HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN: **JACOB ARTHUR WICHEN**
Appellant

and

THE QUEEN
Respondent

SUBMISSIONS OF THE RESPONDENT

Part I: PUBLICATION OF SUBMISSIONS

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

Part II: ISSUES

2. The appeal raises two issues concerning the proper construction and application of the threshold test contained in s 59 of the *Sentencing Act 2017* (SA) ("**the Act**"). The first issue is whether the undefined word "willing" in s 59(1a)(a) of the Act ought to be construed as the converse of the word "unwilling" as defined in s 57(1). If this Court resolves the first issue in the affirmative, the second issue will arise for consideration. The second issue is whether, in determining whether a person is "willing" to control their sexual instincts, the Supreme Court can consider the likely circumstances of the person if released on licence and the effect of any relevant licence conditions that might be imposed.

Part III: NOTICE OF CONSTITUTIONAL ISSUE

3. Not applicable.

Part IV: MATERIAL FACTS

4. The Appellant's statement of material facts is accepted.

Part V: ARGUMENT

5. In summary, the Respondent submits that:

   a. As to Ground 1, the Court of Appeal was correct in construing the undefined word "willing" in s 59(1a)(a) of the Act as the converse of the word "unwilling" as defined in s 57(1). Accordingly, a person will be assessed as "willing" for the purposes of the threshold test in s 59 (and s 58) if, in the circumstances as they might arise *in the future*, where the person has an opportunity to commit a relevant offence, there is not a significant risk that the person will not be inclined to exercise appropriate control over their sexual instincts. This construction narrows the focus of the ordinary meaning of the word, instructing those that are involved in the administration of the Act as to the circumstances, and temporal context, in which the person's willingness is to be assessed. The construction promotes operational symmetry throughout the detention scheme provided for by the Act, and best achieves its purpose of protecting the safety of the community.

   b. As to Ground 2, the Court of Appeal was correct in holding that when the Supreme Court is determining whether a person is "willing" to control their sexual instincts for the purpose of the threshold test in s 59(1a)(a) (and s 58(1a)(a)) of the Act, the risk assessment as to whether the person will fail to exercise appropriate control of their sexual instincts is to be undertaken without regard to the likely circumstances of the person if released on licence and the effect of any relevant licence conditions that might be imposed if the person were released on licence. Rather, properly construed, consistent with the legislative history of the provision and the purpose of the detention scheme, when the Supreme Court is determining whether to exercise its discretion to make an order under s 59 (or s 58) of the Act, it may consider whether there exists any residual risk that ought to be addressed with licence conditions.

6. Therefore, the appeal ought to be dismissed.

Relevant legislative provisions

7. Division 5 of Part 3 of the Act creates a legislative scheme concerning the detention of offenders who are incapable of controlling, or unwilling to control, their sexual

instincts. Section 57(7) empowers the Supreme Court, upon an application by the Attorney-General,[1] to order that "a person to whom this section applies be detained in custody until further order if satisfied that the order is appropriate". A "person to whom [s 57] applies" includes a person who has been convicted of a "relevant offence" as defined by s 57(1).

8. Before the Court may make an order, s 57(6) requires two qualified medical practitioners inquire into the mental condition of the person:[2]

> The Supreme Court must, before determining whether to make an order that a person to whom this section applies be detained in custody until further order, direct that at least 2 legally qualified medical practitioners (to be nominated by a prescribed authority for the purpose) inquire into the mental condition of a person to whom this section applies and report to the Court on whether the person is incapable of controlling, or unwilling to control, the person's sexual instincts.

9. "Unwilling" is defined in s 57 in the following terms:

> (1) In this section —
>
> …
>
> ***unwilling***—a person to whom this section applies will be regarded as unwilling to control sexual instincts if 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.

10. Pursuant to s 57(8), the "paramount consideration" of the Court in determining whether to make the order "must be to protect the safety of the community (whether as individuals or in general)".[3]

11. The power of the Court to release a person detained under s 57 is governed by s 58 (discharge of the detention order) and s 59 (release on licence). The provisions largely mirror one another.

12. Before an order for discharge or release on licence can be made, ss 58(1a) and 59(1a) require the person to satisfy:

> … the Supreme Court that—
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> (a) the person is both capable of controlling and willing to control the person's sexual instincts; or
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> (b) the person no longer presents an appreciable risk to the safety of the community (whether as individuals or in general) due to the person's advanced age or permanent infirmity.

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1 The Act, s 57(3)-(4).

2 Section 62 of the Act governs the manner by which medical practitioners must conduct their inquiries. Section 61 of the Act also empowers the Supreme Court, for the purpose of obtaining assistance in making a determination under Div 5, to order a report from any body or person on any matter.

3 The other matters that the Court must take into account are contained within s 57(9) of the Act.

13. Sections 58(2) and 59(2), in terms that are relevantly identical to s 57(6), also require two qualified medical practitioners to inquire into the mental condition of the person:

> The Supreme Court must … direct that at least 2 legally qualified medical practitioners (to be nominated by a prescribed authority for the purpose) inquire into the mental condition of a person to whom this section applies and report to the Court on whether the person is incapable of controlling, or unwilling to control, the person's sexual instincts.

