IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A20 of 2019

BETWEEN:

KMC
Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS (SA)
Respondent

and

THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA
Intervening

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF TASMANIA, INTERVENING

Part I:

1. The Attorney-General for the State of Tasmania certifies that these submissions are in a form suitable for publication on the Internet.

Part II & III:

2. The Attorney General for the State of Tasmania intervenes under the *Judiciary Act 1903* (Cth) s 78A, in support of the respondent, to argue that s 9(1) of the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) is valid.

Filed on behalf of Attorney-General for the State of Tasmania

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Part IV: Argument

Summary of Argument

3. In response to the applicant's arguments dealt with at [1]-[57] of his written submissions, we respectfully adopt the submissions of the Attorney-General for South Australia.

4. In response to the applicant's argument dealt with at [58]-[68] of his written submissions, it is submitted that in so far as s 9(1) of the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) ('**s 9(1)**') changes the law applicable to sentencing for an offence against s 50 of the *Criminal Law Consolidation Act 1935* (SA) [1] ('**s 50**'), it is not inconsistent with Chapter III of the *Constitution*, because it does not impair or interfere with the institutional integrity of the court.

Effect of s 9(1)

5. Section 9(1) retrospectively authorises a sentencing court to have sentenced a person found guilty of an offence against s 50 consistently with the verdict of the jury, but having regard to the acts of sexual exploitation determined by the sentencing court to have been proved beyond reasonable doubt.

6. Section 9(1) only applies when certain conditions are met, namely that:

   (a) a sentence is imposed on a person who has been convicted of an offence under s 50; and

   (b) the sentence is imposed before the commencement of s 9(1).

7. The provision is not, in its terms, a direction to a sentencing or an appellate court. Rather, it is directed to quality of a sentence passed by a court in certain circumstances. It has the effect of 'deeming' the sentence to be free of error (including being manifestly excessive) if the alleged error was caused by three, cumulative criteria, viz.,

   (a) the trial judge did not ask the jury a question to ascertain which acts of sexual exploitation, or which particulars of the offence, as alleged, the jury found to be proved beyond reasonable doubt;

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[1] As it stood before being amended by the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017*.

(b) the person was not sentenced on the view of the facts most favourable to the person; and

(c) the sentence was consistent with the jury's verdict having regard to the facts that the judge determined had been proved beyond reasonable doubt.

8. A sentence meeting the cumulative criteria would have been in accordance with the law as it was understood to apply before this Court's decision in *Chiro v R.*[2]

9. The criteria for which error is excluded by s 9(1) reflect principles which would be appropriate for a sentencing court to follow when sentencing for a course of conduct offence.

10 *Course of conduct offences*

10. It was recognised in *Chiro*, *KBT v R*[3] and *Cheung v R*[4] that course of conduct offences have an *actus reus* that may be proved by alternative possible versions of the alleged facts. Examples included 'trafficking in drugs' and 'keeping a disorderly boarding house'. To that list may be added 'driving in a manner dangerous to the public'.[5]

11. The Crown may choose to particularise the offence of dangerous driving by alleging a series of discrete acts which tend to prove that the conduct was objectively dangerous to the public. One, some or all of the alleged discrete acts of driving may otherwise constitute offences, occurring at the same or different times and places.

12. In *McBride v R*, Barwick CJ[6] discussed how a jury might find the charge proved, by
20 reference to the manner of driving alleged, the features of the driving said by the Crown to be dangerous and those features of the driving thought by the jury to be dangerous (which were not necessarily the features identified by the Crown). His Honour said:

> Equally, if the evidence could bear such an interpretation, they could be told that if they find the applicant to have been driving in the precise manner charged by the Crown as dangerous but think it dangerous to the public for some reason other than that assigned by the Crown, they are at liberty to find that element of the offence

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2 (2017) 260 CLR 425.
3 (1997) 191 CLR 417.
4 (2001) 209 CLR 1.
5 *R v Coventry* (1938) 59 CLR 633; *McBride v R* (1966) 115 CLR 44; *Jiminez v R* (1992) 173 CLR 572 and *King v R* (2012) 245 CLR 588.
6 *McBride v R* (1966) 115 CLR 44, 49 (Barwick CJ).

established upon the footing of their own view as to the reason why the manner of driving was dangerous to the public.[7]

13. In *King*, Heydon J drew attention to the fact that a jury does not act monolithically. Its members are subject to their individual reflections and perceptions.[8] Thus, in 'course of conduct' offences, the individual members of the jury may each assign differing relevance and weight to different elements of the conduct charged.

14. In the ordinary course, following a conviction for dangerous driving the judge will not pass sentence on an accused person on the facts thought by the jury to be relevant or important to make the driving dangerous. Where the discrete acts of driving included one or more offences, the jury's verdict will not (normally) disclose whether or not the jury found any or all of those separate offences proved. The 'unitary will'[9] of the jury is all that is necessary to require the judge to sentence the accused person.

