HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **BRIAN XERRI**
Appellant

and

THE KING
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Concise statement of issues

2. Between November 2016 and July 2018, the appellant maintained an unlawful sexual relationship with a teenage girl contrary to s 66EA of the *Crimes Act 1900* (NSW). At that time, the offence created by that provision specified a maximum penalty of imprisonment for 25 years. Prior to the appellant's arraignment and sentencing, s 66EA was repealed and replaced. In its new form, s 66EA specified a maximum penalty of imprisonment for life. The issue raised by this appeal is whether it was correct for the appellant to be sentenced by reference to the maximum penalty in force at the time of his arraignment and sentencing, being imprisonment for life, or whether he ought to have been sentenced by reference to the maximum penalty in force at the time of his offending, being imprisonment for 25 years.

3. On the appellant's argument, s 19(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**CSP Act**), read with s 25AA(4), applies and is determinative of the issue.[1] That argument should not be accepted for the following reasons.

   a. First, s 19(1) of the CSP Act did not apply to the repeal and replacement of s 66EA of the *Crimes Act* because the effect of that change was not to "increase[] the penalty for an offence". Rather, it was to enact a new offence. This was the conclusion reached by the majority in the Court of Criminal Appeal of New South Wales (**CCA**).[2]

   b. Second, in the alternative, if the repeal and replacement of s 66EA "increase[d] the penalty for an offence" for the purposes of s 19(1) of the CSP Act, the maximum penalty of imprisonment for life specified in s 66EA(1) following that amendment applied to the appellant because s 66EA(7) gives the section retrospective effect, including as to the maximum penalty. This ground is raised by way of notice of contention.[3]

Part III: Notices pursuant to s 78B of *Judiciary Act*

4. The respondent does not consider that notice is required pursuant to s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Statement of facts

5. The appellant pleaded guilty to an offence of maintaining an unlawful sexual relationship with a child between 9 November 2016 and 14 July 2018, in which relationship the appellant engaged in two or more unlawful sexual acts of penile-vaginal sexual intercourse.[4] The complainant was 14 and 15 years of age during the relationship. The appellant was between 48 and 50 years of age.[5]

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[1] See Appellant's Amended Submissions filed 7 August 2023 (**AS**) at [31], [45].
[2] *Xerri v R* [2021] NSWCCA 268 (**Judgment**) at [111] (Price J, Bell P agreeing).
[3] Core Appeal Book (**CAB**) at 76.
[4] See indictment at CAB 5; guilty plea at CAB 7.
[5] District Court Remarks on Sentence (12 February 2020) (**ROS**) at [28] (CAB 17); Judgment [27] (CAB 30).

6. The appellant met the complainant through his son, with whom the complainant was in a relationship.[6] In late 2014, when the complainant was 12 years of age, the appellant began to groom her for a sexual relationship.[7]

7. In November 2016, the appellant and complainant had sexual intercourse for the first time. The complainant was 14 years of age and the appellant 48.[8] Thereafter, they considered themselves to be in a "consensual intimate relationship".[9] Sexual intercourse occurred on two further occasions in the following months and then became a regular, usually twice weekly, occurrence in the first half of 2017.[10]

8. In July 2017, the complainant was placed into care. From then until July 2018, the appellant and complainant engaged in sexual intercourse on occasions when the complainant ran away from that care.[11]

9. In April 2018, the appellant was served with an apprehended violence order for the protection of the complainant. He continued to contact and see her in breach of that order.[12]

10. The appellant was arrested on 14 July 2018.[13]

11. At the time of the offending and the appellant's arrest, the offence in s 66EA of the *Crimes Act* took the form of "[p]ersistent sexual abuse of a child" constituted by three or more separate occasions of sexual offending against a particular child (**predecessor offence**).[14] A maximum penalty of imprisonment for 25 years was specified. Section 66EA was repealed and replaced with effect from 1 December 2018.[15] Thus, at the time of the appellant's arraignment and guilty plea on 29 August 2019, the offence in s 66EA took the form of "maintain[ing] an unlawful sexual relationship with a child" (**current offence**).[16] A maximum penalty of imprisonment for life was specified. The indictment on which the appellant was arraigned, and to which he pleaded guilty, was

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[6] ROS [5]-[6] (CAB 9); Judgment [27] (CAB 30).
[7] ROS [22]-[23], [28] (CAB 14-15, 17); Judgment [47] (CAB 33).
[8] ROS [7] (CAB 10); Judgment [29] (CAB 31).
[9] ROS [8] (CAB 10); Judgment [30] (CAB 31).
[10] ROS [9]-[11] (CAB 10-11); Judgment [31]-[33] (CAB 31).
[11] ROS [12] (CAB 11); Judgment [34]-[35] (CAB 31).
[12] ROS [13]-[18] (CAB 12-13); (Judgment [36]-[39] (CAB 31-32).
[13] ROS [19] (CAB 13); Judgment [40] (CAB 32).
[14] See Judgment [74] (CAB 38-40).
[15] *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) (**Amending Act**).
[16] See Judgment [75] (CAB 40-41); see also Judgment [11], [76] (CAB 28, 42)

framed in terms of the current offence.[17] The applicant does not dispute that the current offence has retrospective operation by reason of s 66EA(7) and thereby extended to the unlawful sexual relationship maintained by him with the complainant prior to the commencement of the current offence.[18]

12. The sentencing judge proceeded on the basis that the offence for which the appellant stood to be sentenced carried a maximum penalty of imprisonment for life.[19] Neither party raised that the maximum penalty was other than that specified in the current offence.