14. Sections 58(4a) and 59(4a) preclude the Court, when it is determining an application for discharge or release on licence, from considering the length of time that the person subject to the order may spend in custody if the respective application is not granted. Section 59(4a) also precludes the Court from having regard to the length of time the person has spent in custody.

15. Pursuant to ss 58(3) and 59(3), the "paramount consideration" of the Court when determining an application for discharge or release on licence "must be to protect the safety of the community (whether as individuals or in general)".[4]

The Court of Appeal's Decision

16. The Court of Appeal construed the word "willing" in s 59(1a)(a) as the converse of the defined term "unwilling" in s 57(1) of the Act.[5] In doing so, it employed an orthodox approach to statutory construction, involving a consideration of the text, context and purpose of the Act.[6]

17. Turning first to text, the Court acknowledged that the definition of the word "unwilling" in s 57(1) was textually confined to s 57.[7] It was also observed that "unwilling" as defined differs from the ordinary meaning of the word.[8]

18. As to context, the Court considered that the heading to Div 5 of Part 3 was a "weak contextual indicator" that "draws attention to the concept of unwillingness as a character of offenders for the purposes of the Division", and that "ss 57, 58 and 59 form part of a single legislative scheme".[9] In light of this, the Court drew contextual support for its construction from the identical requirements in ss 57, 58 and 59 that,

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4 The other matters that the Court must take into account are contained within ss 58(4) and 59(4) of the Act.

5 Court of Appeal, [28] (CAB 73). See also *R v Iwanczenko* [2019] SASC 140, [112] (Parker J); *Hore v The Queen* (2020) 285 A Crim R 94, 112-113 [91] (Hughes J); Trial Judge, [112] (CAB 51).

6 Court of Appeal, [26] (CAB 72-73), referring to *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-382 [69]-[70] (McHugh, Gummow, Kirby and Hayne JJ).

7 Court of Appeal, [16], [24] (CAB 69, 71).

8 Court of Appeal, [14]-[15], [22], [28] (CAB 69, 70-71, 73).

9 Court of Appeal, [29] (CAB 73).

before the Court may make the respective order, two legally qualified medical practitioners must inquire into the medical condition of the person.[10]

19. Furthermore, the Court observed that to construe "willing" in accordance with its ordinary meaning, rather than the converse of "unwilling" as defined by s 57(1) of the Act, would detract from the coherence of the legislative scheme because "a person would be detained under one test, but potentially amenable to immediate release on licence (or discharge under s 58) under another". This "would frustrate the manifest purpose" of the legislative scheme, namely "protecting the safety of the community".[11]

10 20. For these reasons, the Court concluded that "willing" in s 59(1a)(a) should be construed as the converse of "unwilling" in s 57(1), and that the operation of the principle of legality had been displaced.[12]

21. In relation to the Appellant's alternative submission, the Court of Appeal determined that satisfaction of the threshold test in s 59(1a)(a) does not involve consideration of the effect of any conditions that may be imposed by the appropriate Board should the person be released on licence.[13]

22. The Court endorsed the reasoning of Hughes J in *Hore v The Queen.*[14] It considered that the satisfaction of the threshold question "does not mean that all risk is removed". Rather, any remaining risk, the question of conditions, and the other
20 factors to be incorporated into the decision whether to release, will only arise for consideration following the Supreme Court's determination of the threshold questions.[15]

23. Accordingly, the appeal was dismissed.

Ground 1: The meaning of "willing"

24. Ground 1 alleges that the Court of Appeal erred in holding that the undefined word "willing" in s 59(1a)(a) of the Act is to be construed as the converse of the word

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10 Court of Appeal, [29]-[30] (CAB 73-74).
11 Court of Appeal, [31] (CAB 74), [38] (CAB 75).
12 Court of Appeal, [28] (CAB 73).
13 Court of Appeal, [41] (CAB 76).
14 Court of Appeal, [42] (CAB 76), referring to *Hore v The Queen* (2020) 285 A Crim R 94, 114-115 [99]-[101].
15 Court of Appeal, [41]-[42] (CAB 76).

"unwilling" as defined in s 57(1).[16] In response, the Respondent submits that the Court's construction of s 59(1a)(a) is correct.

Text

25. The starting point for ascertaining the meaning of a statutory provision is the text of the statute as a whole, while at the same time regard is to be had to its context and purpose.[17]

26. The Appellant submits that the Court of Appeal's construction of "willing" is "strained" and cannot "be regarded as falling within the range of its ordinary meanings".[18] In support of this, he contends that the ordinary meaning requires a subjective assessment of willingness, while the Court of Appeal's construction requires an objective assessment.[19]

27. The Respondent submits that the Appellant's submission overstates the inconsistency, if any, between the two constructions. It is accepted that the ordinary meaning of "willing", and its antonym "unwilling", are referrable to a state of mind or inclination to act (or lack thereof).[20] However, the Appellant's submission overlooks that the ordinary meaning is silent as to whether the relevant state of mind or inclination to act is to be assessed by reference to circumstances as they exist at the time of the assessment or as they might exist in the future at a time when an opportunity to offend presents itself.[21]

28. The Court of Appeal's construction of "willing" draws upon the statutory definition of "unwilling" in s 57(1). As set out above, "unwilling" is defined by reference to a risk assessment as to whether a person would, if given an opportunity to commit a

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16 Appellant's submissions, [3(a)].

