggest
20 otherwise would be akin to holding that, although the law originally providing for a judge to order the imprisonment of Mr Kable was invalid, a law that required an appellate court to treat that order as unaffected by error would be valid.

66. Vanstone J characterised the operation of s 9(2) differently from Hinton J, but also held that it was invalid. Her Honour expressed her reasons in part as follows:[75]

> Section 9(2) has the effect of altering the course of a trial that has already commenced and has reached a conclusion, by the interposition of a legislative form of deeming. Section 9(2) must contemplate that a determination of the jury as to which of the alleged acts are proved is transferred into a different decision made by the judge. In my view this can only occur by way of an impermissible executive intrusion into the
30 processes and decisions of the court by the State legislature.
>
> [T]he force of s 9 cannot be characterised as being confined to sentence. The provision is concerned with the meaning of the verdict and, retrospectively, lays the verdict open to a fresh interpretation and one quite possibly different from the factual basis on which it originally rested. In that way it works as an alteration of the division of

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73 [2018] SASCFC 128 at [174].

74 [2018] SASCFC 128 at [176].

75 [2018] SASCFC 128 at [38]-[39].

responsibility between judge and jury with respect to the determination of guilt and sentence, part way through the prosecution, constituting an interference in the process of determination of guilt and sentencing in particular cases.

67. It is respectfully submitted that the reference to "executive intrusion" should be replaced with "legislative intrusion", since the executive (except in introducing the legislation) has no part to play in the scheme established by the Amendment Act. With that change, however, the applicant respectfully adopts Vanstone J's analysis.

68. If s 9(1) is said to have changed the law in the way identified in [58(2)] above, it must have done so by effecting just the same kind of "transformation" of the jury verdict into "a different decision made by the judge" which led to Vanstone J to hold s 9(2) invalid. The "transformation" is no less offensive to Ch III because it occurs after the judge has made the decision, rather than before. If a sentence reached following the process contemplated by s 9(1)(a) and (b) of the Amendment Act is to be taken "*never* to have been affected by error", as s 9(1) dictates, then the same kind of "alteration of division of responsibility between judge and jury" must still be taken to have occurred "part way through the prosecution"; that is, prior to the judge imposing sentence. Moreover, in cases to which s 9(1) applies there is, in any event, still the same "substantial interference with the judicial process" and the *appellate* court is forced, in effect, to give its imprimatur to that interference.

Conclusions

69. The respondent has indicated that it consents to the making of orders granting the necessary extension of time and permission to appeal.

70. For the various reasons advanced above, it is respectfully submitted that s 9(1) of the Amendment Act is not a valid law of the Parliament of South Australia. If the applicant's submissions are accepted, the sentencing of the applicant was, and must be held on appeal to be, initiated by error.

71. It is apparent that trial Judge sentenced the applicant on a factual basis that was consonant with the whole account given by the victim. In the defence closing address and in the trial judge's summing up to the jury, each paraphrased the victim's evidence as describing sexual activity occurring "nearly every day".[76] Other evidence at trial indicated that the applicant would look after her up to three times per week, so

[76] Trial Transcript, p 175, lines 14-26 (Applicant's Book of Further Materials ("**ABFM**"), p 180); Summing up at [73] (CAB 19).

the offending could not have been more frequent than that.[77] It thus appears that the applicant was sentenced for numerous and repeated acts both of gross indecency and of unlawful sexual intercourse constituted by acts of cunnilingus, fellatio and penile-anal intercourse, committed up to three days a week, over a sustained period approaching three years, against a young girl between the ages of six years and almost nine.

72. As is demonstrated by the defendant's closing submissions at trial,[78] and by the exchange between counsel and the trial Judge in sentencing submissions,[79] there were aspects of the complainant's account about which the jury could readily have entertained a doubt, even though satisfied that the applicant had committed at least two acts of sexual exploitation.

