IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY

No A20 of 2019

BETWEEN

KMC
Applicant

and

10 **DIRECTOR OF PUBLIC PROSECUTIONS (SA)**
Respondent

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I Form of Submissions

1. These submissions are in a form that is suitable for publication on the internet.

20 ## Part II Basis of Intervention

2. The Attorney General for the State of New South Wales ("NSW Attorney") intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the respondent.

Part III Argument

Issues presented

3. In summary, the NSW Attorney submits as follows:

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(i) s 9(1) of the Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017 (SA) ("Amendment Act") does not have the purpose or effect of directing an appellate court in relation to the manner and/or outcome of the exercise of its jurisdiction. Rather, it effects a retrospective alteration of the common law principles found by this Court in Chiro v The Queen (2017) 260 CLR 425 ("Chiro") to apply to sentences for offences of persistent sexual exploitation of a child under s 50(1) of the Criminal Law Consolidation Act 1935 (SA) ("CLCA") imposed prior to the commencement of s 9(1). It operates so that the legal position so declared is the same as if the sentencing judge was authorised to sentence a person consistently with the verdict of the jury but having regard to the acts of sexual exploitation determined by the sentencing judge to have been proved beyond reasonable doubt where no inquiry was made of the jury as to which acts it found proved beyond reasonable doubt;

(ii) s 9(1) of the Amendment Act creates a new or different legal regime for sentences imposed for an offence under s 50(1) of the CLCA ("s 50(1) offence") prior to the commencement of s 9(1). It does not withdraw the supervisory jurisdiction of this Court or the Supreme Court of South Australia over inferior courts in contravention of the principle in Kirk v Industrial Court (NSW) (2010) 239 CLR 531 ("Kirk"); and

(iii) s 9(1) does not impair the institutional integrity of the Supreme Court of South Australia contrary to the principle in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 ("Kable"). Section 9(1) of the Amendment Act provides a legislative, rather than common law, solution to the difficulty caused by the generality of the jury's verdict for a s 50(1) offence. The decision in Chiro is premised on the view that it is permissible for a judge to impose a sentence in circumstances where the actus reus of the offence found by the jury to have been proved has not or cannot be identified. Section 9(1) merely alters the basis upon which the sentencing judge may do so.

Decision in Chiro

4. In Chiro at 454 [61] and 456 [68], Bell J noted that the appeal in that case raised two matters of common law principle. The first was whether the proper exercise of discretion was against asking the jury which acts of sexual exploitation it found proved for a s 50(1) offence. The second was whether, in circumstances in which the acts of sexual exploitation which the jury found proved were unknown, it was open to the trial judge to sentence the offender on the basis that he committed all of the acts of sexual exploitation particularised in the information.

5. Chief Justice Kiefel, Keane and Nettle JJ found that, after the jury had returned its verdict, the judge should have exercised her discretion to ask the jury to specify which of the particularised acts of sexual exploitation they were agreed had been proved: Chiro at 448 [46]. Given that each of the underlying acts of sexual exploitation was part of the actus reus of the s 50(1) offence, and that it was for the jury alone to find the actus reus of the offence alleged, it was for the jury to determine which of the acts of sexual exploitation they had found to be proved, otherwise it "would not be a trial by jury": Chiro at 445 [39] and 451 [52]. Consequently, where a jury returned a verdict of guilty of a charge under s 50(1) of the CLCA, and the judge did not or could not get the jury to identify which of the alleged acts of sexual exploitation the jury found to be proved, the offender should be sentenced on the view of the facts most favourable to the offender. As this had not occurred, the sentence in Chiro was infected by error and manifestly excessive: see at 451-452 [52]-[53].

6. Justice Bell found that, in accordance with the principles explained in Cheung v The Queen (2001) 209 CLR 1 ("Cheung"), it was the role of the judge to determine the facts relevant to sentencing, subject to the constraint that the determination must be consistent with the jury's verdict. It was the content of the constraint that was in question: Chiro at 456 [70]. Her Honour held that, in contrast to cases such as Cheung – in which the jury's verdict did not imply a finding on a matter which was highly material in sentencing, but was not a matter on which issue was joined – the acts on which the prosecution relied to establish a s 50(1) offence were particularised in the information and issue was joined as to the commission of each. The verdict established conclusively that the offender engaged in sexual exploitation "by the commission of at least two of the particularised acts over a period of not less than three days, and no more. To sentence the appellant on the basis that he committed all of the particularised acts upon which issue was joined [was] to deprive the requirement of consistency with the verdict of practical content": Chiro at 457 [71].