17 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ), 374-375 [37]-[39] (Gageler J). See also *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 95 ALJR 557, 562 [15] (the Court).

18 Appellant's submissions, [9], [15].

19 Appellant's submissions, [3(a)], [23]-[24], [27]-[28].

20 Appellant's submissions, [24]. See also Court of Appeal, [22] (CAB 70-71).

21 The Appellant's submissions appear to proceed upon an assumption that the effect of the ordinary meaning of "unwilling" would entail an assessment devoid of consideration of the person's inclination to fail to control their sexual instincts in circumstances where an opportunity to offend may arise: see Appellant's submissions, [27]. However, this is by no means clear. There may be very little difference between the ordinary meaning of "willing" and that derived from s 57(1). Applying the ordinary meaning, an applicant for release on licence would presumably be required to prove a willingness to control sexual instincts in the face of an opportunity to offend. Yet, at the very least, the adoption of the meaning of "willing" by reference to the converse meaning of "unwilling" incorporates a threshold standard, namely the "significant risk" test. The Respondent's construction promotes operational symmetry in the scheme in this manner, at least (as submitted below).

relevant offence in the future, fail to exercise appropriate control of their sexual instincts.[22] For present purposes, two aspects of this definition are noteworthy. Firstly, it operates as an instruction to those administering the Act that unwillingness is not to be assessed by reference to the person's expressed inclination while in custody at the time of the examination, but rather by reference to when the person is presented with an opportunity to offend. Secondly, as it directs attention to the person's inclination in circumstances as they may exist in the future, which necessitates a predictive exercise, the use of "significant risk" in the definition clarifies the required threshold for the Court's satisfaction.

10 29. Accordingly, if "willing" is construed as the converse of the statutory definition of "unwilling", a person would be assessed as willing to control their sexual instincts where there is no significant risk that the person would, if given an opportunity, fail to exercise appropriate control of their sexual instincts. This assessment is concerned with the person's state of mind about controlling, or their inclination to control, their sexual instincts. It follows that the test is subjective.[23]

30. Construed this way, the meaning of "willing" is not strained. Rather, the Court of Appeal's construction of the word derived from the defined word "unwilling" narrows the focus of the assessment to be undertaken.[24] The use of the "significant risk" threshold clarifies the requisite standard for the Court's satisfaction.

20 31. Applying this construction, where a person is found to be willing to control their sexual instincts when presented with an opportunity to commit a relevant offence in the future, there will, as a corollary, not be a significant risk that they will be inclined not to control their sexual instincts. Whether or not the Parliament could have employed other methods to this end is not to the point.[25]

32. Contrary to the Appellant's submissions, the apparent textual confinement of the definition of "unwilling" in the chapeau to s 57(1) does not preclude this construction.[26] The Appellant appears to accept that, notwithstanding the chapeau,

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22 In relation to the assessment of future risk under s 57, see: South Australia, House of Assembly, *Parliamentary Debates*, 29 May 2018, 581-582 (Hon V Chapman). See the discussion at paragraph [63] below.

23 C.f. Appellant's submissions, [3(a)], [28].

24 The observations of the Court of Appeal to the effect that the ordinary meaning of the word "unwilling" differs from the statutory definition should be understood as a recognition of this: Court of Appeal, [14]-[15], [22], [28] (CAB 69, 71, 73); see also Trial Judge, [110] (CAB 51).

25 C.f. Appellant's submissions, [16].

26 Appellant's submissions, [21].

the definition applies to "unwilling" as it appears in ss 58(2), 59(2) and 62.[27] In any event, s 59 ought to be construed in light of the provisions that precede it,[28] particularly as it is clear that the provision operates only in respect of detention orders made pursuant to s 57.[29]

Context

33. Division 5 of Part 3 of the Act creates a "single legislative scheme" concerning the detention of those incapable of controlling, or unwilling to control, their sexual instincts.[30] So much is evident from the heading to the division.[31]

34. The Respondent submits that this provides contextual support for the construction of "willing" adopted by the Court of Appeal. This construction can be seen to be consistent with the operational symmetry provided for by the legislative scheme in three respects. The first is in the requirement for the Supreme Court to obtain and consider reports from medical practitioners in ss 57, 58 and 59. The second is in the operation of s 59(1a) as a whole. The third is in the threshold tests that condition the Court's discretion to make orders under ss 57, 58 and 59.

The medical practitioner reports

35. The powers to make an order for detention,[32] discharge,[33] and release on licence[34] are conditioned on a requirement for the Supreme Court to obtain and consider reports from at least two qualified medical practitioners as to whether the person is incapable of controlling, or *unwilling* to control, their sexual instincts. The manner by which these reports are to be provided is governed by s 62. As noted earlier, the Appellant appears to accept that the word "unwilling" in ss 58, 59 and 62 ought to be construed as it is defined in s 57 of the Act.[35] In any event, there is no good reason to depart

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27 Appellant's submissions, [50].

28 *Patman v Fletcher's Fotographics Pty Ltd* (1984) 6 IR 471, 474-475 (Priestley JA); *Girardi v Commissioner of State Taxation* (2013) 93 ATR 822, 825 [8] (Gray J); *Compass Group Education Hospitality Services Pty Ltd v Commissioner of State Revenue* [2021] QCA 98, [216] (Williams J).

