HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 15 Sep 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S76/2023
File Title:	Xerri v. The King
Registry:	Sydney
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	15 Sep 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **BRIAN XERRI**

Appellant

and

THE KING

Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Concise reply to the argument of the respondent.

2. The respondent submits that s 19 of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* "CSP Act" is concerned with alterations in penalties for existing offences, and the respondent relies on the construction of s 19 and cognate provisions by intermediate appellate courts to support this contention. However, one of the decisions cited has not taken such a narrow and restrictive approach. *Cooper v Western Australia*[1], required the Court to consider whether s 10 of the *Sentencing Act 1995 (WA)* applied in a case where an offender committed an offence which was subsequently repealed and replaced with a new offence incorporating the elements of the repealed offence. It was the view of the Judges that comprised the Court[2] that it did. If the current s 66EA was considered to be a new offence, as opposed to a "reformulated, refined and "improved" existing offence as found by Hamill J, then the scenario in *Cooper* would arise and on the reasoning in that case the maximum penalty would be that which applied at the time of the offending.
3. Section 10 of the *Sentencing Act 1995 (WA*) is entitled *"Change of statutory penalty, effect of"* and it provides that "*If the statutory penalty for an offence changes between the time when the offender committed it and the time when the offender is sentenced for it, the lessor*

[1] [2020] WASCA 199.
[2] Buss P, Mazza and Vaughan JJA.

statutory penalty applies for the purposes of sentencing the offender." The Court in *Cooper* observed that the construction of s 10 of the *Sentencing Act* presented little difficulty where Parliament amended the selfsame offence between the time of its commission and the time the offender was sentenced. The Court observed that the sentencing court proceeds on the basis that the applicable statutory penalty is whichever is the lesser. The Court then considered the question as to whether s 10 applied where an offender committed an offence which is subsequently repealed and replaced with a new offence which includes the elements of the repealed offence? It was the Court's view in *Cooper* that it does.[3] The Court considered that the meaning of the term "an offence" in s 10 was crucial to answering that question. The Court had regard to a decision of *R v Melville* (2003) 27 WAR 224; 142 A Crim R 38 at [28] where the majority stated that the definition of an offence was broad enough to mean conduct punishable by written law.[4] The Court in *Cooper* agreed with this statement as according with the ordinary meaning in criminal law of the word "offence" being the factual ingredients or elements, proof of which attracts criminal sanction. As a consequence, the Court found that *"A narrow construction, which restricts the operation of s 10 of the Sentencing Act only to instances where Parliament amends the statutory penalty for the selfsame offence, should not be preferred. Such a construction would unfairly operate to deprive offenders who are convicted of a repealed offence, the elements of which are incorporated into a new offence, of any reduction that Parliament has seen fit to make in the statutory penalty for the new offence."*[5]

4. In NSW the term offence is defined very broadly in the definitions contained in section 3 of the *Criminal Procedure Act 1999 (NSW)* as follows: "*Offence means an offence against the laws of the State*."[6] It is evident that the Court in *Cooper* adopted a different approach from the decision in *R v Ronen*[7]. It is submitted that the broad approach adopted in *Cooper* should be preferred in relation to the operation of provisions such as s 19 of the *CSP Act*, when an offence has been repealed, and replaced by a different offence that incorporates at least the same elements of the repealed offence. A narrow approach involves an unreasonable restriction of the provision where an offender is affected due to a changed position by Parliament regarding an offence. The perceived fairness in provisions such as

[3] [2020] WASCA 199 at [129].
[4] The Court referred to *Kingswell v The Queen* (1985) 159 CLR 264 at 292; 19 A Crim R 65 at 82-83 (Brennan J) where the meaning of the term "offence" was canvassed.
[5] [2020] WASCA 199 at [132].
[6] There is no definition for the term "offence" in the *Crimes Act 1900 (NSW)* or in the *Crimes (Sentencing Procedure Act 1999 (NSW)*.
[7] [2006] NSWCCA 123; 161 A Crim R 300.

s 19 should not be restricted to selfsame offences, particularly as offences are often repealed and replaced by other offences that incorporate at least the same conduct with different maximum penalties.

5. If it was found that the current s 66EA was a "reformulated, refined and "improved" existing offence, as identified by Hamill J, then s 19(1) of the *CSP Act* would apply such that the lower maximum penalty of 25 years would be applicable. However, if the Court were to find that the current s 66EA offence was a new offence that incorporates the elements of the predecessor offence, it is submitted that the approach in *Cooper*, should be applied to section 19(1) avoiding a "narrow construction" confined to a selfsame offence. The respondent accepts, as Hamill J observed, that the appellant's conduct in this case would have constituted an offence under both the predecessor and current offence.[8]

6. As Hamill J observed, some of the amendments to s 66EA were largely facilitative and responsive to the difficulties of proof and decisions of the courts which created obstacles to the prosecution and conviction of those who engaged in the persistent sexual abuse of a child. The effect of these amendments has broadened the scope of the current offence when compared to the predecessor offence, and as such, it is likely that the conduct of most offenders under the predecessor offence, would also constitute an offence under the current s 66EA.