Section 50

15. The history and aims of s 50 are set out in detail in *Hamra v R*.[10]

16. The form of the offence in s 50 was critical to the outcome in *Chiro v R*.[11] By the form of the offence Parliament had signified not only the discrete nature of the acts said to comprise the *actus reus*, but also that 'an accused is not to be convicted or sentenced on any basis other' than those discrete acts.[12] The requirement of 'extended unanimity' derived from the same premise.[13]

17. In common with 'course of conduct' offences, the *actus reus* of s 50 can be proved by various alternative versions of the facts alleged by the Crown. And beyond the requirement for extended unanimity, the jury's verdict would not disclose the factual basis, or the gravity of offences thought relevant by the jury.

18. Prior to *Chiro*, sentencing courts approached sentencing for s 50 offences by determining the factual basis for the sentence, consistently with the principles then understood to apply. Thus, as with course of conduct offences, a sentencing judge

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7 Ibid.
8 *King v R* (2012) 245 CLR 588, 615 [66] (Heydon J).
9 Ibid.
10 (2017) 260 CLR 479 at 489 [22] to 492 [26].
11 (2017) 260 CLR 425, 450 [51] (Kiefel CJ, Keane & Nettle JJ).
12 Ibid.
13 *KBT v The Queen* (1997) 191 CLR 417, 422 (Brennan CJ, Toohey, Gaudron & Gummow JJ).

may have sentenced a convicted offender on a view of the facts not most favourable to the offender.

Section 9(1) is not inconsistent with Ch III

19. Section 9(1) does not interfere with the institutional integrity of the courts. The question of its validity concerns the exercise of the legislative power of the South Australian Parliament, not, as in *Chiro*, the judicial power of a sentencing court. Section 9(1) is a direct response to this Court's decision in *Chiro*. The purpose of the law is to ensure that sentences passed for offences under s 50 will not be disturbed on the grounds on which the error was identified in *Chiro*. Here, Parliament's clear concern is with the important values underlying the rights of children to be protected from sexual predation by adults.[14] Although reforms in this field aim to avoid encroaching upon long standing principles of criminal law for the protection of accused persons, there is an inevitable tension between the two goals,[15] and parliament has power to alter the common law in this regard, as long as clear words are used, in accordance with the principle of legality.[16] In *Australian Education Union v Fair Work Australia* (*'AEU'*)[17] it was said:

20. If a court exercising federal jurisdiction makes a decision which involves the formulation of a common law principle or the construction of a statute, the Parliament of the Commonwealth can, if the subject matter be within its constitutional competence, pass an enactment which changes the law as declared by the court. Moreover, 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.[18]

21. *AEU* concerned a provision that stated a rule that attached legal consequences to an entry in a statutory register.

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14 These values are well recognised. See for example, the *International Covenant on Civil and Political Rights* ATS 1980, No 23, esp cls 22 and 23; *Convention on the Rights of the Child* ATS 1991, No 4.

15 Particularly in light of the 'perverse paradox that the more extensive the sexual exploitation of a child, the more difficult it can be proving the offence' *R v Johnson* [2015] SASCFC 170, [2] (Sulan and Stanley JJ), also noted by the Report of the Royal Commission into Institutional Child Sexual Abuse, Final Report, Part III Child sexual abuse offences, 11 and 68; and Marie Shaw QC and Ben Doyle, *The 'Age of Statutes' and its Intersection with Fundamental Principles: An Illustration* (2019) 40 Adelaide Law Review 353, 354-355.

16 *Potter v Minehan* (1908) 7 CLR 277; *Al-Kateb v Goodwin* (2004) 219 CLR 562, 577 (Gleeson CJ).

17 (2012) 246 CLR 117.

18 Ibid. 141-142, [50].

22. In *Hamra* it was noted that that the underlying purpose of s 50 was no different than the former s 74 of the CLCA.[19] It was the change in the form of the offence that was sufficient to modify the common law, so as to reduce the requirement for precise particulars of each act of sexual exploitation or the occasions on which or the places at which they occurred.[20]

23. By s 9(1) the South Australian Parliament has clearly signified the basis on which an accused person may have been sentenced. That basis is essentially the same as the basis for course of conduct offences. Given that s 50 shares key characteristics with course of conduct offences, it is submitted that Parliament's legislative choice to authorise sentences passed on that basis does not affect the institutional integrity of the sentencing court, or a court hearing an appeal against sentence.

24. None of this offends the principle in *Kable v DPP*.[21] In *Kable*, the function conferred on the Supreme Court required the court 'to participate in the making of a preventative detention order where no breach of the criminal law [was] alleged and where there [was] no determination of guilt'.[22] This is in sharp contrast to the effect of s 9(1), the work of which relates to preserving sentences passed on persons found guilty of a serious crime and specifically on the basis of facts proved beyond reasonable doubt.