29 As observed by the Court of Appeal at [20] (CAB 70).

30 Court of Appeal, [29] (CAB 73).

31 Such headings form part of the Act: *Legislation Interpretation Act 2021* (SA), s 19(1); Court of Appeal, [29] (CAB 73).

32 The Act, s 57(6) and 9(a).

33 The Act, s 58(2) and 4(a).

34 The Act, s 59(2) and 4(a).

35 Appellant's submissions, [50].

from the rule of construction that the same words ought to be given the same meaning throughout a statute.[36]

36. Prior to making an order for discharge or release on licence, the Court must also relevantly be satisfied of the threshold test contained in ss 58(1a)(a) and 59(1a)(a), that "the person is both capable of controlling and willing to control the person's sexual instincts".

37. It follows that to construe "willing" in s 59(1a)(a) (and s 58(1a)(a)) as the converse of "unwilling" as defined in s 57(1), ensures that when the Court is assessing willingness for the purposes of threshold test, it can directly inform itself with the reports of the medical practitioners on that same issue. This introduces operational symmetry into the legislative scheme.

38. If "willing" were construed in accordance with its ordinary meaning, the threshold test would direct the Court to assess whether the person is capable of controlling, and willing (in the ordinary sense) to control, their sexual instincts, while the medical practitioner reports would address the person's capability and unwillingness (as defined in s 57(1)). As submitted earlier, the statutory and ordinary meanings may be directed towards an assessment of willingness at different times and in different circumstances.[37] The Court may, therefore, be left without direct assistance from the medical practitioners as to the threshold test to be applied. Whether or not the medical practitioner reports may yet be relevant to the Court's exercise of its discretion does not avoid the apparent operational difficulties with this construction.[38]

The operation of s 59(1a)

39. The Appellant submits that as the medical practitioner reports address the test in s 59(1a)(a), and not the test in s 59(1a)(b), this undermines the coherence achieved by the Court of Appeal's construction.[39] It is further submitted that it will be

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36 *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450, 452 (Hodges J); *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, 618 (Mason J); *Carroll v Secretary to the Department of Justice* [2015] VSCA 156, [22] (Whelan JA); *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536, 560 [106] (the Court).

37 As acknowledged in fn 21 above, even if there is little difference in the substantive test provided for by an ordinary meaning and the adoption of the converse of "unwilling", at least the latter construction ensures a consistency in the threshold standard to be reported on by the medical practitioners and the test of which the Court must be satisfied.

38 C.f. Appellant's submissions, [47]-[48].

39 Appellant's submissions, [47].

"virtually impossible" for s 59(1a)(b) to be met where s 59(1a)(a) is not already met.[40]

40. The Respondent submits that the Appellant misconstrues the operation of s 59(1a)(b) (and s 58(1a)(b)). As the Appellant acknowledges, the requirement in s 59(1a)(b) is not the converse of any requirement in s 57.[41] Rather, properly understood, s 59(1a)(b) has a distinct operation to s 59(1a)(a). That operation is to tailor the legislative scheme to ensure that those who *cannot* pose an appreciable risk to the safety of the community (due to their advanced age or permanent infirmity), even where they are not capable or willing to control their sexual instincts (and would therefore fail to satisfy the test for release in s 59(1a)(a)), are not subject to unnecessary, continuous detention under s 57.[42] The existence of the Court's power to discharge or release on licence in such circumstances is consistent with the purpose of the legislative scheme of protecting the safety of the community (as discussed further below).

41. It also follows from the distinct operation of s 59(1a)(b) that where the medical practitioner reports produced pursuant to s 59(2) do not address this issue, it does not undermine the coherence of, or operational symmetry between, ss 57 and 59(1a)(a) (and 58(1a)(a)). Instead, it may be expected that the person would produce any relevant reports on this issue in order to discharge their onus of proof. In any event, if additional reports were required, the Court could order their production under s 61.

The threshold tests and the Court's discretion

42. The Appellant draws upon the existence of the Supreme Court's discretion in ss 57, 58 and 59 of the Act in support of his submission that "willing" in s 59(1a)(a) ought to be construed in accordance with its ordinary meaning.[43] He contends that the absence of an express threshold requirement for the making of a detention order, aside from a finding that "the order is appropriate" (pursuant to s 50(7)), tells against the proposition that the scheme would only be "coherent" if "willing" in

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40 C.f. Appellant's submissions, [28], [41].

41 Appellant's submissions, [44].

42 This operation was explained by the Treasurer, representing the Attorney-General, during the Committee stage of the debates in the Legislative Council, while moving an amendment: South Australia, Legislative Council, *Parliamentary Debates*, 21 June 2018, 592-593 (Hon R.I. Lucas); see also 594-595 (Hon M.C. Parnell). As to it being permissible to refer to such statements made at the Committee stage, see: *Moloney v Motor Accident Commission* (2013) 117 SASR 189, 207-208 [89]-[91] (White J); *Loleit v The Queen* (2020) 136 SASR 198, 213 [81], fn 12 (Parker J).