7. Justice Edelman dissented, concluding that it was not necessary for the sentencing judge to sentence the offender on the most favourable basis to him. The sentencing judge was not required to disregard numerous acts of sexual exploitation. To disregard various acts of sexual exploitation would be contrary to the sentencing judge's findings, which were made beyond reasonable doubt and were not inconsistent with the jury's verdict: Chiro at 478 [125].

8. The following three matters should be noted about the decision in Chiro.

9. First, the common law principles identified in that case are of limited application. They concern a particular offence which has now been repealed. They followed from the unusual nature of the offence of persistent sexual exploitation of a child in s 50(1) of the CLCA and

its requirement of extended unanimity, namely, that the jury must reach unanimous agreement (or, after four hours, agreement by a statutory majority) that the Crown has proved beyond reasonable doubt that the accused committed the same two or more underlying acts of sexual exploitation: see Chiro at 435-438 [19]-[23]; R v Little (2015) 123 SASR 414 at 417 [11] and KBT v The Queen (1997) 191 CLR 417 at 422 (Brennan CJ, Toohey, Gaudron and Gummow JJ).

10. Secondly, whilst Bell J found that the jury's verdict only "establishe[d] conclusively" that the offender engaged in sexual exploitation by the commission of two of the particularised acts (Chiro at 457 [71]), and Kiefel CJ, Keane and Nettle JJ held that it was for the jury alone to find the acts which constituted the actus reus (Chiro at 445 [39] and 447 [43]), neither the plurality nor Bell J found that the sentencing of an offender on the basis of more than two of the particularised acts would be *inconsistent with* the verdict. This is unsurprising, given that there is "no way of knowing" which acts of sexual exploitation the jury found to be proved if the judge declined to exercise his or her discretion to ask questions of the jury: Chiro at 438 [24] (Kiefel CJ, Keane and Nettle JJ). In these circumstances, the NSW Attorney submits that the applicant's claim at [27]-[30] of the applicant's submissions ("AS") that the legislature misapprehended the central basis for the majority of this Court's conclusion in Chiro, because it expressed s 9(1) to apply to cases in which the "sentencing court sentenced the person consistently with the verdict of the trier of fact", is without foundation.

11. Thirdly, as Chiro itself reveals, the exercise of a judge's sentencing discretion is "not unbounded. Its exercise is always hedged about by both statutory requirements and applicable judge-made principles": Magaming v The Queen (2013) 252 CLR 381 ("Magaming") at 396 [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). Chiro sets out judge-made principles which respond to a particular problem – the generality of the jury's verdict for a s 50(1) offence – caused by the nature of an offence created by Parliament. As set out below, the NSW Attorney submits that there is nothing antithetical to the judicial process for a law to be enacted which alters those judge-made principles, even though the alteration to the law may have an impact on later proceedings. In this case, s 9(1) of the Amendment Act merely alters the common law principles to a position which is consistent with what was understood to be the law at the time of sentencing.

Retrospective alteration of the substantive law

12. The first step in the making of an assessment of the validity of any given law is one of statutory construction: Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (2008) 234 CLR 532 ("Gypsy Jokers") at 553 [11] (Gummow, Hayne, Heydon and Kiefel JJ). Where different constructions are available, a construction is to be selected which would avoid rather than lead to a conclusion of constitutional invalidity: New South Wales v Commonwealth (Work Choices Case) (2006) 229 CLR 1 at 161-162 [355] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd (2015) 255 CLR 352 at 381 [66] (Gageler J); see also s 22A(1) of the Acts Interpretation Act 1915 (SA).

13. Contrary to the applicant's "primary contention" that s 9(1) of the Amendment Act has the purpose and effect of directing an appellate court in relation to the manner and/or outcome of the exercise of its appellate jurisdiction (AS at [34]), the NSW Attorney submits that s 9(1) of the Amendment Act effects a retrospective alteration of the substantive law applicable to sentencing for s 50(1) offences.

14. Section 9(1) of the Amendment Act operates in a comparable manner to Part 13 of Schedule 4 to the Independent Commission Against Corruption Act 1988 (NSW) ("ICAC Act"), the constitutional validity of which was upheld by this Court in Duncan v Independent Commission Against Corruption (2015) 256 CLR 83 ("Duncan"). Clause 35(1) of Schedule 4 provided that anything done or purporting to have been done by the Independent Commission Against Corruption ("ICAC") before 15 April 2015 – the date of this Court's decision in Independent Commission Against Corruption v Cunneen (2015) 256 CLR 1 ("Cunneen") – that would have been validly done if "corrupt conduct" included "relevant conduct" (as defined in cl 34(1)), was "taken to have been, and always to have been, validly done". Clause 35(2) also validated "legal proceedings and matters arising in or as a result of those proceedings" if their validity relied on the validity of a thing done or purporting to have been done by ICAC.