73. The effect of the decision in *Chiro* is that the applicant ought to have been sentenced on the basis that he had committed two individual acts of gross indecency. Given the basis on which he was in fact sentenced, it is apparent that a substantially shorter sentence ought to have been imposed, and thus ought now to be imposed. The manifest excess of the sentence is starkly illustrated by the consideration that, had they been charged as separate offences, each act of gross indecency would have attracted a maximum penalty of three years' imprisonment.[80] Accordingly, the appeal should be allowed.

74. If the Court holds that s 9(1) is constitutionally invalid, it is respectfully submitted that it would also be appropriate for this Court to make a declaration to that effect.

75. On a sentence appeal to the Full Court, if the Court is satisfied that the sentence should be quashed and another sentence imposed, it must impose the sentence that should have been imposed in the first instance.[81] The whole of the cause having been removed into this Court, it is theoretically open to this Court to exercise those powers for itself. However, this Court "is not a sentencing court"[82] and would not ordinarily determine the new sentence to be imposed. It is therefore respectfully submitted that

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77 Trial Transcript, p 108, lines 20-36 (T M Hanson XN) (ABFM 113); p 134, line 24 (accused XN) (ABFM 139); p 155, lines 1-20; p 158, lines 4-8 (prosecutor's closing address) (ABFM 160, 163).

78 Trial Transcript, pp 167-179 (ABFM 172-184).

79 Sentencing Submissions Transcript, pp 7-9 (ABFM 222-224).

80 *Criminal Law Consolidation Act 1935* (SA), s 58(1). The maximum penalty of three years' imprisonment applies to a "first offence", while five years' imprisonment is prescribed as the maximum penalty for a "subsequent offence". The established meaning of the expression "subsequent offence" in provisions of this kind is that it refers only to an offence committed after the accused has already previously been *convicted* of a like offence: *R v Devries* [2019] SASCFC 8 at [19].

81 *Criminal Procedure Act 1921* (SA), s 150.

82 See, eg, *Bugmy v The Queen* (2013) 249 CLR 571 at 596 [49].

an appropriate course would be to remit the remainder of the cause to the Full Court of the Supreme Court of South Australia,[83] as occurred in *Chiro*.[84]

VII Orders sought

76. The applicant respectfully seeks the following orders:

    (1) The time within which the applicant may appeal against his sentence is extended to 15 February 2019.

    (2) Permission to appeal against sentence is granted.

    (3) The appeal is allowed.

    (4) It is declared that s 9(1) of the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) is invalid.

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    (5) The remainder of the cause removed is remitted to the Full Court of the Supreme Court of South Australia for determination in accordance with the reasons and orders of this Court.

VIII Estimate of time for oral hearing

77. The applicant estimates that up to two hours will be required for the presentation of oral argument on his behalf.

Dated: 27 September 2019

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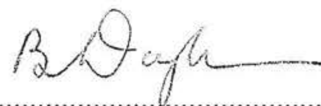

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83 *Judiciary Act*, s 42(1).

84 See *R v Chiro* [2017] SASCFC 144.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No A20 of 2019**

BETWEEN: **KMC**
Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS (SA)
10 Respondent

ANNEXURE TO APPLICANT'S SUBMISSIONS

List of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

I Constitutional provisions

1. Commonwealth Constitution, Chapter III, ss 71, 73, 75, 77, 78

II Statutes

20 2. *Acts Interpretation Act 1915* (SA) (as currently in force), s 7

3. *Judiciary Act 1903* (Cth) (as currently in force), s 42

4. *Sentencing Act 2017* (SA) (as in force between 18 July 2017 and 29 April 2018), s 10

5. *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) (as enacted on 24 October 2017), ss 6, 9

6. *Criminal Law Consolidation Act 1935* (SA) (as in force between 16 December 2016 and 30 June 2017), ss 50, 58

7. *Criminal Procedure Act 1921* (SA) (as currently in force), s 150

III Statutory instruments

(none)

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