43 Appellant's submissions, [29], [43].

s 59 is construed as the converse of "unwilling".[44] Rather, in light of the "fact that both initial detention and release from detention are discretionary",[45] he submits that the Court of Appeal's construction "creates an asymmetrical regime for detention and release".[46] It is then further contended that there would be nothing "capricious" about the threshold test for s 59 being "willing" (in the ordinary sense), as the Court would retain a wide discretion as to whether to release the person on licence.[47]

43. The Respondent submits that two related matters tell against the Appellant's submission. The first concerns the operation of s 57. The second concerns the intention of the Parliament in amending s 59.

44. Turning to the first matter, it is accepted that s 57 does not contain an express threshold requirement that, before the Supreme Court may make a detention order, it must satisfy itself that the person is incapable and unwilling to control their sexual instincts. Nonetheless, it has been consistently held that it is an "implicit prerequisite" or "threshold question" for the making of a detention order "that the Court be satisfied that the person is incapable of controlling or unwilling to control his or her sexual instincts".[48] Satisfaction of this threshold risk assessment then enlivens the Court's discretion to make a detention order.

45. The construction of "willing" in s 59(1a)(a) (and s 58(1a)(a)), as the converse of "unwilling" as defined in s 57(1), results in the respective threshold risk assessments in ss 57, 58 and 59 being mirrored. These then provide the foundation for the Court's exercise of its discretion to detain, discharge or release on licence. In light of this, the Court of Appeal's construction does indeed introduce operational symmetry, or coherence, into the legislative scheme.

46. Conversely, as the Court of Appeal observed, to give "willing" its ordinary meaning in s 59 would mean that a "person would be detained under one test, but potentially amenable to immediate release on licence (or discharge under s 58) under another".[49]

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44 Appellant's submissions, [37].
45 Appellant's submissions, [38].
46 Appellant's submissions, [17].
47 Appellant's submissions, [39].
48 *R v Schuster* (2016) 125 SASR 388, 409 [97], fn 15 (the Court), citing *R v Ainsworth* (2008) 100 SASR 238, 242, [1] (Doyle CJ), 247 [24] (White J), 263 [101] (Layton J); *R v Whyte* [2006] SASC 56, [10] (White J). See also *Attorney-General (SA) v Duroux* (2019) 278 A Crim R 375, 378-379 [10] (Hinton J); *Driver v Attorney-General (SA)* [2022] SASCA 13, [13]-[14] (the Court).
49 Court of Appeal, [31] (CAB 74).

Contrary to the Appellant's submission, it is not apparent that the Court of Appeal was referring to anything other than the threshold test in adopting this reasoning.[50]

47. Turning to the second matter, it is submitted that the Appellant's reliance upon the existence of the Court's wide discretion to make an order pursuant to s 59 is inconsistent with the purpose for which the Parliament enacted the provision in its current form. As the Second Reading Speech makes plain,[51] the relevant amendments to s 59 were made in response to the decision in *R v Humphrys*. In that matter, the Court released Mr Humphrys on licence, notwithstanding that he was unwilling (as defined in s 57(1)) of controlling his sexual instincts.[52] This decision was upheld on appeal. The Court of Criminal Appeal held that the Supreme Court had a discretion to release a person on licence even where they pose a significant risk to the safety of the community, if that risk could be contained within acceptable limits.[53]

48. After the decision at first instance, but before the Court of Criminal Appeal delivered its judgment, the Parliament amended the Act in order to, *inter alia*, "fix" the previous scheme and "strengthen the provisions" relating to the release on licence, to "ensure that convicted offenders who are unable or unwilling to control their sexual instincts do not pose a risk to the community".[54] The amendments included the enactment of the threshold test in s 59(1a) with the reversed onus of proof. In order to "minimis[e] the risk" posed by sexual offenders to the safety of the community,[55] in light of the *R v Humphrys* decision, the amendments were intended to limit the circumstances in which the Supreme Court's discretion to release on licence is enlivened.

49. On the Appellant's construction, as submitted above, the discretion to release on licence would be enlivened if the person could satisfy the Court that they were *presently* inclined (or "willing", understood in the ordinary sense) to control their sexual instincts. If the ordinary meaning has the effect contended for by the

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50 Appellant's submissions, [37].

51 South Australia, House of Assembly, *Parliamentary Debates*, 29 May 2018, 581 (Hon V Chapman), concerning the amendments made to the Act by the *Sentencing (Release of Licence Amendment Act 2018* (SA). Recourse to the Second Reading Speech is permissible in such circumstances, see *Legislation Interpretation Act 2021* (SA), s 16(2)(f). See also South Australia, Legislative Council, *Parliamentary Debates*, 5 June 2018, 370 (Hon K.J. Maher).

52 [2018] SASC 39, [29]-[31], [37], [57] (Kelly J).

53 *R v Humphrys* (2018) 131 SASR 344, 346 [2], 349 [12], 350 [15]-[16] (Kourakis CJ).

54 South Australia, House of Assembly, *Parliamentary Debates*, 29 May 2018, 581-582, 583-584 (Hon V Chapman). See the passage below at [64].

55 South Australia, House of Assembly, *Parliamentary Debates*, 29 May 2018, 583 (Hon V Chapman).

Appellant,[56] this would result in a lowering of the threshold in the risk assessment and therefore increasing the circumstances in which the Court's discretion to release on licence is enlivened. This would tend to undermine the purpose of the amendments to s 59 and of the legislative scheme.