15. Chief Justice French, Kiefel, Bell and Keane JJ concluded, inter alia, that cll 34 and 35 deemed to be valid acts done by ICAC and constituted a retrospective alteration of the substantive law which was to be applied by the courts in accordance with their ordinary processes: Duncan at 94 [11] and 98 [28]. Justice Gagelar rejected an argument that Parliament chose to leave the previous jurisdictional limits of ICAC unaltered and attempted to prevent the Supreme Court from declaring and enforcing those limits. His Honour considered that cl 35(1) did no more than provide that the authority conferred on ICAC extended to include authority to have done those historical acts: Duncan at 100 [36]-[38]

and 101 [41]. Justices Nettle and Gordon concluded that cll 34 and 35 operated to effect a change in the law, creating a new or different legal regime for a prescribed period of time, and validated acts done during that time according to the new or different legal regime: Duncan at 102 [46].

16. The NSW Attorney submits that s 9(1) of the Amendment Act has a similar operation. It deems to be valid sentences imposed for s 50(1) offences to the extent that they would have been valid if the court was not required, at common law, to sentence an offender on the view of the facts most favourable to the offender in circumstances where the judge did not ask any questions of the jury directed to ascertaining which acts of sexual exploitation the jury found to have been proved. It retrospectively alters the common law principles identified in Chiro, creating a new or different legal regime for sentences imposed for s 50(1) offences prior to the commencement of s 9(1). It operates so that the "legal position so declared" (Duncan at 94 [14] (French CJ, Kiefel, Bell and Keane JJ)) is the same as if the sentencing judge was authorised to sentence a person consistently with the verdict of the jury but having regard to the acts of sexual exploitation determined by the sentencing judge to have been proved beyond reasonable doubt.

17. The five matters put forward by the applicant in support of his submission that s 9(1) does not have the effect of retrospectively altering the substantive law (AS at [40]) are without merit, for the following reasons:

(i) first, the applicant's assertion that s 9(1) does not purport to have any operation from a point in time earlier than its commencement is contrary to the express terms of the subsection. The provision *only* applies to sentences imposed prior to its commencement and provides that such sentences are taken to be, and "always to have been", not affected by error or manifestly excessive. As Leeming JA stated in Lazarus v ICAC (2017) 94 NSWLR 36 ("Lazarus") at 54 [73] regarding the ICAC Amendment (Validation) Act 2015 (NSW) ("the Validation Act"), the statute which inserted Part 13 into Schedule 4 to the ICAC Act, "[s]elf-evidently, the Validation Act has retrospective force. It is, after all, a *validation* Act, whose entire purpose is to alter the legal status of historical conduct" (original emphasis);

(ii) secondly, the provision identifies the content of the new or different body of law applicable to sentencing for s 50(1) offences, as set out in the preceding paragraph;

(iii) thirdly, the fact that s 9(1) provides that a sentence is taken to be, and always to have been, not "affected by error" or otherwise "manifestly excessive" does not support a submission that, because these concepts concern a conclusion which an appellate court may have otherwise reached, there has been no retrospective change to the

content of the substantive law. Just as this Court found that cl 35(1) of Schedule 4 to the ICAC Act retrospectively altered the substantive law by providing that specified acts of ICAC were taken to have been, and always to have been, "validly done" – which a court may otherwise have found not to have been validly done, as occurred in Cunneen – s 9(1) alters the substantive law by providing that sentences imposed in contravention of the principles in Chiro were not "affected by error" or "manifestly excessive";

(iv) fourthly, the fact that s 9(1) only has work to do where the conditions in (a) and (b) of that subsection are satisfied is of no moment. Clause 35(1) of Schedule 4 to the ICAC Act only had work to do where findings of ICAC were, having regard to this Court's interpretation of "corrupt conduct" in Cunneen, beyond power. That provision was nevertheless found to constitute a retrospective alteration of the substantive law: see Duncan at 92 [8] and 98 [28] (French CJ, Kiefel, Bell and Keane JJ); and

(v) fifthly, contrary to what is asserted by the applicant, the class of cases to which s 9(1) applies is not defined by reference to the characteristics of the sentence itself, thus denying it of the character of a change to the content of the substantive law. Section 9(1) applies generally to sentences imposed for s 50(1) offences prior to the commencement of that provision, albeit that it only has practical effect where the conditions in (a) and (b) are met.

18. Previous decisions of this Court establish that a law to the effect of s 9(1) is not inconsistent with Ch III of the Constitution. It is well settled that if a court makes a decision which involves the formulation of a common law principle, the legislature can pass an enactment which changes the law as declared by the court. Such an enactment may be expressed so as to make a change in the law with deemed operation from a date prior to the date of its enactment: Australian Education Union v General Manager of Fair Work Australia (2012) 246 CLR 117 ("AEU") at 141-142 [50] (French CJ, Crennan and Kiefel JJ); Nicholas v The Queen (1998) 193 CLR 173 ("Nicholas") at 225 [123]-[124] (McHugh J), 272-273 [234] (Hayne J).

19. It is also well settled that a statute which alters substantive rights does not necessarily involve an invasion of judicial power contrary to Ch III, even if those rights are in issue in pending litigation: Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth (1986) 161 CLR 88 at 96; HA Bachrach Pty Ltd v Queensland (1998) 195 CLR 547 ("Bachrach") at 560 [8]-[9], 653-564 [17]-[20]. However, a statute affecting litigation with respect to the guilt of a person charged with criminal offences may

involve quite different considerations from one affecting litigation as to rights which the Parliament may choose to have determined either by a judicial or non-judicial body, given that adjudging and punishing criminal guilt is an exclusively judicial function: Bachrach at 563 [18] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); see also Magaming at 396 [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

20. The NSW Attorney makes the following submissions about the fact that s 9(1) affects litigation with respect to a person convicted of a criminal offence.

21. First, in contrast to s 9(2) of the Amendment Act, s 9(1) does not apply to sentencing proceedings that were pending at the time the provision was enacted. Rather, s 9(1) only applies where a sentence for a s 50(1) offence has already been imposed. Although s 9(1) might apply to a sentence appeal that was commenced before the enactment of that provision, the present appeal was instituted after the enactment of s 9(1). Therefore, the provision does not alter any substantive rights of the applicant that were in issue in any pending sentence or appeal proceedings.

22. Secondly, in Nicholas, this Court considered the validity of a provision which affected litigation with respect to the guilt of a person charged with criminal offences. Section 15X of the Crimes Act 1914 (Cth) required a trial court to disregard the fact that a law enforcement officer had committed an offence in importing narcotic goods when exercising its discretion as to whether evidence of the importation in the course of a controlled operation should be admitted in a prosecution under s 233B of the Customs Act 1901 (Cth). Although s 15X concerned the reception of evidence into a prosecution, and is therefore distinguishable from the present case, it is notable that s 15X was found not to contravene the doctrine of separation of powers or the Kable principle, despite the fact that it was Commonwealth legislation, applied to a pending criminal prosecution and was squarely directed to courts.

23. Thirdly, s 9(1) of the Amendment Act does not interfere with the jury's determination of criminal guilt or "deal directly with ultimate issues of guilt or innocence": Nicholas at 277 [249] (Hayne J); X7 v Australian Crime Commission (2013) 248 CLR 92 at 120 [48] (French CJ and Crennan J). Whilst s 9(1) may affect the outcome of a sentence appeal for a s 50(1) offence, in that it retrospectively alters the sentencing regime for such offences and validates sentences imposed according to that regime, this is a "long way away from interfering with the judicial process, let alone affecting the institutional integrity of a court": Lazarus at 64 [125] (Leeming JA). In Lazarus, Leeming JA, with whom McColl and Simpson JJA agreed, found that even though the Validation Act might be determinative of whether the applicants in that case were found innocent or guilty, that did "not impact upon

the restrictions on state legislative capacity identified in Kable and the cases which followed": at 65 [130].

24. Justice Leeming identified a number of reasons in Lazarus why the Validation Act did not amount to an impermissible legislative interference in the exclusively curial function of adjudging innocence or guilt. These included that the Validation Act did not affect the determination of any issue of fact, but effected a retrospective alteration of the "legal characterisation" of facts, and that the premise of the Validation Act was that Cunneen was correctly decided, such that there was no suggestion that a court was being directed to disregard that decision: Lazarus at 64-65 [122]-[129]. This reasoning may be applied in this case. The effect of s 9(1) of the Amendment Act is retrospectively to validate the legal characterisation of sentences imposed on the basis of the acts of sexual exploitation found by the sentencing judge to have been proved beyond reasonable doubt, rather than to determine any issue of fact on sentence. The premise of the Amendment Act is also that Chiro was correctly decided.