13. The sentencing judge found that the appellant's offending was below the mid-range of objective seriousness for this kind of offence, but not significantly so.[20] The Crown relied on the victim impact statement and a psychological report as demonstrating the trauma the complainant continued to suffer "as a direct result of the [appellant's] ongoing psychological grooming and sexual assault". There was evidence that the complainant exceeded the criteria for post-traumatic stress disorder.[21]

14. Although the appellant pleaded guilty, he continued to deny the offending and gave no indication of remorse or regret. The sentencing judge observed that he had "seemingly no insight" into his offending and appeared "indifferent" to the effects of his offending on the complainant.[22]. The sentencing judge allowed a discount of 20% for the appellant's guilty plea.[23] Her Honour took into account that the appellant had a very limited criminal record; had been assessed as having low intellectual functioning; and had experienced previous issues and insecurities in past adult relationships which made him more predisposed to forming a relationship with someone younger and more vulnerable than him.[24]

15. In respect of the offence against s 66EA, the sentencing judge imposed a term of imprisonment for 8 years, with a non-parole period of 4 years and 9 months. A fixed term of imprisonment for 4 months was imposed for the contravention of the

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[17] CAB 5; Judgment [11], [142] (CAB 28, 57-58).
[18] AS [11], [14], [29], [52].
[19] ROS [2] (CAB 8); Judgment [6], [41] (CAB 27-28, 32).
[20] ROS [29] (CAB 17); Judgment [49] (CAB 33).
[21] ROS [24]-[25] (CAB 15-16); Judgment [14]-[18], [136] (CAB 28-29, 56-57).
[22] ROS [30], [35], [37] (CAB 17-18, 19); Judgment [23], [52]-[53], [135] (CAB 30, 34, 56).
[23] ROS [30] (CAB 17-18); Judgment [50] (CAB 34).
[24] ROS [31]-[32] (CAB 18); Judgment [19]-[22], [50]-[51] (CAB 29-30, 34).

apprehended violence order.[25] The appellant was eligible for release to parole, and was released, on 13 June 2023.[26]

16. The appellant sought leave to appeal against sentence to the CCA, including on the ground that the sentencing judge erred by sentencing him on the basis that the maximum penalty for the offence against s 66EA was life imprisonment.[27] By majority, the CCA granted leave, but dismissed the appeal.[28]

Part V: Argument on appeal

17. The appellant's argument requires consideration of s 19(1) of the CSP Act and, in particular, of when an Act "increases the penalty for an offence". Section 19 of the CSP Act provides:

> "**Effect of alterations in penalties**
>
> (1) If an Act or statutory rule increases the penalty for an offence, the increased penalty applies only to offences committed after the commencement of the provision of the Act or statutory rule increasing the penalty.
>
> (2) If an Act or statutory rule reduces the penalty for an offence, the reduced penalty extends to offences committed before the commencement of the provision of the Act or statutory rule reducing the penalty, but the reduction does not affect any penalty imposed before that commencement.
>
> (3) In this section, a reference to a penalty includes a reference to a penalty that is expressed to be a maximum or minimum penalty."

18. The majority in the CCA proceeded on the basis that s 19 has "no role to play when a new offence is created".[29] The conclusion, which the appellant challenges, was that:[30]

> "[a]lthough the current offence covers broadly the same subject matter as the predecessor offence, it is not a re-enactment of the predecessor offence with an increased maximum penalty. It is a different offence to which s 19 of the CSP Act has no application …"

19. The point of departure between the majority and Hamill J was as to the significance of the differences between the predecessor offence and the current offence and whether

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[25] *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 14(1).

[26] ROS [40]-[41] (CAB 20-21); Judgment [24]-[26] (CAB 30).

[27] CAB 23; Judgment [7]-[9], [131] (CAB 28, 56).

[28] CAB 67.

[29] Judgment [83]-[84] (CAB 44).