Purpose

50. The manifest purpose of the legislative scheme in Division 5 of Part 3 of the Act is to protect the safety of the community from the risk posed by sexual offenders who are incapable of controlling, or unwilling to control, their sexual instincts.[57] Consistent with the above, the Respondent submits that the Court of Appeal's construction of "willing" in s 59(1a)(a) best achieves this purpose.[58]

51. The purpose of the legislative scheme is evident in ss 57(8), 58(3) and 59(3) of the Act, which require that when the Supreme Court is considering whether to exercise its discretion to make an order for detention, discharge or release on licence, the paramount consideration must be the protection of the safety of the community. The legislative purpose is also evident in ss 58(4a) and 59(4a), which preclude the Court from taking into account the length of time that the person subject to a detention order may spend in custody (and has spent in custody in the case of an application for release on licence), when determining whether to grant an application for discharge or release on licence.[59] Together, these provisions may weigh in favour of continued detention,[60] being "[p]lainly the measure which most effectively protects the community from persons who are incapable or unwilling to control their sexual instincts".[61]

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56 See discussion in paragraph [27] and fn 21 above.

57 As is accepted in the Appellant's submissions, [30]. In any event, see, e.g., *Driver v Attorney-General (SA)* [2022] SASCA 13, [28]-[30] (the Court); *R v Schuster* (2016) 125 SASR 388, 405 [75] (the Court); *R v England* (2003) 86 SASR 273, 276 [11] (Bleby J), 283 [51] (Besanko J); *The Queen v Kiltie* (1986) 41 SASR 52, 61 (King CJ). See also South Australia, House of Assembly, *Parliamentary Debates*, 29 May 2018, 581-585 (Hon V Chapman).

58 *Legislation Interpretation Act 2021* (SA), s 14. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-382 [70] (the Court); *Esso Australia Pty Ltd v Australian Workers Union* (2017) 263 CLR 551, 582 [52] (Kiefel CJ, Keane, Nettle and Edelman JJ).

59 In contrast, prior to the inclusion of s 59(4a), it was observed that the Court may consider that "a person has been detained for so long that continued detention is antitherapeutic, and the detained person faces lifelong imprisonment because of institutionalisation" is a strong consideration in favour of release on licence: see *R v Schuster* (2016) 125 SASR 388, 406 [81] (the Court).

60 This appears to be accepted in the Appellant's submissions, [30].

61 *R v Humphrys* (2018) 131 SASR 344, 350 [15] (Kourakis CJ).

52. The legislative history also illustrates that the enduring legislative purpose of the scheme is to protect the safety of the community.[62] The legislative purpose is, for example, evident in the amendments that extended the power to detain to those not just incapable but also unwilling to control their sexual instincts,[63] and those that prescribed that the paramount consideration for discharge or release on licence is the protection of the safety of the community and conditioned those powers on the Court obtaining and considering medical practitioner reports.[64]

53. This legislative purpose supports the Court of Appeal's construction of "willing". In enacting the scheme in its current form, the Parliament was cognisant of the fact that the risk posed by such sexual offenders "may not be an immediate risk".[65] As submitted earlier, this is recognised in the instruction contained in the definition of "unwilling" in s 57(1) to those involved in the administration of the Act to assess the risk posed by the person in the future, in the circumstances as they might arise in which the person has an opportunity to commit a relevant offence. The construction of "willing" in s 59(1a)(a) as the converse of "unwilling" as defined in s 57(1), therefore, also recognises that the safety of the community may not be at risk at the point at which the person makes an application for release on licence, but when they are presented with an opportunity to offend *in the future* while in the community.[66]

54. Lastly, in support of his submission that the word "willing" in s 59(1a)(a) should be construed in accordance with its ordinary meaning, the Appellant draws upon the principle of legality.[67] The Respondent submits that this principle does not assist in resolving the issue of construction before this Court. For the reasons outlined above, the text, context and purpose of Division 5 of Part 3 of the Act make plain that the Parliament has directed its attention to the question of interfering with, and the extent

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62 The first iteration of the scheme was contained in s 77a of the *Criminal Law Consolidation Act 1935* (SA), which was later replaced by s 23 of the *Criminal Law (Sentencing) Act 1988* (SA). This was then repealed in favour of the scheme in its current form, see *Sentencing (Release of Licence) Amendment Act 2018* (SA).

63 *Statutes Amendment (Sentencing of Sex Offenders) Act 2005* (SA); South Australia, Legislative Council, *Parliamentary Debates*, 24 May 2005, 1874-1875 (Hon P Holloway), in which it is explained that these amendments were introduced in response to the decisions in *The Queen v Kiltie* (1986) 41 SASR 52 and *R v England* (2003) 86 SASR 273.

64 *Criminal Law (Sentencing) (Sentences of Indeterminate Duration) Amendment Act 2013* (SA); South Australia, House of Assembly, *Parliamentary Debates*, 17 October 2013, 7391-7392 (Hon J Rau). See also South Australia, House of Assembly, *Parliamentary Debates*, 31 October 2013, 7629 (Hon J Rau).

65 South Australia, House of Assembly, *Parliamentary Debates*, 29 May 2018, 583 (Hon V Chapman).

66 South Australia, House of Assembly, *Parliamentary Debates*, 29 May 2018, 581-582 (Hon V Chapman); *Hore v The Queen* (2020) 285 A Crim R 94, 113 [91] (Hughes J).

67 Appellant's submissions, [31]-[35].

of that interference with, the liberty of those subject to the legislative scheme, and has determined to authorise the same in pursuit of the public interest in the protection of the safety of the community.[68]

55. This is not a case where the effects of the operation of the detention scheme may have been passed over in the legislative process without a full appreciation of its implications.[69] Nor is this a case where the principle of legality ought be put to one side as the purpose of the scheme merely involves an interference with the liberty of the subject.[70] Rather, the amendments to s 59 itself speak against the application of the principle of legality to the specific constructional task at hand. The inclusion of ss 58(4a) and 59(4a) into the scheme in particular indicate that the Parliament appreciated the extent to which the scheme might impact the right to liberty of those subject to a detention order.

56. The Parliament has made a legislative choice in enacting the scheme to prioritise the reduction of the risk that a person subject to a detention order will reoffend. In circumstances where that intent is clear, the description of the scheme as "harsh" or even "cruel" is beside the point.[71] The Appellant does not contend that the scheme is not a valid enactment of the Parliament.

57. For these reasons, Ground 1 should be dismissed.

Ground 2: The assessment of risk

58. Pursuant to Ground 2, and in the alternative to Ground 1, the Appellant submits that the Court of Appeal erred in holding that, in considering whether a person is "willing" (construed as the converse to "unwilling" as defined in s 57(1)) to control their sexual instincts for the purposes of ss 58 and 59 of the Act, the risk of the person failing to exercise appropriate control of their sexual instincts is to be

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68 *Australian Securities and Investment Commission v DB Management Pty Ltd* (2000) 199 CLR 321, 340 [43] (the Court); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 230 [56] (French CJ), 249-250 [126] (Crennan J), 310-311 [313]-[314] (Gageler and Keane JJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 582 [11] (French CJ, Kiefel and Bell JJ), 605-606 [81] (Gageler J). See also *Kassam v Hazzard; Henry v Hazzard* [2021] NSWCA 299, [85]-[86] (Bell P).

69 Cf. Appellant's submissions, [20].

70 Cf. Appellant's submissions, [32].

71 Cf. Appellant's submissions, [18]-[19], [41]. This is consistent with the Court's constitutional task when construing a statute: *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, 135-136 [32] (French CJ, Crennan and Kiefel JJ); *Esso Australia Pty Ltd v Australian Workers Union* (2017) 263 CLR 551, 582 [52] (Kiefel CJ, Keane, Nettle and Edelman JJ).

considered without regard to the effect of any relevant conditions that might be imposed if released pursuant to s 59.[72]

59. The Appellant firstly seeks to impugn the Court of Appeal's holding on the basis that the Court did not expressly articulate its understanding of the task required by s 59(1a)(a).[73] However, the Respondent submits that the Court did do so in its adoption of Hughes J's reasoning in *Hore v The Queen* as follows:[74]

> Section 59(1a)(a) makes it clear that a person detained cannot be released on licence unless they satisfy the Court of the matters specified therein. The power to release on licence is enlivened only on satisfaction of those matters (or of the infirmity criterion under s 59(1a)(b)). It is only once the Court is so satisfied that the question of conditions arises. This much is illustrated by the fact that under s 59(8), determination of the conditions to be imposed is a matter for the appropriate Board.
>
> To this end, we agree with the reasoning of Hughes J in *R v Hore*. Where the Court is satisfied that the person is both capable of controlling and willing to control their sexual instincts, that does not mean that all risk is removed. Further, the Court still has a discretion. We agree with Hughes J that the balance of s 59 is directed to other factors to be incorporated into the decision whether to release, following determination of the threshold questions.

60. In the passages in *Hore v The Queen* that the Court of Appeal refer to, Hughes J explains that:[75]

> Notwithstanding the effect that the interpretation gives rise to, I am satisfied that it reflects the legislature's intent. It is sufficiently clear by the language and form of s 59 that the first step in the applicant's case is that he must establish that he is both capable of and willing to control his sexual instincts when an opportunity to fail to do so arises. The Court cannot release the person without that having been established. However, it does not follow from such a conclusion that the risk is wholly removed, and the balance of s 59 is directed at other factors to be incorporated into the decision as to what is an appropriate order to make.

61. Her Honour then concludes as follows in relation to the operation of s 59:[76]

> [I]t can be seen that an applicant may establish that they have reduced the risk that they pose below a significant risk, whereupon they may be considered for release and conditions may be imposed to address any residual appreciable risk.

62. The Appellant further contends that as "[t]he whole point of the detention regime is related to risk to the community", the assessment of the risk that a person would if given an opportunity commit a relevant offence, "must at least be anchored by reference to the circumstances which are likely to apply if the person were to be released into the community".[77]

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72 Appellant's submissions, [53].
73 Appellant's submissions, [56].
74 Court of Appeal, [41]-[42] (CAB 76), referring to *Hore v The Queen* (2020) 285 A Crim R 94, 114-115 [99]-[101] (Hughes J) (citations omitted).
75 *Hore v The Queen* (2020) 285 A Crim R 94, 114-115 [101].
76 *Hore v The Queen* (2020) 285 A Crim R 94, 114-115 [103].
77 Appellant's submissions, [57].