25. Justice Leeming went on to identify a further reason why the Validation Act was not repugnant to the integrity of the judicial function, as follows (at 66 [133]):

> When a court, especially the High Court, determines a point of law, the effect is retrospective. ... An inevitable consequence of Cunneen and every other appellate judgment which alters the perceived legal meaning of a statute is that it may affect the legal character ascribed to past acts purportedly made pursuant to that statute. That may extend to judicial acts. In this State, sentencing which was entirely orthodox in accordance with what had been held in R v Way (2004) 60 NSWLR 168; [2004] NSWCCA 131 was found, years later, to have been erroneous in light of the High Court's determination of the true legal construction of the statute in Muldrock v The Queen (2011) 244 CLR 120; [2011] HCA 39. Examples of appellate decisions which had the effect of converting acts which were perceived to be legally impeccable to acts which were legally erroneous could readily be multiplied. The presently relevant observation is merely that retrospective alterations to the perceived character of past acts brought about by appellate decisions cannot be antithetical to the institutional integrity of courts, because this is an intrinsic aspect of the legal system. In those circumstances, it is difficult to see how legislation which reverses the effects of those retrospective alterations to the perceived character of past acts could be antithetical to the institutional integrity of courts.

26. Section s 9(1) alters the common law principles to a position which was consistent with what was understood to be the law prior to this Court's decision in Chiro. The NSW Attorney submits that there is nothing inherently antithetical to the judicial process in the legislature doing so.

No legislative direction to appellate court as to manner and outcome of exercise of jurisdiction

27. In considering the validity of a provision which provided that a court "is not to order the release from custody of a designated person" in Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 ("Lim") at 36-37, Brennan, Deane and Dawson JJ drew a distinction between a law which grants or withholds jurisdiction from a court and a law which directs a court as to the manner and outcome of the exercise of its jurisdiction. Their Honours stated:

> It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates.

28. This passage was referred to with approval by Gummow, Hayne and Bell JJ in AEU at 150 [78] and by French CJ, Kiefel, Bell and Keane JJ in Duncan at 97 [24]. In the latter case, their Honours held that the retrospective conferral of jurisdiction upon ICAC by cl 35 of Schedule 4 to the ICAC Act which was held lacking in Cunneen was a grant of jurisdiction within the first category of cases identified in that passage: Duncan at 98 [25]. The NSW Attorney submits that s 9(1) of the Amendment Act operates in a similar manner, retrospectively granting upon a sentencing court the jurisdiction which was held lacking in Chiro. The provision thereby attaches "new legal consequences and a new legal status to things done which otherwise would not have had such legal consequences or status": Duncan at 98 [25].

29. Contrary to the applicant's submission that s 9(1) of the Amendment Act operates to direct an appellate court to hold that a sentence which is affected by error is not affected by error and that a sentence which may be manifestly excessive is not manifestly excessive (AS at [34]), the NSW Attorney submits that s 9(1) "neither confers a function on the Supreme Court nor deprives it of one": Duncan at 98 [28] (French CJ, Kiefel, Bell and Keane JJ). Rather, the effect of s 9(1) is that, in considering a sentence appeal to which that provision applies, an appellate court must – in accordance with ordinary judicial processes – apply the substantive law which has been retrospectively altered by that provision.

30. By retrospectively altering the common law principles identified in Chiro and granting a sentencing court the jurisdiction which was held lacking in that case, s 9(1) has the effect that, in an appeal against sentence, a sentence is taken to be, and always to have been, not affected by error or otherwise manifestly excessive on the ground that questions were not asked of the jury as to which acts of sexual exploitation it found proved and the offender was not sentenced on the view of the facts most favourable to the offender. An appellate court may otherwise find that the trial judge erred in the exercise of his or her sentencing discretion in one or more of the respects identified in House v The King (1936) 55 CLR 499.

10 31. Section 9(1) is therefore distinguishable from the legislation examined in International Finance Trust Co Ltd v NSW Crime Commission (2009) 240 CLR 319, which required the court to hear particular applications for restraining orders on an ex parte basis and which this Court found to be an impermissible direction to the judiciary: see at 354-355 [55] (French CJ). Unlike that legislation, s 9(1) of the Amendment Act "does not affect the processes applied by the Supreme Court" or this Court in determining an appeal against sentence for a s 50(1) offence (Duncan at 98 [28] (French CJ, Kiefel, Bell and Keane JJ)), nor direct the court as to the manner or outcome of the exercise of its jurisdiction.

No precluding of review for jurisdictional error

32. In considering an argument in Duncan that Part 13 of Schedule 4 to the ICAC Act took from
20 the Supreme Court power to grant relief on account of jurisdictional error, French CJ, Kiefel, Bell and Keane JJ held at 99 [29]:

> This Court's decision in *Kirk* was concerned with legislative intrusion upon the supervisory jurisdiction of the Supreme Courts of the States over administrative agencies and inferior courts; but it did not deny the competence of State legislatures to alter the substantive law to be applied by those agencies and courts. As has been explained, Pt 13, properly understood, effects an alteration in the substantive law as to what constitutes corrupt conduct; it does not withdraw any jurisdiction from the Supreme Court. The Court of Appeal remains seized of the proceedings pending before it.
> 30 Accordingly, Pt 13 does not contravene the *Kirk* principle.

33. The NSW Attorney submits that this analysis has application to s 9(1) of the Amendment Act. Section 9(1), properly understood, effects an alteration in the substantive law identified in Chiro, creating a new or different legal regime for sentences imposed for s 50(1) offences prior to the commencement of s 9(1). It does not withdraw the supervisory jurisdiction of this Court or the Supreme Court of South Australia over inferior courts contrary to the principle in Kirk. This Court remains seized of the applicant's application for permission to appeal against sentence and his sentence appeal pending before it.

Applicant's submissions regarding alleged breach of Kable principle should be rejected

34. The applicant submits that if s 9(1) of the Amendment Act effects a change to the law of sentencing, it is nevertheless inconsistent with the principle in Kable. He makes this submission on a number of bases.

35. First, he asserts that s 9(1) of the Amendment Act authorises and requires the courts to proceed on the basis that a trial process conducted by a court "produced a conviction with a legal operation and effect different from that which it actually had" (AS at [59]).

36. The NSW Attorney submits that s 9(1) says nothing about an offender's conviction. The majority in Chiro did not suggest that the sentencing of an offender on the basis of the acts found by the sentencing judge to have been proved beyond reasonable doubt produced a verdict with a different legal operation to that found by the jury. Their Honours were concerned with the proper common law approach to sentencing where the actus reus found to have been proved by the jury for a s 50(1) offence was not revealed by the verdict. All members of the Court in Chiro rejected an argument that the jury's general verdict of guilty was uncertain because it failed to disclose which of the underlying acts of sexual exploitation the jury found to be proved: see at 448 [46] (Kiefel CJ, Keane and Nettle JJ), 453 [59] (Bell J) and 460 [82] (Edelman J). In these circumstances, a submission that s 9(1) of the Amendment Act alters the operation or effect of an offender's conviction should not be accepted.

37. Secondly, the applicant appears to suggest that s 9(1) is inconsistent with Ch III because the sentencing judge "will never him or herself have conducted a judicial trial of the applicant's guilt in any ordinary sense", so that none of the safeguards normally associated with a criminal trial by a judge will have applied, such as the application of the rules of evidence, the requirement to provide adequate reasons for the verdict and the capacity of the judge to acquit the accused (AS at [60]).

38. This submission is misconceived. The rules of evidence will have applied in the trial over which the sentencing judge presided and the jury will have entered its verdict on the basis of that evidence. No reasons for the verdict are ever available following a jury trial. To the extent that this is a complaint about a lack of transparency regarding the factual basis of the jury's verdict for a s 50(1) offence, such a complaint could equally be made in respect of the "common category of case in which the jury's verdict does not imply a finding on an issue which is nonetheless highly material in sentencing", of which Cheung is one illustration: Chiro at 456 [70] (Bell J); see also Cheung at 9 [5] (Gleeson CJ, Gummow and Hayne JJ). Although the sentencing judge will not have had the capacity to acquit the accused, the jury

will have had the opportunity to do so. Thus, the applicant's claim that s 9(1) of the Amendment Act breaches the Kable principle because it removes safeguards normally associated with a criminal trial is without merit.

39. Thirdly, adopting Hinton J's analysis in respect of s 9(2) of the Amendment Act in Question of Law Reserved (No 1 of 2018) [2018] SASCFC 128 ("Question of Law Reserved"), the applicant submits that s 9(1) authorised the sentencing judge to treat the jury's verdict as no more than a "trigger" for the determination of a sentence, unbounded by the verdict, and to "repeat the exercise" of determining which acts of sexual exploitation are proved without the jury's involvement. He claims that the effect of s 9(1) is that the controversy resolved by the jury's verdict is reopened, the outcome of which may differ to the true content of the verdict, such that the initial exercise of judicial power is "dispensed with". This is said to undermine the legitimacy of the judicial process in a manner antithetical to the exercise of judicial power. The applicant argues that legislation requiring an appellate court to treat such an exercise as resulting in a sentence unaffected by error must have the same consequence (AS at [61]-[65]).

40. In respect of the claim that s 9(1) has the effect that the jury's determination is "dispensed with", and that the sentencing judge is "unbounded" by the jury's verdict, Hinton J acknowledged that s 9(2) of the Amendment Act did not alter the position that the person was found guilty by the jury and the court was "duty bound to consider and impose the appropriate penalty ... the sentencing court cannot act contrary to the verdict": Question of Law Reserved at [126]. His Honour also found that s 9(2), at least formally, left the verdict intact: Question of Law Reserved at [170]. Therefore, even on Hinton J's reasoning, an assertion that s 9(1) has the effect that the jury's exercise of judicial power as the trier of fact is "dispensed with" cannot be accepted.

41. As to the argument that s 9(1) impermissibly authorises the sentencing judge to repeat the jury's task, Hinton J found that the Chiro approach of sentencing on the view of the facts most favourable to the offender did not involve "any repeated exercise of judicial power": Question of Law Reserved at [171]. Neither Hinton J nor the applicant has identified why this task – which requires a judicial determination as to which facts are most favourable to the offender – does not involve a repeated exercise of judicial power, but the task of determining which acts are proved beyond reasonable doubt does so. Even if s 9(1) does retrospectively authorise a sentencing judge to repeat the jury's task, it is unclear how this undermines the "legitimacy of the judicial process" or is "antithetical to the exercised [sic] of judicial power" (AS at [65]) so as to offend the principle in Kable.

42. The submission that s 9(1) retrospectively authorises the sentencing judge to treat the jury's verdict as a mere "trigger" for the determination of a sentence should also be rejected. If this argument is accepted, the Chiro approach of sentencing on the basis of the facts most favourable to the offender must also be characterised in this manner, given that the acts of sexual exploitation the jury found to be proved are not ascertainable if the judge declined to ask questions of the jury: Chiro at 438 [24] (Kiefel CJ, Keane and Nettle JJ).

43. Hinton J expressly acknowledged in Question of Law Reserved at [113] that the fictitious meaning afforded to the verdict by s 9(2) was:

> no less consistent with a jury's verdict than the presumption inherent in the order made by the High Court in disposing of Chiro. In each case the factual basis for sentence falls within the range of possible factual bases that *might* be consistent with the jury's verdict. It follows that to sentence the offender on either basis may be to sentence on a basis that does not accord with the jury's findings as to which of the acts of sexual exploitation were proved beyond reasonable doubt.

His Honour considered that the difference was that the Chiro approach ensured that punishment never exceeded what could properly be imposed had the jury been asked which acts it found proved: Question of Law Reserved at [113].

44. It may be accepted that s 9(1) retrospectively authorises the imposition of a sentence based on acts which the jury may not have found to be proved, although this will never be able to be established. Significantly, however, s 9(1) only validates sentences where the judge undertook the task of satisfying himself or herself that the relevant acts of sexual exploitation were proved to the criminal standard. This approach is consistent with the ordinary role of a sentencing judge in respect of other offences: Cheung at 13 [14] (Gleeson CJ, Gummow and Hayne J); The Queen v De Simoni (1981) 147 CLR 383 at 392 (Gibbs CJ) and 398-399 (Wilson J); and Kingswell v The Queen (1985) 159 CLR 264 at 276 (Gibbs CJ, Wilson and Dawson JJ) and 283 (Mason J). Accordingly, although s 9(1) validates sentences imposed for s 50(1) offences in contravention of the principles in Chiro, this Court should not find that s 9(1) validates sentences imposed in a manner inconsistent with the "ordinary processes" of a court, or in a manner substantially incompatible with the functions of the court of which the judge is a member: see Duncan at 98 [28] (French CJ, Kiefel, Bell and Keane JJ); Wainohu v New South Wales (2011) 243 CLR 181 ("Wainohu") at 210 [47] (French CJ and Kiefel J); North Australian Aboriginal Justice Agency Ltd v Northern Territory (2015) 256 CLR 569 at 595 [39] (French CJ, Kiefel and Bell JJ).

45. The applicant's final argument rests on the analysis of Vanstone J in Question of Law Reserved regarding s 9(2) of the Amendment Act. He argues that s 9(1) "transfers" a

determination of the jury as to which of the alleged acts of sexual exploitation are proved into a different decision made by the judge. Section 9(1) is said to lay the verdict open to a fresh interpretation and one that may be different from the factual basis on which it originally rested, thereby working an alteration of the division of responsibility between judge and jury, constituting an interference in the process of determination of guilt and sentencing in particular cases: AS at [66], citing Question of Law Reserved at [38]-[39]. He submits that the appellate court is also forced to give effect to that interference: AS at [68].

46. Whilst it is ordinarily for the jury alone to find the actus reus of an offence alleged (Chiro at 445 [39] (Kiefel CJ, Keane and Nettle JJ)), where a State has elected, under no compulsion from s 80 of the Constitution, to provide that certain offences are to be tried by jury, the NSW Attorney submits that the State may enact legislation authorising a judge to sentence on the basis of the acts found by the sentencing judge to have been proved beyond reasonable doubt, assuming such findings are not inconsistent with the verdict. The NSW Attorney submits that to do so does not infringe the Kable principle. In this regard, it is significant that Chiro itself is premised on the view that it is permissible for a judge to impose a sentence in circumstances where the actus reus of the offence found by the jury to have been proved has not or cannot be identified. Section 9(1) merely alters the basis upon which the sentencing judge may do so, namely, on the basis of the facts found by the sentencing judge to have been proved beyond reasonable doubt, rather than the facts found to be most favourable to the offender.

47. Section 9(1) "does not direct the exercise of the judicial power in finding facts, applying law or exercising an available discretion": Nicholas at 188 [20] (Brennan CJ); see also Question of Law Reserved at [160] (Hinton J); Lim at 36-37 (Brennan, Deane and Dawson JJ); Liyanage v The Queen [1967] 1 AC 259 at 290; and Gypsy Jokers at 560 [39] (Gummow, Hayne, Heydon and Kiefel JJ). It neither prevents a court from independently determining the appropriate sentence to be imposed, nor requires a court to proceed in circumstances which bring the administration of justice into disrepute: Nicholas at 211 [80] (Gaudron J).

48. Moreover, s 9(1) does not impair the reality and appearance of the independence and impartiality of an appellate court; effect an impermissible "intrusion into the processes or decisions" of an appellate court; enlist an appellate court to implement decisions of the executive or legislature in a manner incompatible with that court's institutional integrity; or confer upon an appellate court "a function (judicial or otherwise) incompatible with the role of that court as a repository of federal jurisdiction": Wainohu at 208-210 [44]-[46] (French CJ and Kiefel J) and the cases cited therein.

49. In reliance on Hinton J's judgment in Question of Law Reserved, the applicant seeks to extend the Kable principle by reference to judicial statements about the requirements of s 80 of the Constitution. Justice Hinton's judgment does not distinguish between constitutional principles developed in entirely different contexts. The NSW Attorney submits that this extension of the Kable principle should not be entertained. In any event, the NSW Attorney notes that a procedure which involves a "trial judge, following a jury verdict of guilty, reviewing the evidence for himself for the purpose of making findings on matters of fact which were necessary for sentencing, and which were not resolved by the jury's verdict" does not involve any infringement of a right to trial by jury, even in the case of federal offences: Cheung at 24-25 [52]-[55] (Gleeson CJ, Gummow and Hayne JJ, Gaudron and Callinan JJ agreeing); see also at [125]-[126] (Kirby J).

50. The applicant has not established that s 9(1) of the Amendment Act confers a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with the court's role as a repository of federal jurisdiction. The NSW Attorney submits that the constitutional validity of s 9(1) of the Amendment Act should be upheld.

Part IV Estimate of time for oral argument

51. It is estimated that 15 minutes will be required for oral argument.

Dated: 29 October 2019

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IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY No A20 of 2019

BETWEEN

KMC
Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS (SA)
Respondent

ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

1. Pursuant to Practice Direction No 1 of 2019, the constitutional provisions, statutes and instruments referred to in these submissions are:

   a. Constitution, Chapter III;

   b. *Criminal Law Consolidation Act 1935* (SA) (historical version as at 23 October 2017);

   c. *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) (as assented to on 24 October 2017);

   d. *Acts Interpretation Act 1915* (SA), s 22A (current version);

   e. *Independent Commission Against Corruption Act 1988* (NSW), Schedule 4, Part 13 (as enacted by *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW) on 6 May 2015) ; and

   f. *Crimes Act 1914* (Cth), s 15X (as at commencement on 8 July 1996).