[30] Judgment [111] (CAB 52); AS [26].

those differences were such as to have the effect of creating a new offence. There was no disagreement as to the need to determine whether the current offence was a new offence or (as his Honour found) simply a reformulation of an existing offence.[31]

20. This approach by each member of the CCA – to ask whether the current offence was a new offence – was correct. In order for an Act to increase or reduce "the penalty for an offence", there must be consistency between the offence prior to the alteration in penalty and the offence subsequent to the alteration in penalty. Section 19 of the CSP Act is concerned with alterations in penalties for existing offences. That is consistent with how intermediate appellate courts have construed s 19 and cognate provisions.[32]

21. For example, in *R v Ronen* [2006] NSWCCA 123; 161 A Crim R 300, the Court was concerned with the application of s 4F(2) of the *Crimes Act 1914* (Cth),[33] in circumstances where the offence of conspiracy to defraud the Commonwealth had been repealed from the *Crimes Act* and replaced with an offence in the *Criminal Code* (Cth). Justice Howie, with whom Spigelman CJ and Kirby J agreed, concluded:[34]

> "The simple fact is that the maximum sentence prescribed by the repealed *Crimes Act* provisions were not reduced in any real sense. It is artificial in my view to describe the repeal of one offence and the enactment of a different offence as a reduction in the sentence for the repealed offence.
>
> … [Section 4F] is intended to operate only where the actual penalty for the precise offence is amended and not where an existing offence is replaced with another offence even though the two offences may have some common features or may be addressing similar prohibited conduct."

22. To similar effect, in *Commissioner of Taxation v Price* [2006] 2 Qd R 316, Keane JA, with whom McMurdo P and Holmes J agreed, considered the application of s 4F(2) to offences for the possession and unlawful conveyance of excisable goods in circumstances where the relevant offence provisions (*Excise Act 1901* (Cth), ss 117

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[31] Judgment [146], [164] (CAB 59, 64).

[32] See *Cooper v State of Western Australia* [2020] WASCA 199; 286 A Crim R 28 at [129]-[134]; *TRH v The Queen* [2018] NTCCA 14 at [24], [27]; *Woodward v R* [2017] NSWCCA 44 at [61], [64] per R A Hulme J (Beazley P and Bellew J agreeing); *R v Wruck* [2014] QCA 39; 239 A Crim R 111 at [33] per Holmes JA (Fraser JA and Mullins J agreeing) (the point being agreed by the parties); *Olsen v Sims* (2010) 28 NTLR 116 at [17] per Mildren J, [84] per Blokland J (the point not being argued); *R v Bowen* [2008] VSCA 33 at [14] per Vincent JA (Buchanan and Kellam JJA agreeing (without finally determining the point).

[33] Section 4F(2) relevantly provided: "Where a provision of a law of the Commonwealth reduces the penalty or maximum penalty for an offence, the penalty or the maximum penalty as reduced extends to offences committed before the commencement of that provision, but the reduction does not affect any penalty imposed before that commencement."

[34] *R v Ronen* [2006] NSWCCA 123; 161 A Crim R 300 at [32], [39].

and 119) had been repealed and replaced (with *Excise Act*, ss 117 and 117A) after the commission of the offences. His Honour reasoned:[35]

> "The situation wrought by the amendments to the Act is not sensibly described as effecting a reduction of penalty for offences which remain on the statute books. There has been a repeal of those offences and the replacement of those provisions by offences with different elements.
>
> The provisions which were substituted for the repealed provisions create a different range of offences constituted by different elements."

23. Thus, the enactment of a new or different offence with a particular penalty does not answer the description of an increase or a reduction in penalty for the purposes of s 19(1) or (2). Contrary to one of the bases on which the appellant seeks to distinguish the authorities referred to above,[36] the same continuity (or discontinuity) ought to be required as between s 19(1) and s 19(2) in circumstances where the question, in both cases, is whether there has been an alteration to "the penalty for an offence". The appellant does not appear to dispute that it is necessary to determine whether there is a new or different offence.[37] There may, however, be a dispute as to what constitutes a new or different offence.[38]

24. The words "an offence" in s 19(1) and s 19(2) of the CSP Act have "no fixed technical meaning in the law".[39] Whether particular legislative amendments create a new or different offence will arise as a question of statutory construction in each case. As a general proposition, however, it should be accepted that different factual ingredients or elements usually signify different offences. That is consistent with the rule of statutory construction identified by Gibbs CJ, Wilson and Dawson JJ in *Kingswell* (1985) 159 CLR 264 at 276, by reference to *R v Courtie* [1984] AC 463. Justice Brennan dissented on the question of whether the relevant provisions of the *Customs*

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[35] *Commissioner of Taxation v Price* [2006] 2 Qd R 316 at [81]-[83].

[36] See AS [41]-[43], [46], referring to *R v Ronen* [2006] NSWCCA 123; 161 A Crim R 123 and *Woodward v R* [2017] NSWCCA 44.

[37] See AS [4](a), [54], [57].

[38] See AS [4](b).

[39] *Kingswell v The Queen* (1985) 159 CLR 264 (***Kingswell***) at 276 per Gibbs CJ, Wilson and Dawson JJ (Mason J agreeing); *Cheng v The Queen* (2000) 203 CLR 248 (***Cheng***) at [156], [163] per McHugh J.