63. The Respondent submits that this contention fails to appreciate the purpose of the legislative scheme. As submitted earlier, the purpose is to protect the safety of the community. That purpose is not merely "related to risk". Rather, the legislative scheme is designed to "*minimis[e]* the risk" posed by sexual offenders to the safety of the community.[78] The Appellant's construction is inconsistent with legislative intent, given it may leave the safety of the community vulnerable to the significant risk posed by a person released under s 59 should they fail to comply with the imposed licence conditions.

64. Furthermore, as was also submitted earlier, an impetus for the insertion of s 59(1a) into the legislative scheme was the decision in *R v Humphrys*.[79] In that case, the Court adopted the very approach contended for by the Appellant. As the Attorney-General explained in the Second Reading Speech:[80]

> *In the past, the court has expressed the view that, despite the risks an offender might pose to the safety of the community, it was appropriate to release the offender into the community on licence as the community could be adequately protected through a number of steps to be taken by the Department for Correctional Services and other agencies to manage those risks*.
>
> *This bill amends the Sentencing Act to address concerns that have been raised about this approach. The reforms create a two-step process. Firstly, a detained person will need to satisfy the court that they are both capable of and willing to control their sexual instincts*. It is a reversal of onus. If the court is so satisfied, the court can then consider whether they should be released on licence or have their indefinite detention order discharged, with the paramount consideration being the safety of the community in making that decision. This means that *if the person cannot satisfy the court that they are both capable and willing to control their sexual instincts, then the court is unable to make an order to release the person on licence* or to discharge their order of detention subject to one exception. …

65. The Appellant also seeks to draw support for his construction from the requirement in s 59(4)(c)(ii), that, "when determining an application under [s 59]" the Court must take into consideration "a report as to the probably circumstances of the person if the person is released on licence". It is submitted that it is this "particular factual situation in which the hypothetical question is to be considered".[81]

66. The Respondent submits that the Appellant overstates the significance of the requirement in s 59(4)(c)(ii). Properly understood, in light of the excerpt of the Second Reading Speech set out above, s 59 requires a two-step analysis. The first step relates to the threshold test. The second step relates to the Court's discretion to

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78 South Australia, House of Assembly, *Parliamentary Debates*, 29 May 2018, 583 (Hon V Chapman) (emphasis added).

79 [2018] SASC 39; *R v Humphrys* (2018) 131 SASR 344.

80 South Australia, House of Assembly, *Parliamentary Debates*, 29 May 2018, 583-584 (Hon V Chapman) (emphasis added).

81 Appellant's submissions, [57], [60].

make an order under ss 58 or 59 (or no order at all). It is uncontroversial that the report referred to in s 59(4)(c)(ii) is relevant to the second step.[82] However, as submitted above, in light of the legislative history of s 59, it would be inconsistent with the manifest purpose of the provision and the detention scheme for the report referred to in s 59(4)(c)(ii) to be considered at the threshold test stage.

67. The construction adopted by the Court of Appeal, therefore, best achieves the purpose of the legislative scheme.[83] Properly construed, ss 58(1a)(a) and 59(1a)(a) require the Supreme Court to consider the question of a person's capacity and willingness (as defined in s 57(1)) to control their sexual instincts by reference to the circumstances which are likely to apply were the person to be released into the community *without condition*. Satisfaction of the threshold test then enlivens the Court's discretion. In the case of s 58, an order discharging the person from detention may be expected to be made where the risk that the person would, if given an opportunity to commit a relevant offence, fail to exercise appropriate control of the person's sexual instincts is no longer significant and warrants discharge. In the case of s 59, an order releasing the person from detention on licence may be expected to be made where the risk that the person would, if given an opportunity to commit a relevant offence, fail to exercise appropriate control of the person's sexual instincts is no longer significant, but there is a residual risk that the Court considers ought to be addressed with licence conditions.

68. For these reasons, Ground 2 should be dismissed.

Part VI: ESTIMATE OF TIME

69. The respondent estimates that it will require approximately 45 minutes for the presentation of oral argument.

Dated 20 April 2022

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82 Appellant's submissions, [60].
83 *Legislation Interpretation Act 2021* (SA), s 14.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN: **JACOB ARTHUR WICHEN**
Appellant

and

THE QUEEN
Respondent

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

No.	Description	Version	Provision
1.	*Criminal Law Consolidation Act 1935* (SA)	Version from 1 January 1985 to 9 May 1985	s 77a
2.	*Criminal Law (Sentencing) Act 1988* (SA)	Version from 5 March 2018 to 29 April 2018	Division 3 of Part 2
3.	*Criminal Law (Sentencing) (Sentences of Indeterminate Duration) Amendment Act 2013* (SA)	As enacted	Part 2
4.	*Legislation Interpretation Act 2021* (SA)	In force version	ss 14, 16(2)(f), 19(1)
5.	*Sentencing Act 2017* (SA)	In force version	Division 5 of Part 3
6.	*Sentencing (Release of Licence) Amendment Act 2018* (SA)	As enacted	Part 2
7.	*Statutes Amendment (Sentencing of Sex Offenders) Act 2005* (SA)	As enacted	Part 2