7. If the maximum penalty of life imprisonment was intended by Parliament to operate retrospectively then the current s 66EA offence would involve triple retrospectivity, and s 19(1) would have no work to do in providing some measure of fairness to an offender from the retrospective operation of the relevant provisions. Firstly, there is the retrospectivity that can be said to arise from s 25AA that requires a court to sentence an offender in accordance with the sentencing patterns and practices at the time of sentencing, and not those that applied at the time of the offence. Secondly, there is retrospectivity of the current s 66EA offence by virtue of s 66EA(7), that extends the section to a relationship that existed before the commencement of the relevant amendments or the predecessor offence. The third aspect of retrospectivity would be the increased maximum penalty of imprisonment for life for which s 19(1) of the CSP Act, on the respondent's contention, has no application. Clarity of language within s 66EA would have been expected as to the disapplication of s 19(1) to the increased maximum penalty of imprisonment for life if retrospective effect of an increased penalty was intended.

[8] RS [29].

8. The appellant submits that the respondent's contention that s 66EA(7) is the leading provision should be rejected. The same amending act enacted both the current s 66EA offence and s 25AA which specifically provided that this section does not affect section 19 in relation to sentencing for child sexual offences. In *Corliss v R* [2020] NSWCCA 65 Johnson J[9] considered the proper construction of s 25AA at [64] – [87]. Johnson J noted that for the purposes of interpretation of s 25AA regard may be had to extrinsic material, namely the second reading speech and the 2017 report of the Royal Commission into Institutional Responses to Child Sexual abuse. Johnson J noted that the purpose of the new s 25AA was to override the current common law rule that courts must apply the standards at the time of the offence, rather than at the time of sentencing. Johnson J considered the conclusions expressed by the Royal Commission in support of recommendation 76, where "Jurisdictions that have departed from the absolute historical standards approach have been criticised for breaching the principle against retrospectivity."[10] One such conclusion was at page 318 of the Royal Commission Report as follows: *"... the courts and the Sentencing Council for England and Wales considered that fairness to the offender was secured by the continued application of the maximum penalty that applied at the time of the offending (or any lesser penalty adopted subsequently). Similarly, the House of Lords held that a breach of human rights in this context would only occur if a sentence is imposed on a defendant which constitutes a heavier penalty than that which could have been imposed under the law in force at the time that the offence was committed."*

9. It was also noted by Johnson J (emphasis having been added in the judgment) that the Royal Commission continued (report, page 321) *"In our view, the maximum penalty for the offence should apply as at the date of the offending, but any principles in legislation, or guidance by way of similar decisions, should be drawn from sentencing practice at the time of sentencing. We are satisfied that this approach represents a fair balance in the complex task of sentencing for these types of offences, and, by virtue of the preservation of the then existing maximum penalty, does not infringe the right of an offender to face no harsher penalty than that which would have applied at the time of the offending."*

10. Having undertaken the review of the this extrinsic material Johnson J found at [86] that: *"To the extent that considerations of fairness to offenders who have committed historical child sexual offences arise for consideration, it was the clear legislative intention to require*

[9] Lonergan J at [179] agreed with and endorsed the comments of Johnson J in [65]-[100] of the judgement.
[10] Ibid at [79] citing the Royal Commission Report at p.318.

attention to be given to contemporary sentencing patterns and practices, with s.19 confirming that the maximum penalty for the relevant offence is that which applied at the time of the commission of the offence: s 25AA(4).”

11. It is evident that s 19 was seen as a mechanism that would temper the perceived retrospectivity of the amendments to sentencing practices made by s 25AA(1) that introduced the requirement for historical sexual offences to be sentenced on the basis of sentencing patterns and practices at the time of sentencing. In these circumstances, it is unlikely that the Parliament intended to introduce a third aspect of retrospectivity in relation to the maximum penalty, such that s 19(1) would not operate. Further, it can be inferred that this is why there is no reference to the disapplication of s 19(1) in section 66EA. As the leading provision, s 19(1) should be interpreted as preserving the appellant's liability to be sentenced on the basis that the applicable maximum penalty was that as of the time of his offending being 25 years imprisonment.
12. Whilst, as Hamill J noted, the traditional approach to the construction of penal statutes to favour the liberty of the subject has been qualified in more recent times, those principles remain of importance.[11] The appellant submits that the construction favoured by Hamill J, does as he observed, allow the provisions to operate in a cohesive and unified way, whilst according with the enduring principle of favouring the liberty of the subject.[12]

Dated: 15 September 2023

Nathan Steel
Public Defenders Chambers
Tel: 02 9268 3111

Rebekah Rodger
Maurice Byers Chambers
Tel: 02 8233 0300

[11] Xerri v R [2021] NSWCCA 268 at [166].
[12] Idem.