Act 1901 (Cth) could evince an intention contrary to that rule.[40] In doing so, his Honour expressed the "principle" in the following terms:[41]

> "What is a criminal offence? A criminal offence can be identified only in terms of its factual ingredients, or elements, and the criminal penalty which the combination of elements attracts. … If a particular combination of elements attracting a particular penalty is one offence, a different combination of elements attracting a different penalty is another offence".

25. Importantly, in the present case, the appellant accepts that the current offence has different elements to the predecessor offence.[42] The touchstone of the current offence is the existence of an "unlawful sexual relationship". Section 66EA(1) proscribes the maintenance of an unlawful sexual relationship by an adult with a child. An unlawful sexual relationship will exist where there "is a relationship in which" two or more unlawful sexual acts were committed (s 66EA(2)). The prosecution must prove the existence of such a relationship.[43] Although the jury must be satisfied beyond reasonable doubt that an unlawful sexual relationship existed, the jury does not need to be "satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence" and the members of the jury are "not required to agree on which unlawful sexual acts constitute the unlawful sexual relationship" (s 66EA(5)).

26. By contrast, the actus reus of the predecessor offence was constituted by the separate sexual offences alleged.[44] The predecessor offence required proof that a person had engaged "in conduct in relation to a particular child that constitutes a sexual offence" "on 3 or more separate occasions occurring on separate days during any period" (s 66EA(1)). A charge for the predecessor offence had to specify with reasonable particularity the period during which the offending occurred and to describe the nature of the separate offences alleged (s 66EA(5)). To convict an accused of the predecessor offence, the jury had to be satisfied beyond reasonable doubt about the material facts

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[40] See *Cheng* (2000) 203 CLR 248 at [153] per McHugh J.

[41] *Kingswell* (1985) 159 CLR 264 at 292-293. See also *Cheng* (2000) 203 CLR 248 at [90], [94] per Gaudron J, [229] per Kirby J.

[42] AS [48].

[43] *MK v The King; RB v The King* [2023] NSWCCA 180 at [3], [18], [95] per Beech-Jones CJ at CL (Ward P, Price, Wilson and Lonergan JJ agreeing); *R v Mann* (2020) 135 SASR 457 at [35] per Kourakis CJ (Kelly and Peek JJ agreeing).

[44] See generally *KBT v The Queen* (1997) 191 CLR 417 at 422 per Brennan CJ, Toohey, Gaudron and Gummow JJ.

of the separate occasions on which the accused engaged in conduct constituting a sexual offence and all members of the jury had to be so satisfied about the same three occasions (s 66EA(6)(a)-(c)).[45]

27. By reason of these differences, the Amending Act altered the nature of the offence in s 66EA, as well as the elements which must be alleged and proved. It is clear from the extrinsic material that this was the legislative intention. The current offence was enacted because the predecessor offence had "not fulfilled [its] objective" of assisting "the prosecution of the most terrible cases of abuse where many largely indistinguishable incidents of abuse made it difficult for victims to recall specific occasions with sufficient particularity for individual charges". For that reason, the new section 66EA was to proscribe the maintenance of an unlawful sexual relationship, without a need for the prosecution to specify the full particulars of the unlawful sexual acts and without a need for the jury "to necessarily agree on the same unlawful acts that make up the relationship".[46] As the majority in the CCA reasoned, the extrinsic material supports the view that Parliament intended to create a new or different offence.[47]

28. There are further noteworthy differences in scope between the current offence and the predecessor offence.

    a. First, whereas the predecessor offence required proof of three or more sexual offences (s 66EA(1)), the current offence requires proof of two or more unlawful sexual acts (s 66EA(2)).

    b. Second, the current offence extends to an unlawful sexual relationship that "existed wholly or partly" before the commencement of the current offence and before the commencement of the predecessor offence, provided the acts engaged in were unlawful sexual acts at the time of the offending (s 66EA(7), (15)). This significantly broadens the reach of the offence by giving it application prior to the commencement of the predecessor offence in 1999.

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[45] *ARS v R* [2011] NSWCCA 266 at [33]-[34] per Bathurst CJ (James and Johnson JJ agreeing), citing *KRM v R* (2001) 206 CLR 221.

[46] Second Reading Speech for Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018 (NSW), *Hansard*, Legislative Assembly, 6 June 2018 at 5.

[47] Judgment [83], [110]-[111] (CAB 44, 52).

c. Third, the current offence applies to unlawful sexual relationships between a person under the age of 16 years, being the child, and a person over the age of 18 years, being the adult (s 66EA(15)). The predecessor offence applied to conduct by any person in relation to another person under the age of 18 years (s 66EA(12)).

29. It may be accepted, as Hamill J observed, that the appellant's conduct in this case would likely have constituted an offence under the predecessor offence, as well as constituting an offence under the current offence.[48] The complainant was able to give reasonable particulars of at least the first three instances of sexual intercourse.[49] Moreover, in light of the conclusion that the appellant considered himself to be in a "consensual intimate relationship" with the complainant,[50] the existence of an unlawful sexual relationship for the purposes of the current offence was plainly established. But, for the reasons given, there are marked and substantive differences between the predecessor offence and the current offence, which may assume significance in other cases and, in any event, are significant in an examination of the consistency between the two offences for the purposes of s 19(1) of the CSP Act.[51] In particular, the differences extend to the nature and elements of the offences. The predecessor offence and the current offence should not be considered to be the same offence.

30. To the extent that the appellant submits there can be no new or different offence for the purposes of s 19(1) of the CSP Act if the offences broadly or "essentially cover[] the same criminal conduct", that submission should not be accepted.[52] It adopts too broad an understanding of "an offence". There may be many offences that overlap in relation to the same criminal conduct, yet differ with respect to a particular element or factual ingredient (such as the existence of an unlawful sexual relationship for the purposes of the current offence). By way of example, it could not be doubted that common assault and intimidation are distinct offences,[53] or that perverting the course

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[48] Judgment [146] (CAB 59).

[49] ROS [7]-[10] (CAB 10-11); Judgment [29]-[32] (CAB 31).

[50] ROS [8] (CAB 10); Judgment [30] (CAB 31).

[51] See Judgment [92] (CAB 47); [145] (CAB 58).

[52] AS [4](b), [26].

[53] *Crimes Act*, s 61; *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 13. See, for example, *Director of Public Prosecutions (NSW) v Nikolovski* [2017] NSWSC 1038.

of justice and influencing a witness are distinct offences,[54] despite the fact that there is potential for the same underlying conduct to give rise to a charge under either. It does not assist to suggest, as the applicant does, that such a broad approach ought be taken in a case where it is difficult to determine whether a new offence has been created.[55] As a matter of construction, it must be possible to determine when an Act "increases [or reduces] the penalty for an offence" and that construction of s 19 of the CSP Act should apply in each case.

31. If it is accepted that the current offence is a new offence, it is of no moment that the current offence does not refer to s 19 of the CSP Act or expressly state that s 19(1) does not apply.[56] The enactment of a new offence itself made clear that s 19(1) did not apply. While s 25AA(4) of the CSP Act expressly preserved the operation of s 19, it did so in the context of s 25AA(1) which provided that a court must sentence an offender for a child sexual offence in accordance with the sentencing patterns and practices at the time of sentencing, not at the time of the offence.[57] It says nothing as to when, on its proper construction, s 19 will operate in any other context.

Part VI: Argument on notice of contention

32. By notice of contention, the respondent submits that the maximum penalty of imprisonment for life specified in the current offence applied to the appellant by reason of s 66EA(7), irrespective of whether the Amending Act "increase[d] the penalty" for the predecessor offence.[58] The argument in support of the notice of contention is consistent with the analysis of the majority in the CCA to the effect that the maximum penalty in the current offence was intended to apply retrospectively.[59] But, because the majority held that s 19(1) of the CSP Act did not apply, no conclusion was expressed as to the reconciliation of s 19(1) and s 66EA(7) in the event that s 19(1) did apply.

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[54] *Crimes Act*, ss 319, 323.
[55] AS [4](b).
[56] Judgment [103] (CAB 50). Cf AS [29], [37].
[57] *Corliss v R* [2020] NSWCCA 65; 282 A Crim R 195 at [66]-[87] (Johnson J).
[58] CAB 76.
[59] Judgment [100], [111] (CAB 49, 52).

33. In the current offence, s 66EA(7) and (8) provide:

> "(7) This section extends to a relationship that existed wholly or partly before the commencement of the relevant amendments, or the predecessor offence, if the acts engaged in by the accused were unlawful sexual acts during the period in which the relationship existed.
>
> (8) A court, when imposing a sentence for an offence under this section constituted by an unlawful sexual relationship that existed wholly or partly before the commencement of the relevant amendments, must take into account (but is not limited by) the maximum penalty for the unlawful sexual acts engaged in by the accused during the period in which the unlawful sexual relationship existed."

34. The appellant accepts that s 66EA(7) gives the current offence retrospective application. Yet he contends that the retrospectivity of the current offence must be divided into two different aspects: the retrospective application of the offence and the retrospective application of the maximum penalty.[60] The result, on the appellant's argument, is that the current offence "operates retrospectively, but for the maximum penalty, due to the operation of s 19(1), as made clear by s 25AA(4) of the CSP Act."[61]

35. There is no justification in the words of s 66EA(7) to divide the express retrospective application of the current offence in this way. Section 66EA(7) applies "[t]his section" to offending that predates the commencement of the current offence. The maximum penalty of imprisonment for life is specified in the section. Section 66EA(1) provides:

> "(1) An adult who maintains an unlawful sexual relationship with a child is guilty of an offence.
>
> Maximum penalty – Imprisonment for life."

It should not be accepted that the description of the offence in s 66EA(1) is part of "[t]his section" for the purposes of s 66EA(7), but that the description of the maximum penalty is not. Section 18 of the CSP Act provides that, in the context of the current offence, the maximum penalty of imprisonment for life defines the upper limit of the punishment to which a person is liable on conviction for the offence.

36. In its terms, the current offence does not leave unclear whether the maximum penalty of imprisonment for life was intended to have retrospective application.[62]

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[60] AS [11], [53].

[61] AS [14].

[62] Cf AS [29], [52]; Judgment [152] (CAB 61).

37. Reference to the extrinsic material confirms this point. As noted by the appellant, the current offence was introduced in response to the Royal Commission into Institutional Responses to Child Sexual Abuse.[63] The recommendations of the Royal Commission are, therefore, part of the legislative context. It is clear that the persistent child sexual abuse offence recommended by the Royal Commission applied both the offence and the maximum penalty retrospectively. Indeed, the Royal Commission directly referred to concerns that the retrospective operation of the offence would have the effect of exposing offenders to a much higher maximum penalty.[64] In acknowledgment of those concerns, the draft provision in Appendix H contained a sub-s (8) in the following form:

> "A court that imposes a sentence for an unlawful sexual relationship offence constituted by an unlawful sexual relationship that is alleged to have existed wholly or partly before the commencement of this section must, when imposing sentence, take into account:
>
> (a) the maximum penalty for the predecessor offence, if the predecessor offence was in force during any part of the alleged period of the unlawful sexual relationship, and
>
> (b) the maximum penalty for the unlawful sexual acts that the unlawful sexual relationship is alleged to have involved, during the period of the unlawful sexual relationship, if the unlawful sexual relationship is alleged to have existed wholly or partly before the commencement of the predecessor offence.

38. The form of the offence recommended by the Royal Commission would have seen the maximum penalty in the newly enacted offence applied retrospectively, but any lesser maximum penalty in the predecessor offence taken into account.

39. There is no explanation in the second reading speech for the Amending Act as to why sub-s (7) in s 66EA was enacted in the form recommended by the Royal Commission, but sub-s (8) was not. Nonetheless, it may be inferred that the New South Wales legislature adverted to the retrospective operation of the maximum penalty in the current offence. In the second reading speech, the Attorney General stated that the current offence:[65]

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[63] AS [15].

[64] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017), "Part III Child sexual abuse offences" at 69-70.

[65] Second Reading Speech for Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018, *Hansard*, Legislative Assembly, 6 June 2018 at 5.

> "will be punishable by a maximum penalty of life imprisonment. This maximum penalty recognises that some of the constituent acts that make up the unlawful sexual relationship may themselves carry life imprisonment if they were charged as separate sexual offences. … The offence will apply retrospectively as long as the sexual acts that make up the unlawful sexual relationship were illegal at the time they were committed".

There is nothing in the second reading speech which supports a suggestion that the legislature did not intend the retrospective application of the current offence to extend to its maximum penalty.

40. The appellant's argument that the current offence applies retrospectively, but for the maximum penalty, places critical reliance on s 19(1), read with s 25AA(4), of the CSP Act. Section 19(1) and 25AA(4) are said to be the textual indications against the retrospective application of the maximum penalty.[66] It is not entirely clear whether the appellant's argument is that s 66EA(7) is abrogated by s 19(1) of the CSP Act or that, as a matter of construction, the reference to "[t]his section" in s 66EA(7) does not extend to the maximum penalty.[67] Importantly, however, it does not appear to be disputed that the command of s 19(1) of the CSP Act could be abrogated by a clear expression of contrary legislative intent in an offence provision.[68] The appellant accepts that *Siganto v The Queen* (1998) 194 CLR 656 stands as authority for the proposition that courts must give effect to a clear intention that a new statutory regime for sentencing should apply retrospectively.[69] In this way, the appellant also accepts the possibility that certain offences will "sit wholly outside the sentencing regime" mandated by s 19(1).[70]

41. Justice Hamill addressed how an apparent conflict between the retrospective operation of s 66EA of the *Crimes Act*, as provided by s 66EA(7), and the position in s 19(1) of the CSP Act, as maintained by s 25AA(4), might be resolved. His Honour concluded

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[66] AS [14], [45].

[67] See *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 (***Nystrom***) at [49]-[51] per Gummow and Hayne JJ.

[68] See AS [38]. See, for example, *Chief Executive Officer of Customs v Derbas* [2002] NSWCCA 132; 167 FLR 269 at [25], [27].

[69] See *Siganto v The Queen* (1998) 194 CLR 656, particularly at [17] per Gleeson CJ, Gummow, Hayne and Callinan JJ; AS [50]-[51].

[70] AS [60].

that s 19(1) is determinative of the applicable maximum penalty under the current offence, reasoning that the:[71]

> "… conflict is readily reconciled, and the legislative scheme given a cohesive and unified operation, once it is accepted that the retrospectivity of s 66EA relates to the offence, while the increase in the maximum penalty is precluded by the overarching sentencing provisions in ss 19 and 25AA 'notwithstanding the literal command' of s 66EA. To again adopt the language of the majority in *Project Blue Sky* [(1998) 194 CLR 355 at [79]], s 25AA (and in turn, s 19) 'provides the conceptual framework in which the functions conferred' by s 66EA operate."

42. This reasoning, which the appellant embraces, involves a reading down of the literal meaning of s 66EA(7) in order to give a "cohesive" and "harmonious" construction to the current offence and the provisions of the CSP Act.[72] Even allowing for a presumption that the legislature intended each provision to operate,[73] it is submitted that it is not open on the words of s 66EA(7) to construe that provision as if it read "[t]his section [other than the maximum penalty specified in it] …". That construction does not involve an adjustment of meaning that achieves a result which best gives effect to the purpose and language of the competing provisions.[74] It also proceeds on the erroneous basis that, in the "hierarchy" of the apparently conflicting provisions, s 19(1) of the CSP Act should be treated as the leading provision, with the result that s 66EA(7) of the *Crimes Act* is construed as subordinate to it.[75] Section 66EA(7) makes specific provision for the temporal operation of a particular offence. It was also enacted at a time when s 19(1) was extant. The legislature should not be taken to have intended that s 19(1) would deprive s 66EA(7) of effect according to its terms.[76] To the contrary, as the substantive offence and penalty provision, s 66EA(7) is the leading provision. On that basis, a more harmonious construction would be achieved by

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[71] Judgment [157], [163] (CAB 63, 64).

[72] Judgment [159]-[161], [164] (CAB 63-64); AS [62]-[66].

[73] See *Saraswati v The Queen* (1991) 172 CLR 1 at 17 per Gaudron J.

[74] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70] per McHugh, Gummow, Kirby and Hayne JJ; *ENT19 v Minister for Home Affairs* [2023] HCA 18; 97 ALJR 509 at [87] per Gordon, Edelman, Steward and Gleeson JJ.

[75] Judgment [162] (CAB 64).

[76] *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1 at 29 per Dixon J; *Smith v The Queen* (1994) 181 CLR 338 at 348 per Mason CJ, Dawson, Gaudron and McHugh JJ; *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346 at [17] per French CJ, Gummow, Hayne, Heydon, and Bell JJ; *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at [25] per Crennan, Bell, Gageler and Keane JJ. See also *Nystrom* (2006) 228 CLR 566 at [49]-[50] per Gummow and Hayne JJ.

construing s 19(1) as subject to s 66EA(7) or, put another way, as insusceptible of application where the maximum penalty is otherwise retrospective.[77]

43. The appellant emphasises the notion of fairness which underlies s 19 of the CSP Act.[78] Concern for the liberty of a subject might be said to favour the conclusion that s 19 is the leading provision.[79] As a matter of context, such concern could inform the identification of the likely legislative intention.[80] In the present case, however, it does not. Section 66EA(7) of the *Crimes Act* constitutes a clear indication of statutory policy and intent by the legislature that the current offence, including the specified maximum penalty, should apply retrospectively. While retrospectivity need not be "all-or-nothing",[81] s 66EA(7) applies, in its terms, to all of the section. Additionally, the perceived unfairness of the retrospective application of the maximum penalty is tempered by s 66EA(8), which requires the sentencing court to take into account the maximum penalties for the unlawful sexual acts at the time the relationship existed. The balance struck in that regard is part of the legislative design.

44. The appellant contends that the retrospective application of the maximum penalty in the current offence would disturb his reasonable expectation (that s 19(1) of the CSP Act would operate to an offender's benefit).[82] To the extent that any such presumption may be available, it is not of sufficient strength to warrant a construction which fails to give full effect to the words of s 66EA(7).[83] Clearly, the force of any such presumption is reduced in circumstances where the wrongful nature of the conduct, now punishable by imprisonment for life, was made apparent by the maximum penalty in the predecessor offence and also by the maximum penalties for the ingredient offences. As was observed in the second reading speech for the Amending Act, in a particular case the ingredient offences could themselves carry maximum penalties of imprisonment for life (see [39] above).

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[77] *Nystrom* (2006) 228 CLR 566 at [51] per Gummow and Hayne JJ.

[78] AS [17]-[19].

[79] See Judgment [166] (CAB 65).

[80] See *Minogue v Victoria* (2018) 264 CLR 252 at [47] pr Kiefel CJ, Bell, Keane, Nettle and Edelman JJ.

[81] *Stephens v The Queen* (2022) 273 CLR 635 (***Stephens***) at [35] per Keane, Gordon, Edelman and Gleeson JJ.

[82] AS [45].

[83] *Stephens* (2022) 273 CLR 635 at [33]-[34] per Keane, Gordon, Edelman and Gleeson JJ.

45. The significance of s 25AA(4) of the CSP Act and its enactment as part of the Amending Act appears, on the appellant's argument, to be twofold. First, s 25AA(4) provides an example of the kind of express clarification of the relationship between a provision of the Amending Act and s 19(1) which is said to be notably absent from the current offence. Inclusion in the current offence of an express dis-application of s 19(1) would have put the present issue beyond doubt. But, for the reasons given, s 66EA(7) is clear that the maximum penalty for the current offence applies retrospectively.

46. Secondly, s 25AA(4), and its re-enactment as s 21B(5) in 2022, is said by the appellant to confirm the general position that maximum penalties from the time of the offending should apply including where subsequent sentencing patterns and practices are adverse to an offender.[84] It is not in dispute that the general position is as stated in s 19(1). The issue is whether the current offence departed from that position. For the reasons given, it did so.

47. If the Court is of the view that it is not possible to achieve a harmonious construction of s 66EA of the *Crimes Act* and s 19 of the CSP Act (with the former as the leading provision as explained in [42] above) such that the provisions can stand together,[85] the respondent further submits that s 66EA(7) impliedly repeals s 19(1) in its particular application to the current offence.[86] The relevant inconsistency would arise from the inability of s 66EA(7) to give retrospective effect to that part of the section which specifies the maximum penalty as imprisonment for life if s 19(1) operates to require that the increased maximum penalty only apply to offences committed after the commencement of the current offence.[87]

48. It is acknowledged that cases of implied repeal are comparatively rare because it is to be assumed that the legislature did not intend to contradict itself.[88] But, in the present case, s 19(1) is abrogated or negated by the express words of s 66EA(7). The temporal

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[84] AS [35], [53], [60], [67].

[85] *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at [48] per Crennan, Kiefel and Bell JJ referring to *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at [18] per Gummow and Hayne JJ; *Shergold v Tanner* (2002) 209 CLR 126 at [35] per Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ.

[86] *Goodwin v Phillips* (1908) 7 CLR 1 at 7 per Griffith CJ, 14 per O'Connor J.

[87] See generally *Hoffman v Chief of Army* (2004) 137 FCR 520 at [10]-[17] per Black CJ, Wilcox and Gyles JJ; *R v Crehan* (2001) 4 VR 189 at [10]-[11] per Brooking JA (Phillips and Vincent JJA agreeing).

[88] See *Butler v Attorney General (Vic)* (1961) 106 CLR 268 at 275-276 per Fullagar J.

operation given to the maximum penalty specified in the current offence by s 66EA(7) was intended as a substitute for what would otherwise be required by s 19(1).[89]

Part VII: Estimate

49. The respondent estimates that no more than two hours will be required for the presentation of the respondent's oral argument.

Dated: 1 September 2023

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[89] See *Mitchell v Scales* (1907) 5 CLR 405 at 416-417 per Isaacs J.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

BRIAN XERRI
Appellant

and

THE KING
Respondent

ANNEXURE TO RESPONDENT'S SUBMISSIONS

Pursuant to paragraph 3 of the Practice Direction No. 1 of 2019, the Respondent sets out a list of the statutes and statutory instruments referred to in these submissions.

No.	Statute	Version	Provisions
1.	*Crimes Act 1900* (NSW)	In force from 2 July 2018 to 12 August 2018	s 66EA
2.	*Crimes Act 1900* (NSW)	As at 14 July 2023	ss 66EA, 61, 319, 323,
3.	*Crimes (Sentencing Procedure) Act 1999* (NSW)	In force from 26 September 2019 to 27 September 2020	s 25AA
4.	*Crimes (Sentencing Procedure) Act 1999* (NSW)	As at 14 July 2023	ss 19, 18, 21B(5)
5.	*Judiciary Act 1903* (Cth)	As at 28 February 2022	s 78B
6.	*Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW)	As at 31 October 2018	[20]
7.	*Crimes (Domestic and Personal Violence) Act 2007* (NSW)	In force from 25 November 2017 to 20 June 2018	s 14(1)
8.	*Crimes (Domestic and Personal Violence) Act 2007* (NSW)	As at 14 July 2023	s 13

9.	*Crimes Act 1914* (Cth)	In force from 3 August 2005 to 15 November 2005	s 4F(2)
10.	*Excise Act 1901* (Cth)	In force from to 6 July 2000 to 6 September 2000	ss 117, 119
11.	*Excise Act 1901* (Cth)	In force from 7 September 2000 to 25 October 2000	ss 117, 117A
12.	*Customs Act 1901* (Cth)	In force from 26 June 1991 to 19 September 1991	s 233B(1)(cb)