25. Rather that undermining public confidence in a court,[23] s 9(1) is consistent with its maintenance. Without it, convicted persons who were properly found guilty of persistent sexual exploitation of a child and were properly sentenced in accordance with the law as it was then understood, would be able to appeal their sentence and be re-sentenced on the basis that they only committed the least two serious acts of sexual exploitation alleged against them. They could not be re-tried for the remainder of the acts (s 50(5)). Such an outcome is unlikely to enhance public confidence in the courts or the judicial system, and it would not reflect the value that Parliament is entitled to place on appropriately punishing sexual abuse of children.

26. Section 9(1) involves no plan by the South Australian Parliament to convict and sentence a person.[24] It is a provision that removes error by disengaging the principle

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19 *Hamra v R* [2017] HCA 38; (2017) 260 CLR 479, 492 [26] (Kiefel CJ, Bell, Keane, Nettle & Edelman JJ).
20 Ibid, [27].
21 (1996) 189 CLR 51.
22 *Kable,* 98 (Toohey J).
23 *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [62].
24 In contrast, for example, to *Liyanage v R* [1967] AC 259.

of sentencing identified in *Chiro* for an offence under s 50. The legislature is not, by s 9(1), attempting to 'conscript the court in a "legislative plan"'.[25]

27. States are not constrained in a way that requires their Courts to try indictable offences by jury.[26] Subject to the requirement to try Commonwealth indictable offence by jury, States are at liberty to abolish jury trials for some, or all State offences. By parity of reasoning, a State must be at liberty to make laws regarding the division of tasks between a jury and the judge.[27]

28. To the extent that *Chiro* says that such an approach breaches the principle in *R v De Simoni*,[28] it is submitted that it is permissible for the legislature to authorise that (by s 9(1)), without interfering with the institutional integrity of the court because:

(a) all of the acts of sexual exploitation that may be considered relevant by the sentencing judge are encompassed by the particulars of the charge;

(b) s 50 is in substance, if not form, the same as course of conduct offences; and

(c) s 9(1) effectively only authorises the sentencing court to sentence for s 50 in the same way as it would ordinarily sentence for a course of conduct offence.

Question of Law No 1

29. It is submitted that *Question of Law Reserved (No 1 of 2018)*[29] was wrongly decided, and we adopt the submissions of the Attorney-General for South Australia in that regard. But in any event, it is submitted that the reasoning in that case does not apply in relation to s 9(1), for the following reasons.

30. First (and contrary to the applicant's submission: **A[63]**), s 9(1) does not apply where a sentencing judge has 'ignored' or dispensed with[30] the determination by the jury, or has treated it as a 'trigger' to repeat the task undertaken at trial 'unbounded' by the jury's verdict. Rather, s 9(1) only authorises a determination that was consistent with the verdict. Consistency with the jury's verdict remains the touchstone for the sentence; the verdict cannot be 'transformed' (cf., **A [68]**).

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25 *North Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [128] (Gageler J).
26 cf, the Commonwealth Constitution, s 80.
27 cf., *Question of Law No 1*, [40] (Vanstone J).
28 (1981) 147 CLR 383.
29 [2018] SASCFC 128.
30 cf., *Question of Law No 1*, [173] (Hinton J).

31. Secondly, s 9(1) does not authorise an 'alteration of the division of responsibility between judge and jury'. The jury, not the judge, must have determined guilt. The sentencing judge must have done no more than pass sentence by recognised sentencing principles, albeit modified to meet the exigencies of s 50.

32. Section 9(1) will not apply if the court has 'depart[ed] to a significant degree from the ordinary methods and standards of the judicial process'.[31] It is not a law which is 'repugnant to the judicial process in a fundamental degree'.[32] To the contrary, it recognises that the sentencing court remains 'free and independent' to determine the issue of what facts were proved beyond reasonable doubt.[33] Authorising a sentencing court to undertake that task is not antithetical to its role as a Ch III court; rather, it reflects the legislature's balancing of the principle of protecting the rights of accused persons against the appropriate institutional response to child sexual abuse.

33. Thirdly, s 9(1) does not 'interfere with the judicial process itself.'[34] A judge acting on sentencing principles before *Chiro* was nevertheless acting judicially in accordance with what was understood to be established legal principle.

Part V: Estimate Time for Oral Argument

34. Tasmania will need no longer than 15 minutes to present its oral argument.

Dated: 29 October 2019

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31 *Question of Law No 1*, [61].

32 *Question of Law No 1*, [62] quoting *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [122]-[125], [128]-[129], citing *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at 379 [140].

33 *Question of Law No 1*, [156] citing Sir Anthony Mason, 'Comment' (2008) Sydney Law Review 95, 96.

34 *Australian Building and Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ).