HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	A6/2022
File Title:	Wichen v. Queen
Registry:	Adelaide
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	01 Apr 2022

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

ON APPEAL FROM THE COURT OF APPEAL
OF THE SUPREME COURT OF SOUTH AUSTRALIA

No. A6 of 2022

B E T W E E N: JACOB ARTHUR WICHEN
Appellant

-and-

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. Part 3 Division 5 (including ss 57, 58 and 59) of the *Sentencing Act 2017* (SA) (**the Act**) establishes a regime that provides for the indefinite detention, by order of the Supreme Court, of certain sexual offenders beyond the completion of their finite sentences (s 57), for the release on licence of persons who have been so detained (s 59), and for the discharge of such orders (s 58).

3. Once an initial order for detention is made by the Supreme Court in the exercise of its discretion under s 57(7), it can only be brought to an end by the making of a further discretionary decision by the Court, under s 58 or s 59(1). The issues presented by the appellant's two grounds of appeal concern the proper construction and operation of the "threshold" test in s 59(1a), satisfaction of which enlivens the Court's power to release a person on licence. More particularly, the issues are as follows:

   (a) ***Ground 1***

   Is the undefined word "willing" in s 59(1a) properly construed as bearing its ordinary meaning – signifying a *subjective* state of mind held by the detained person – or as the converse of the word "unwilling" as defined in s 57(1) of the Act, such that a detained person may be found to be "willing" to control their sexual instincts

only if they can establish that there is not "a significant risk that [they] would, given an opportunity to commit a relevant offence, fail to exercise appropriate control of [their] sexual instincts" (ie, an *objective* risk assessment)?

(b) ***Ground 2***

In considering whether a person who has applied for release on licence under s 59 is "willing" to control their sexual instincts, is the Court required to ignore the likely circumstances of the person if released on licence and the effect of any relevant conditions that might be imposed?

Part III: Notice pursuant to s 78B of the *Judiciary Act 1903* (Cth)

4. The appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth). No such notice is required to be given.

Part IV: Authorised reports of the judgments of the courts below

5. The judgment of the primary judge (Kourakis CJ), *Wichen v The Queen* [2020] SASC 157, has not been reported. The judgment of the Court of Appeal is reported as *Wichen v The Queen* (2021) 138 SASR 134.

Part V: Facts

6. The factual circumstances of the appellant are set out in detail in the judgment of Kourakis CJ at first instance (**TJ**) at [2]-[97] (CAB 24-54) – including a detailed summary of relevant evidence given on the application by two psychiatrists, Dr Nguyen and Dr Nambiar, and by the appellant and his aunt. The facts are also briefly summarised in the judgment of the Court of Appeal (**CA**) at [4]-[10] (CAB 64-76). Without attempting to be exhaustive, some key background facts are as follows:

(a) The appellant has a significant record of serious sexual offending against adult women prior to 2002.

(b) On 5 February 2003, the appellant pleaded guilty to aggravated serious criminal trespass and assault with intent to rape committed on 25 April 2002. He broke into the home of a 65-year-old woman and attacked her. On 26 July 2005, the appellant was sentenced to imprisonment for ten years for those offences.

(c) On 4 November 2011, on an application by the respondent, the appellant was found to be incapable of controlling his sexual instincts and an order was made that he be detained in custody until further order, pursuant to the predecessor to s 57 of the Act, namely s 23 of the *Criminal Law (Sentencing) Act 1988* (SA).

(d) At the time that the s 23 order was made detaining the appellant indefinitely, the provisions governing discharge of such orders or release on licence did not include a requirement that a person detained under s 23 prove that they were capable of controlling or willing to control their sexual instincts before the order could be discharged or the person released on licence. That requirement was first introduced by a legislative amendment that took effect in 2018.[1]

(e) On 6 November 2017, the appellant made an application for release on licence pursuant to s 24(1) of the *Criminal Law (Sentencing) Act*. That Act was repealed and replaced with the Act from April 2018. Consequently, the pending application fell to be determined in accordance with s 59 of the Act.

(f) On 26 August 2020, Kourakis CJ refused the application. Construing s 59(1a)(a) in the particular manner identified at [9]-[10] below, his Honour was not satisfied that the appellant was "willing" to control his sexual instincts within what he held to be the peculiar meaning of that expression for the purpose of s 59(1a)(a).

7. Kourakis CJ found that Mr Wichen was "determined to change" (TJ [119], CAB 52) and said that "if the relevant condition for release on licence was whether Mr Wichen was willing to control his sexual instincts, in the ordinary meaning of that word, I would find that he is" (TJ [122], CAB 53).

8. In relation to question of whether a there was a "significant risk" of the kind described in the definition of "unwilling" in s 57(1), Kourakis CJ explained (TJ [123], CAB 53):

> Unfortunately, the serious abuse to which Mr Wichen was exposed as a child and the innate disposition manifested by his previous offending, precludes me from being satisfied that Mr Wichen is now willing, within the statutory definition of that term, to control his sexual instincts. That disposition endured for much of Mr Wichen's adult life. Entrenched patterns of behaviour are difficult to escape. I find that, as much as I am sure Mr Wichen would make strong attempts to control his sexual instincts, there is more than a merely negligible risk of reoffending. I find that if an opportunity to commit an offence were to arise, there is a significant risk that Mr Wichen would fail to exercise appropriate control.

Part VI: Argument

Ground 1: The word "willing" in s 59(1a) should be given its ordinary meaning

9. Section 57(1) is expressed to define "unwilling" *for the purposes of s 57*, in a way that is significantly removed from the ordinary meaning of the word. The word "willing", which appears in the critical provision, s 59(1a)(a), is not defined, in s 57 or at all.

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[1] *Sentencing (Release on Licence) Amendment Act 2018* (SA).

Despite this, both Kourakis CJ and the Court of Appeal held that the word "willing" as used in s 59(1a)(a) was to be construed as the "converse" of the definition of "unwilling" found in s 57(1).

10. In effect, Kourakis CJ and the Court of Appeal each construed the expression "the person is both capable of controlling and *willing to control the person's sexual instincts*" in s 59(1a)(a) as though that paragraph read:

> the person is capable of controlling the person's sexual instincts and there is not a significant risk that the person would, given an opportunity to commit a relevant offence, fail to exercise appropriate control of the person's sexual instincts.

11. Notably, a "relevant offence" is defined to mean any of a range of offences of a sexual nature, including – at the low end – the summary offence of indecent behaviour,[2] which carries a maximum penalty of a $1,250 fine or imprisonment for up to three months.

12. The Court of Appeal explained the main basis for its conclusion as follows (CA [31], CAB 74), in terms that also reflect in substance the reasons given by Kourakis CJ (TJ [110]-[112], CAB 51):

> [W]hen reading ss 57 and 59 together, they can only provide a coherent regime for detention and then release on licence if the word "willing" in s 59 is read as the converse of "unwilling" in s 57. The reason for this is straightforward. Were it not so, a person would be detained under one test, but potentially amenable to immediate release on licence (or discharge under s 58) under another. Such a result would not only be capricious, it would be nonsensical and would frustrate the manifest purpose of a legislative scheme that takes the form of a highly prescriptive regime for the detention and prospective release of persons to whom s 57 applies.

13. The Chief Justice's reasoning, to which the Court of Appeal referred, was expressed as follows (TJ [110], CAB 51; quoted at CA [21], CAB 70):

> Reading ss 57 and 59 of the *Sentencing Act* together, they <u>can only provide a coherent regime for the detention and then, if circumstances warrant, the release on licence of a person if the word 'willing' in s 59 is the converse of the word 'unwilling' in s 57</u>. So too for s 58.

14. Five observations should be made at the outset concerning the effect of this construction.

15. The first is that the construction given to the word "willing" does not reflect the "ordinary meaning" of the word, or any meaning that can be regarded as falling within the range of its ordinary meanings. Instead, it gives the word "willing" a meaning which it cannot reasonably bear as a matter of ordinary English usage. That is, the Court of

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2 *Summary Offences Act 1953* (SA), s 23.

Appeal adopted a *strained* construction of the language used in s 59(1a). It did so because it regarded that construction as necessary "to provide a coherent regime for detention and then release on licence": CA [31] (CAB 74).

16. Secondly, if the Parliament had intended that the word "willing" in s 59(1a) should be given that unusual meaning, it could easily have made that intention clear. For example:

    (a) the Parliament might have expressed the definition of "unwilling" in s 57(1) as applying for the purposes of the whole Division (or for ss 57, 58 and 59) and, instead of using the word "willing" in s 59(1a), could have engaged the definition by using the expression "not unwilling";

    (b) the Parliament might have expressly defined the term "willing" for the purposes of ss 58 and 59;

    (c) the Parliament might have expressed s 59(1a) in the terms set out at [10] above.

17. Thirdly, the construction adopted by the Court of Appeal creates an asymmetrical regime for detention and release. A person can only be detained in custody until further order pursuant to s 57(7) if the Supreme Court is "satisfied that the order is appropriate". On the other hand, on the Court of Appeal's construction, a person can only be *released* from detention on licence if they satisfy the Court that there is not a significant risk that they would, given an opportunity to commit a relevant offence, fail to exercise appropriate control of their sexual instincts – and they *cannot* be released *even if the Supreme Court is no longer satisfied that continuing detention is appropriate*, and indeed, even if the Court is positively satisfied that detention is *not* appropriate.

18. Fourthly, the practical consequences of this construction in the case of the appellant (and others in his position) were expressed by Kourakis CJ as follows (TJ [124], CAB 53):

> The result is that Mr Wichen is trapped in a paradox. He has already served close to the minimum non-parole period reserved for offences of murder. However, unless and until he has an opportunity to demonstrate his ability to exercise appropriate control in ordinary social circumstances outside prison, his fate is largely determined by his past. I am confident that if he were released on licence with conditions properly safeguarding against reoffending, Mr Wichen is likely to be appropriately socialised into the community in a way which would, over time, show that there is not a significant risk of re-offending. However, s 59 of the *Sentencing Act* does not allow for that course until Mr Wichen can demonstrate, from within the artificial constraints of prison, that there is no significant risk that he will fail to exercise appropriate control. On the evidence given by Dr Nambiar and Dr Nguyen, and the weight they give to static factors, it is not easy to see how that can be done in the short term. The "stepped down" approach to which Dr Nambiar testified might show that it is safe to release Mr Wichen, but is not permitted by s 59 of the *Sentencing Act*. Absent that opportunity there is little prospect that Mr Wichen will be released until

> he meets the criterion of infirmity in s 59(1a)(b) of the *Sentencing Act*. By that time he will have been imprisoned for longer than even the higher of the non-parole periods fixed for murder. That is the undoubtedly harsh, and some may say cruel, result of imposing the same test for release on licence as a discharge of the order. It is an unfortunate result in a society as advanced as, and with the resources of, our State.

19. The construction adopted by the Court of Appeal makes it extremely difficult in practice for a person, once detained, *ever* to escape the "paradox" and to be released. The *only* way a person detained under s 57 may be released is by an order under s 58 or s 59 (both of which are subject to the same threshold). On the Court of Appeal's construction, once detention under s 57 begins, the person is likely to be consigned to permanent (or near permanent) detention in custody in many cases, because:

    (a) if a person has previously been convicted of a "relevant offence" and was found in the past to be "unwilling" to control their sexual instincts (in the defined sense contemplated by s 57(1a)), then they will have been detained for a lengthy period;

    (b) as release from prison in any form is not possible, it is highly unlikely that they will *ever* be in a position to demonstrate that they are no longer "unwilling" to control their sexual instincts (in the defined sense).

20. This is just the sort of operation of legislation which, if not clearly identified in unmistakeable terms, is liable to be passed over in the legislative process without a full appreciation of its implications.

21. Fifthly, the Court of Appeal's construction of the word "willing" in s 59 relies upon the definition of a *different* word, "unwilling", for purposes expressed to be *limited to s 57*. Within s 57, the word "unwilling" is used only in s 57(6), which requires the Court to direct that at least two medical practitioners "inquire into the mental condition of [the person] … and report to the Court on whether the person is incapable of controlling, or unwilling to control, the person's sexual instincts". The evident purpose of the definition, then, was to supply practical content to the reports which s 57(6) requires the medical practitioners to prepare. The construction adopted by the Court of Appeal thus gives the definition of "unwilling" an operation of an entirely different character, whereby it becomes the "threshold test" for release on licence.

The appellant's preferred construction

22. Section 59(1a) creates two alternative preconditions (in paragraphs (a) and (b) respectively), one or other of which must be met before a person who is detained pursuant to an order made under s 57 can be released on licence by the Supreme Court.

23. The appellant contends that s 59(1a)(a) should be construed consistently with the ordinary meaning of the words used. In particular, the word "willing", as it appears in s 59(1a), should be understood as bearing its ordinary meaning – signifying a subjective state of mind on the part of the detained person. The word "willing" is not defined at all for the purposes of any of the relevant provisions.

24. The central concept connoted by "willing", in its ordinary sense, is a *subjective* state of mind, of being open to or prepared to do something (ie, essentially the concept discussed at CA [22], CAB 70). It may be accepted that, dependent upon the context, there may be shades of meaning conveyed by the term "willing", ranging from being positively "eager" to being "prepared to attempt" to act in a particular way.

25. At all events, in the present case, the Chief Justice expressly found that, "if the relevant condition for release on licence was whether Mr Wichen was willing to control his sexual instincts, in the ordinary meaning of that word, I would find that he is" (TJ [122], CAB 53). The Chief Justice found that Mr Wichen was "determined to change" (TJ [119], CAB 52). This finding as to his state of mind is consistent only with Mr Wichen being "willing" to control his sexual instincts, within the ordinary meaning of the term.

26. The word "capable" directs attention to a question of free choice or capacity to do one thing rather than another. Is it within the person's *capability* to control their sexual instincts, in the sense of refraining from inappropriately acting on them, or is the person's psychological condition such that they are effectively disabled from making a free choice? A person who is not "capable" of controlling their sexual instincts is to be contrasted with a person who is able voluntarily to choose, at the point when the choice arises, to act in one way rather than another (ie, a person of whom it may be said that they "could have done otherwise", in the ordinary sense).

27. By contrast, whether a person is "willing" to control their sexual instincts is a subjective state of mind held by the person, as to how they intend to act in the future. Does the person *want* not to commit sexual offences? Being "willing" in this sense does not mean the person will *necessarily* exercise that choice in a particular way on every occasion where such a choice is presented, or that there is no risk that they may fail to exercise control: it looks to the subjective preparedness of the person, at the time when the Court considers the question, to act in a particular way in the future. Whatever scientific or philosophical questions might arise as to whether a distinction between "capable" and "willing" is an appropriate one in relation to the human mind, it is one that is commonly

made and readily understood, and one drawn by the language of the provision itself.

28. The appellant's construction has the important advantage of giving a distinct and meaningful operation to the two separate paragraphs of s 59(1a); it allows for a harmonious operation of the two alternative preconditions identified in paragraphs (a) and (b) of s 59(1a). On the other hand, if – as the Court of Appeal would have it – the word "willing" in paragraph (a) is to be understood as requiring an *objective risk assessment* in accordance with the definition of "unwilling" in s 57(1), then it is difficult to see what substantive work paragraph (b) of s 59(1a) could have to do. If that construction were right, then *both* paragraphs (a) and (b) would require an objective risk assessment. Moreover, if paragraph (a) enlivened the discretion to release only when a person objectively poses less than a "*significant* risk" that they would, if given the opportunity to commit a relevant offence, fail to control their sexual instincts, that would be an *easier* threshold for the person to meet than showing that they do not present an "*appreciable* risk" to the safety of the community (as required by paragraph (b)).[3] Moreover, the clear use of the language of objective risk used in paragraph (b) ("appreciable risk") contrasts with the apparently subjective language of paragraph (a) ("willing").

29. Far from being "capricious", "nonsensical" or "reduced to incoherence" (as suggested at CA [31], CAB 74), the appellant's construction of s 59(1a)(a) produces a detention regime that is both coherent and sensible. Just as the Court has a discretion to order detention under s 57 if the Court thinks it is appropriate, it will have a discretion to release on licence if either of the preconditions in s 59(1a) is met. When enlivened, that discretion will, of course, be exercised judicially and only if the Court thinks release is appropriate, taking into account all relevant considerations, *including* the objective level of risk to the community. Moreover, in exercising that discretion the Court must treat the protection of the safety of the community as the "paramount" consideration: s 59(3). Even if a person can satisfy the Court that they are subjectively willing to control their sexual instincts, the Court may still take the view that the objective risk is nevertheless too great, or cannot be adequately mitigated, and may decline to release the person on licence at all – or, for example, until the person has undertaken all programs available in prison that may reduce the risk associated with their release.

30. A fundamental purpose of ss 57-59 is undoubtedly the protection of the safety of the

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[3] See, eg, *Hore v The Queen* (2020) 285 A Crim R 94 at 115 [103] (Hughes J) (*Hore* A5/2022 CAB 59).

community. The appellant's construction serves, and is tailored to, that purpose, because s 59(3) ensures that the safety of the community is a central consideration in any exercise of the Court's discretion to release a person on licence. Further, s 59(4a) is specifically designed to prevent the Court, in the exercise of its discretion, giving weight to the mere fact of the length of time spent, or likely to be spent, in custody – thus further elevating the importance of community safety in the discretionary exercise.

The principle of legality

31. The Court of Appeal rightly accepted that the principle of legality had a role to play in the construction of the scheme created by Part 3 Division 5 of the Act. The Court acknowledged that "[t]he conclusion that Parliament has so expressed itself must be a necessary one" (CA [25], CAB 72). Respectfully, it was correct to identify that as the relevant inquiry, because the construction adopted by the Court of Appeal makes it more difficult for a person, once detained, ever to be released, and indeed consigns such persons to the "paradox" where the very fact of their continuing incarceration may virtually guarantee that they will continue to be unable to show that there is no longer a "significant risk" of the kind referred to in the definition of "unwilling" in s 57(1).

32. The principle of legality is relevant to the construction of a statute that authorises and regulates preventive detention in custody, and the deprivation of personal liberty that necessarily entails. As French CJ, Kiefel and Bell JJ said in *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (***NAAJA***), the construction of such a statute:[4]

> … will give effect to the ordinary meaning of its text in the wider statutory context and with reference to the purpose of the provision. Further, the principle of legality favours a construction, if one be available, which avoids or minimises the statute's encroachment upon fundamental principles, rights and freedoms at common law. The presumption, which is well established, has been called "a working hypothesis, the existence of which is known both to Parliaments and the courts, upon which statutory language will be interpreted". It is a presumption whose longstanding rationale is that it is highly improbable that parliament would "overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness". Its object was set out in the joint judgment of Mason CJ, Brennan, Gaudron and McHugh JJ in *Coco v The Queen:*
>
> > [C]urial insistence on a clear expression of unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights.
>
> It is a principle of construction which is not to be put to one side as of "little assistance"

[4] (2015) 256 CLR 569 at 581-2 [11]. (Emphasis added; footnotes omitted.)

> where the purpose of the relevant statute involves an interference with the liberty of the subject. It is properly applied in such a case to the choice of that construction, if one be reasonably open, which involves the least interference with that liberty.

33. The other majority justices in *NAAJA*, Nettle and Gordon JJ, likewise appear to have accepted the relevance and applicability of the principle of legality to the interpretative task in such a case.[5] This is consistent with other statements of principle which indicate that the principle of legality is relevant not just to the question of whether legislation is intended to impact on rights *at all*, but on the *manner* and *extent* of such interference.[6]

34. A significant aspect of the principle of legality is that expressed in *Coco v The Queen* and quoted in the joint reasons in *NAAJA* (see [32] above), namely "securing a greater measure of attention to the impact of legislative proposals on fundamental rights". This rationale for the principle of legality was accepted by Gageler and Keane JJ in *Lee v NSW Crime Commission*.[7] As their Honours pointed out there, this echoes the explanation of the principle given by Lord Hoffman in *R v Secretary for Home Department; Ex parte Simms*,[8] which has also repeatedly been endorsed.[9] Moreover, Parliament itself must be taken to have known and intended that the indefinite detention of offenders, by the State, in prison, beyond the completion of any sentence, engages the fundamental common law right to personal liberty; and that "irresistible clearness" would be expected if a greater impact on liberty were intended.[10]

35. The assistance to be gained from the principle of legality will vary with the context in which it is applied.[11] But the normative rationale for the principle of legality generally should be regarded as being at its strongest in relation to "asymmetrical" legislation that subjects individuals to the coercive power of the State,[12] and where the rights in issue are "vulnerable" in the sense that "the risk is high that rights will come to be abrogated

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5 (2015) 256 CLR 569 at 647-8 [222].

6 See, eg, *Independent Commissioner Against Corruption v Cunneen* (2015) 256 CLR 1 at 27 [54] (French CJ, Hayne, Kiefel and Nettle JJ); *Momcilovic v The Queen* (2011) 245 CLR 1 at 46 [43]; *South Australia v Totani* (2010) 242 CLR 1 at 29 [31]; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 521 [49] (French CJ).

7 (2013) 251 CLR 196 at 309 [310]-[311].

8 [2000] 2 AC 115 at 131.

9 See, eg, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 520 [47]; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [30].

10 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), quoting *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21]. See also *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 134-5 [30] (French CJ, Crennan and Kiefel JJ).

11 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 328 [19].

12 Brendan Lim, "Executive Power and the Principle of Legality" in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (2020, Federation Press) at p 80-89. While the powers in ss 57 and 59 of the *Sentencing Act* are conferred upon the Supreme Court rather than the executive, similar considerations apply.

without especially anxious consideration".[13] Observations to the effect that the principle has "limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of [a] particular right, freedom or immunity"[14] should, it is respectfully submitted, be treated with care. They are more apt in relation to legislation that adjusts rights and obligations as between subject and subject,[15] or where – unlike in the present case – adopting the rights-sensitive construction would require a significant straining or "reading down" of the language used.

Errors in the central reasoning of the Court of Appeal

36. The Court of Appeal considered that "[i]t is *a necessary conclusion* that the word 'willing' in s 59(1a)(a) has a meaning that is the opposite to the defined term 'unwilling' in s 57(1)" (CA [28], CAB 73). It is this conclusion which the appellant disputes. The construction adopted by the Court of Appeal is not "a necessary one".

37. First, the suggestion that a person "*would be* detained under one test" (CA [31], CAB 74) is potentially misleading. Section 57 does not in terms state that the Supreme Court may detain a person under that section only if the Court finds that they are "unwilling" in the defined sense: the only express condition on the power of the Supreme Court to make an order for continuing detention until further order under s 57(7) is that the Court be "satisfied that the order is appropriate". True it undoubtedly is that "[o]ne consideration relevant to making such an order is whether the person is incapable of controlling, or unwilling to control, their sexual instincts" (CA [2], CAB 66); this is a "mandatory consideration";[16] and "an order is nonetheless unlikely to be made in the absence of such a finding" (TJ [107], CAB 50). Nevertheless, the absence of an express "threshold" requirement for making a detention order (except that the Court is satisfied that it is "appropriate") tells textually against the proposition that the regime could only be "coherent" if the word "willing" in s 59(1a)(a) were construed as meaning the "converse" of the defined term "unwilling" in s 57. On *any* view, the "test" in s 57(7), under which a person may be detained, is different from the "test" stated in s 59(1a)(a).

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13 Brendan Lim, "The Normativity of the Principle of Legality" (2013) 37 *Melbourne University Law Review* 372 at 404.

14 *Lee v NSW Crime Commission* (2013) 251 CLR 196 at 311-2 [314] (Gageler and Keane JJ).

15 See, eg, *Daly v Thiering* (2013) 249 CLR 381 at 392 [32]-[33] (Crennan, Kiefel, Bell, Gageler and Keane JJ); *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329-30 [22]-[23] (Gleeson CJ); *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321 at 340 [43] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

16 *R v Schuster* (2016) 125 SASR 388 at 409 [97]-[98].

38. Secondly, satisfaction of the "test" for the purposes of s 57 enlivens a *discretionary* power in the Court to order the detention of the person until further order (s 59(1)). Even a person who is found "unwilling" to control their sexual instincts is not *required* to be detained under s 57. There is nothing "capricious" about the Court having a discretion to release a person whom the Court itself has detained only in the exercise of a discretion. The core reasoning of the Court of Appeal, set out at [11] above, entirely ignores the fact that both initial detention and release from detention are discretionary. (A maximally "harmonious"[17] regime would be one in which the Court could exercise a discretion to order the *release* of a person if – circumstances having changed since the original detention order were made – the Court would not now, in the circumstances prevailing, exercise its discretion in favour of a detention order.)

39. Thirdly, the mere fact that the conditions *enlivening the discretion* to release might be met immediately in a particular case does not mean that the discretion must inevitably be exercised in favour of release. A Court that would be inclined immediately to exercise the discretion to release would never exercise the discretion in favour of detention in the first place. The immediate (theoretical) availability of a discretion to release a person on licence would not be "nonsensical", nor would it "frustrate the manifest purpose of the legislative scheme". That would only be so if the Supreme Court, having decided in the exercise of its discretion that a person should be detained, were then *required* immediately to release the person. That is not the scheme created by ss 57 and 59.

40. Fourthly, in any event, even a regime that enabled a person, who would otherwise be released from custody automatically upon the completion of their sentence without any conditions, to be first detained and then immediately released on licence – that is, *on conditions* designed to protect the community – would not be capricious or nonsensical.

41. Far from the *appellant's* construction being "capricious" (cf CA [31], CAB 74), it is the Court of Appeal's construction that gives rise to a "capricious" result. As explained at [28] above, the practical effect of that construction is that it will be virtually impossible for the condition in paragraph (b) *ever* to be met in a case where the condition in paragraph (a) is not already met. That is because paragraph (b) requires a *lower* level of objective risk than the definition of "unwilling" – "appreciable" rather than "significant" risk – as well as the satisfaction of an *additional* requirement (ie, that the reduction in

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[17] Cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70] (McHugh, Gummow, Kirby and Hayne JJ), quoted at CA [26] (CAB 72) in support of the Court of Appeal's construction.

risk be "due to the person's advanced age or permanent infirmity").

42. Further, on the construction adopted by the Court of Appeal, the historical fact that the Supreme Court initially exercised the discretion to make a detention order would now dictate that the discretion to release cannot be considered if there is a "significant risk" that the person, if given the opportunity to commit a "relevant offence" (which, it will be recalled, includes even the summary offence of indecent behaviour), would fail to exercise appropriate control over their sexual instincts. That is so even if the person is capable of controlling and subjectively willing (ie, willing in the ordinary sense) to control their sexual instincts – and even if the current circumstances are such that, had those circumstances existed at the point when the initial order was made, the Court's discretion to detain the person certainly would *not* have been exercised.

43. If both powers – the power to detain and the power to release – were *mandatory* in cases where a statutory threshold requirement were met, rather than discretionary, then there would be considerable force in the view that considerations of "coherence" would imply that the two threshold tests should be complementary (ie, that one should be the "converse" of the other). But, since both are discretionary, the opposite is true.

44. In short, there is no reason why the threshold test to enliven the exercise of a discretion to detain (assuming that is what it is, remembering that the power in s 57(7) is *not expressed* to be conditional on any such threshold) must necessarily be the "converse" of the threshold test to enliven the exercise of a subsequent discretion to release. Indeed, that it need not be is manifest from the express terms of s 59(1a). A person can be released under s 59(1a) if they satisfy *either* the requirement in s 59(1a)(a) *or* the requirement in s 59(1a)(b). Yet the requirement in s 59(1a)(b) plainly is not the "converse" of any requirement found, expressly or impliedly, anywhere in s 57.

45. Even if it might be thought more linguistically or aesthetically pleasing to posit that the words "unwilling" and "willing" should have complementary or "converse" meanings (which may be debated, where one of those expressions has a defined meaning that is different from its usual meaning, and the other does not), the requirement for irresistible clearness is not satisfied by "neatness" of that kind. *This is a regime for indefinite – potentially permanent – detention.*

Other considerations relied upon by the Court of Appeal

46. The Court of Appeal at CA [29] (CAB 73) relied upon the Division heading, "Offenders incapable of controlling, or unwilling to control, sexual instincts". But the Division

heading provides no support for the construction adopted by the Court of Appeal. If anything, it simply reflects the fact that the offenders *liable to be detained* under the Division at all are those who are "unwilling" to control their sexual instincts. But that is so whatever may be the "threshold" that enlivens the discretion to release such persons once they have been detained; it does not show that the threshold for release must be that the person is "not unwilling" in the sense defined in s 57(1). The mere use of the word "unwilling" in the Division heading says nothing about the circumstances in which a court may order release of a person who has been detained. Besides, a person can still satisfy at least *one* of the threshold tests for release – prescribed in s 59(1a)(*b*) – even if they remain "unwilling" to control their sexual instincts in the sense defined in s 57(1).

47. The Court of Appeal at CA [29]-[30] (CAB 73-74) also referred to the fact that ss 58(2) and 59(2), like s 57(6), each require that the Court receive a report from two medical practitioners on whether the offender is incapable of controlling, or unwilling to control, their sexual instincts. It was said that "in the cases of ss 58 and 59, those inquiries are manifestly for the purposes of the person subject to an order satisfying the Court that they are both capable of controlling and willing to control their sexual instincts". This reflected a submission advanced by the respondent in the Court of Appeal that "[t]here would be no utility in the medical reports, as they would not be directed to the inquiry which the Court is required to undertake". But, with respect, that is not so. Such reports would provide information that would be highly relevant to the exercise of the *discretion* to release; why should it be assumed that they are directed *only* to, *and must perfectly reflect*, the content of the "threshold test" itself? The fact that similar reports must be obtained for the purposes of the exercise of the power in s 57 – even though s 57(7) does *not* expressly prescribe "unwillingness" as a threshold for the making of a detention order – strongly suggests otherwise. The reasoning of the Court of Appeal in this respect also, again, completely ignores that there are *two alternative* threshold tests in s 59(1a), and on any view the issues which the reports are required to address do *not* correspond to the test set out in s 59(1a)(b).

48. Section 59(2) simply requires that, before the Supreme Court can order release on licence of a person who has been detained under s 57, it must obtain and consider reports from two medical practitioners, addressed to whether the person is incapable of controlling, or unwilling to control, the person's sexual instincts. Given the nature of the scheme and the objective of community protection, such reports will always be highly relevant to the exercise of the discretion whether or not to release. That those

reports must be obtained does not logically control the construction of the word "willing" in ss 58 and 59.

49. There is nothing odd in requiring that the Court have before it up-to-date medical reports addressing that issue. Again, there is nothing "capricious" or "nonsensical" about the Court having to consider such reports before deciding whether to release a prisoner. Even if there were *no* threshold requirement to be satisfied before the Court could order a person's release, one would expect the Court, when contemplating the discretion to release, to consider whether, and in what way, the person's circumstances had changed since the Court had decided that it was "appropriate" to make an order under s 57.

50. It might well be that the word "unwilling", where it appears in s 58(2) and s 59(2), was intended by the drafter to bear the same meaning as the same expression when used in s 57(6), even though the definition in s 57(1) is expressed to be only for the purposes of *that section*. That view gains some support from the circumstance that each of ss 57(6), 58(2) and 59(2) is directed to identifying the content of reports which the Court must direct medical practitioners to provide. Assuming the same expression *was* intended to have the same meaning in each of ss 57(6), 58(2) and 59(2), notwithstanding the express limitation of the definitions in s 57(1) to "*this* section" (ie, s 57), it still does not follow that the *different* word, "willing", must bear the "converse" meaning. If the definition in s 57(1) *were* intended to apply for the purposes of s 58 and 59 as well as s 57, then the express limitation of the definition to s 57 may reveal a lack of clarity or attention to detail on the part of the drafter, and the Parliament. But if so, that is a factor that militates *against* a construction that impinges more severely on fundamental rights.

51. The second reading speech[18] for the Bill that introduced s 59(1a) provides little assistance in the resolution of the present issue. It is not inconsistent with the appellant's construction of s 59(1a)(a). The appellant makes the following submissions about it:

    (a) First, the speech does not actually address the relevant issue of construction. In describing the intended operation of ss 58 and 59, the Attorney-General simply employed the *same language* that appears in ss 58(1a) and 59(1a) themselves.

    (b) Secondly, for the second reading speech to assist the respondent, it must first be assumed that the Attorney-General was using the expression "willing to control their sexual instincts" (the language of s 59(1a)) in the unnatural and unusual sense required by the Court of Appeal's own construction (ie, the "defined" sense, rather

[18] Parliament of South Australia, *Legislative Council Debates*, 31 May 2018, p 330.

than its ordinary meaning). There is no reason to assume that. Indeed, it would normally be expected that a Minister would use words in their ordinary sense when explaining the operation of legislation in a second reading speech.

(c) Thirdly, in any event, it can hardly be assumed that, when the Attorney said that "a detained person will need to satisfy the court that they are … willing to control their sexual instincts", members of Parliament voting on the Bill would have understood that what such a person would *actually* need to prove was the outcome of an objective risk assessment in respect of a hypothetical, highly abstract, circumstance. This only confirms that the operation of the statute urged by the respondent may all too readily have "passed unnoticed in the democratic process".[19]

(d) Fourthly, the "mischief" identified by the Attorney-General seems to have been a concern that, in the cases of some offenders already detained for a very long time, the Supreme Court was taking the view that it should order their release, with it then being up to the Department of Corrections or other government agencies to put in place measures to alleviate the risk created by their release. That mischief was then addressed by the 2018 amendments in a number of ways – not just by s 59(1a) but also, in particular, by inserting a new subs (4a) into each of s 58 and s 59, expressly stating that the Supreme Court, when determining an application for discharge or release on licence, must not take into account the length of time spent in custody, or likely to be spent in custody, if the order is not discharged. The identification of that mischief does not control the construction of s 59(1a)(a).

(e) Fifthly, the Attorney-General's descriptions of the provisions concerning release as involving a "two-step process" and "a reversal of onus" are equally consistent with either of the competing constructions.[20]

(f) Finally, a second reading speech is of limited utility where the law is restrictive of the liberty of the individual, especially when it does not state any clear intention.[21]

Ground 2: **Consideration of risk in the abstract, or taking into account conditions?**

52. The second ground of appeal relates to the argument that was rejected by the Court of Appeal at CA [40]-[42] (CAB 75-76). The argument is in the alternative to the

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19 Cf *R v Secretary of State for the Home Dept; Ex parte Simms* [2000] 2 AC 115 at 131 (Lord Hoffmann).

20 The first stage is a determination as to whether either of the alternative threshold requirements in paragraphs (a) and (b) of s 59(1a) is met, and the second stage is the exercise of the discretion whether or not to release on licence under s 59(1). The person applying for release on licence bears the onus of establishing that one of the threshold requirements is satisfied and that their release should be ordered.

21 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 265 [31]-[33].

arguments presented above, and proceeds on the assumption that "willing" in s 59(1a)(a) is properly to be construed as if it were defined as the converse of the definition of "unwilling" in s 57(1).

53. The Court of Appeal rejected the appellant's argument that, in assessing whether "there is a significant risk that the person would, given an opportunity to commit a relevant offence, fail to exercise appropriate control of the person's sexual instincts" for the purposes of ss 58 and 59, the Court should have regard to the situation the appellant would be in if he were released. The appellant contends that, on a proper construction of ss 58 and 59, the relevant inquiry under each section must relate to the circumstances of the person on their release (ie, under s 58, unconditionally discharged, and under s 59, released on licence upon conditions fixed by s 59(7) and, especially, conditions imposed under s 59(8)). The Court of Appeal accepted the submission of the respondent that an applicant for release on licence was obliged to satisfy the Court of his willingness and capacity to control his sexual instincts "*without consideration of the effect of any conditions* that may be placed upon his release".[22]

54. Precisely what this meant, in real terms, was spelt out more fully in the judgment of Kourakis CJ in the passage already set out at [18] above (TJ [124], CAB 53). Hughes J at first instance in *Hore* likewise explained the practical effect of this approach as follows:[23]

> On the approach advocated for by the Director, a risk that may be mitigated in a manner that is considered by the medical experts and the Court to be likely to be highly effective in reducing the risk posed by the applicant is nonetheless to be disregarded when determining whether the applicant is willing to control his sexual instincts within the meaning of the Act. The imposition of conditions is only considered after the applicant establishes that he is willing and capable of controlling his sexual instincts. The effect of this construction is to place a significant — and in some cases it will be an impossible — burden on an offender. It also relieves the State of the burden of monitoring compliance with conditions that may be agreed to achieve a significant reduction in risk. The task facing an applicant for release on discharge is to establish that they have, whilst detained, sufficiently reduced the risk that they pose notwithstanding the limited scope for effecting such change that the prison environment offers.

55. There is no question that s 59(1a) is a "threshold" and "the power to release on licence

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22 *Hore v The Queen* (2020) 285 A Crim R 94 at 116 [107] (Hughes J) (*Hore* CAB 59).

23 *Hore v The Queen* (2020) 285 A Crim R 94 at 114 [99] (*Hore* CAB 58). Her Honour then went on to refer to a passage from the Chief Justice's judgment in *Thomas v Attorney-General (SA)* [2019] SASCFC 21 at [49]: "Plainly, then, there is considerable tension between s 58 of the *Sentencing Act 2017* and Article 9 of the ICCPR. The detention authorised by s 58 of the *Sentencing Act 2017* may be characterised as arbitrary for the purposes of Article 9, both because a shorter period of detention, or less intensive restraints, might in many cases sufficiently protect the community, and because meaningful information cannot be provided in prison."

is enlivened only on satisfaction of those matters" (cf CA [41], CAB 76). The issue is *what that assessment requires* and in particular, whether in making that assessment in the context of s 59(8), the Court is to ask "whether, if released on licence under conditions mandated by s 59(7) and permitted by s 59(8), they would in that circumstance be capable and willing in the statutory sense" (the proposition expressly rejected at (CA [40]-[41], CAB 75-76).

56. The question of construction raised by this ground arises because of the very abstract terms in which the definition of "unwilling" in s 57(1) is expressed. It evidently requires consideration of some hypothetical "opportunity to commit a relevant offence" (meaning any of a wide range of sexual offences against adults or children, identified in the definition of "relevant offence" in s 57(1)). The Court of Appeal never clearly articulated its understanding of the task which the application of the definition of "unwilling" requires of the Court. It is not, with respect, self-evident.

57. Whether there is a "risk" that a person would, given an "opportunity" to commit an offence, fail to exercise appropriate control over their sexual instincts, must surely depend very much upon the particular circumstances in which the posited "opportunity" might arise. Whatever the precise level of abstraction at which that question is to be considered, on the proper construction of the statute, the hypothetical consideration must at least be anchored by reference to the circumstances which are likely actually to apply if the person were to be released into the community. The whole point of the detention regime is related to protecting the community. This construction is supported by the requirement, in s 59(4)(c)(ii), that, in considering an application for release on licence, the Court must take into account a Parole Board report that identifies "the probable circumstances of the person if the person is released on licence": *that* is the particular factual situation in which the hypothetical question is to be considered.

58. While it is undoubtedly true that ss 59(7) and (8) are directed to "factors to be incorporated into the decision whether to release, following determination of the threshold questions" (see CA [42], CAB 76), that does not entail that s 59(1a)(a), on its proper construction, somehow requires the Court to answer some completely abstract question without regard to the risk in the circumstances that will actually apply if the person is released pursuant to s 59. Nor does the fact that it is the Parole Board that fixes the conditions of release under s 59(8) prevent the Court from making findings as to the circumstances in which the person would find themselves; evidence can readily be adduced about the kinds of conditions that are likely to be imposed, the availability in

fact of electronic monitoring equipment, and so forth.

59. The major flaw in the construction that was accepted by the Court of Appeal is that it requires the Court to assess the risk of a person failing to control their sexual instincts in circumstances that will *certainly never occur in fact*. That is because the appropriate Board (ie, the Parole Board) has the power to make release subject to such conditions as it thinks fit, being conditions directed to, and capable of addressing, any identified risk: s 59(8). On the respondent's construction, the Court is required to ignore the effect of conditions. The regime produced by this construction is not at all "tailored"[24] to the evident object of protecting the community from serious sexual offences; it drastically increases the prospect that a prisoner's detention will be required to continue *irrespective* of whether the risk posed by the prisoner's release could adequately be addressed by the imposition and enforcement of appropriate conditions, and without the opportunity for the Court to make any assessment of whether it could. What could possibly be the point of such a requirement?

60. If an alternative construction is available, then it should be preferred. The obvious alternative, as submitted by the appellant, is that the Court may and should consider the risk by reference to the circumstances *actually* likely to apply if the prisoner is released: that is, to consider the effect of proposed or likely licence conditions (and the systems available to ensure compliance with them). By s 59(4)(c)(ii), the Court is expressly required to take into account "a report as to the probable circumstances of the person if the person is released on licence". The words in s 59(4) – "when determining an application under this section for he release on licence of a person detained in custody under this Division" – is apt to refer to the whole process, involving *both* consideration of the threshold requirements in s 59(1a) *and* the exercise of the discretion itself. While the report to which s 59(4)(c)(ii) refers is obviously a matter to be taken into account in the exercise of the discretion to release, there is no reason to construe s 59(4)(c)(ii) as *precluding* the Court from considering the relevant content of such a report when assessing whether either of the preconditions in s 59(1a) is met. This results in an appropriately tailored regime where a person can be released if the Court assesses that the risk which release *actually* entails can indeed be appropriately controlled or addressed by the imposition and enforcement of conditions.

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[24] Compare *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 245 [52] (quoting *R v Mee* [2004] 2 Cr App R (S) 81 at 438-9 [14]) (Bell, Keane, Nettle and Edelman JJ), 286 [167], 287 [171], 288 [174] (Gageler J, diss); *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at [32] (and see also at [40]) (Kiefel CJ, Bell, Keane and Steward JJ), [151], [160], [163], [173], [177] (Gordon J, diss).

Part VII: Orders sought

61. The appellant seeks the following orders:

    1. Appeal allowed.

    2. Set aside the orders of the Court of Appeal of the Supreme Court of South Australia made on 7 May 2021 and, in their place, order that:

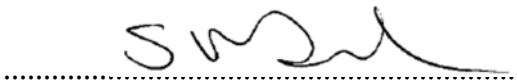
        (a) the appeal to that Court be allowed; and

        (b) that the appellant's application for release on licence be remitted to the Chief Justice to be determined according to law.

Part VIII: Estimate of time required

10 62. The appellant estimates that he will require up to one and a half hours for the presentation of his oral argument.

Dated: 1 April 2022



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ANNEXURE: LIST OF RELEVANT STATUTORY PROVISIONS

1. *Sentencing Act 2017* (SA), Part 3, Division 5 (as presently in force)
2. *Criminal Law (Sentencing) Act 1988* (SA), Part 2, Division 3 (as in force on 4 November 2011)
3. *Criminal Law (Sentencing) Act 1988* (SA), Part 2, Division 3 (as in force on 6 November 2017)
4. *Summary Offences Act 1953* (SA), s 23 (as presently in force)
5. *Statutes Amendment (Sentencing of Sex Offenders) Act 2005* (SA) (Act No 31 of 2005), Part 2 (as enacted)
6. *Sentencing (Release on Licence) Amendment Act 2018* (SA) (Act No 2 of 2018), Part 2 (as enacted)