

BETWEEN:



KMC
Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS (SA)
Respondent

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APPLICANT'S OUTLINE OF ORAL ARGUMENT

I Certification

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

II Outline of the propositions the applicant intends to advance in oral argument

1. Error in the trial and sentencing

1.1. The jury were properly given an extended unanimity direction and told to convict if satisfied of any two or more acts. (AS [8]-[10], [25])

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1.2. The trial judge did not ask the jury questions to determine the acts, or the kinds of acts, of which it was satisfied, and sentenced without regard to the *actus reus* found by the jury, contrary to *Chiro v The Queen* (2017) 260 CLR 425. (AS [11]-[15], [26])

1.3. The trial judge sentenced on the basis of multiple acts falling within each of the categories of acts of exploitation particularised in paragraphs (a)-(d) of the Information (CAB.5), but the trial judge did not:

- (a) in terms make any independent factual finding as to the two or more acts of sexual exploitation of which he was satisfied beyond reasonable doubt;
- (b) give reasons for any implicit finding that all alleged acts had been proved to any particular standard.

30 2. The *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) ("the Amendment Act") and its application

2.1. The Amendment Act, in each of ss 6, 9(1) and 9(2), addresses the consequences of the holding in *Chiro* in three separate and distinct ways applicable to three different scenarios. (AS [18]-[22])

2.2. Section 9(1) does not apply to the applicant's appeal, because:

- (a) it cannot be concluded that the sentencing court sentenced the applicant "having regard to ... acts of sexual exploitation determined by [it] to have been proved [to its satisfaction] beyond a reasonable doubt";

- (b) it cannot be concluded that the applicant was sentenced “consistently with the verdict of the trier of fact”. (AS [28]-[29])

3. Section 9(1) of the Amendment Act is an invalid direction to the appellate court

3.1. A direction to a court as to the manner or outcome of the exercise of its jurisdiction is invalid both because:

- (a) it is incompatible with the independence and institutional integrity of the court; and
- (b) in the case of a court exercising federal jurisdiction, it is an interference with the exercise of the judicial power of the Commonwealth. (AS [31]-[32])

10 3.2. Section 9(1) is, in terms, concerned to assign to particular existing sentences two characteristics which peculiarly reflect, and are expressed in terms of, the outcome of the judicial process on a sentencing appeal. (AS [34]-[38], AR [7])

3.3. Although cast in the passive voice to avoid referring directly to an appeal court, the real and substantive effect of s 9(1) is in relation to sentence appeals, and is indistinguishable from an explicit direction to an appeal court as to what is to be the outcome of its consideration of grounds of appeal. (AS [38]-[39])

20 3.4. Section 9(1) is not properly characterized as effecting a retrospective change to the law applying at a point in time prior to sentence; rather, it merely alters the character or quality to be assigned (by an appellate court) to an existing sentence. (AS [40]. AR [4]-[5], [11])

3.5. Section 9(1) preserves the original sentence *as a sentence*, but dictates the outcome of a *Chiro* ground of appeal, giving the appearance that an appellate court has found the sentence to have been unaffected by error, when the reality is that that result is simply dictated by the legislation. (AS [36]-[37], AR [8])

3.6. Section 9(1) is distinguishable from the legislation that was considered and upheld as valid in *Duncan v ICAC* (2015) 256 CLR 83. (AR [3])

4. *Kirk v Industrial Court (NSW)* / precluding review for jurisdictional error

30 4.1. A law which in substance and effect insulates a decision of an inferior court, in the exercise of judicial power, from judicial review for jurisdictional error, including by deeming the decision not to have been affected by error, prevents the Supreme Court of a State from enforcing the limits of the sentencing court’s jurisdiction, and thereby denies the Supreme Court of one of its defining characteristics. (AS [43]-[44])

4.2. The error in sentencing is properly characterized as jurisdictional error, because the power of a sentencing court to sentence an offender following a trial by jury is limited by reference to the offence of which the offender was found guilty by

the verdict of the jury (and, when that cannot be ascertained, by the least serious offence which could be reflected in the verdict). (AS [45]-[57], AR [12])

5. If s 9(1) does retrospectively change the law applicable to sentencing, the functions it confers on the trial and appeal court impair institutional integrity

5.1. Even if s 9(1) can be construed so as retrospectively to alter the sentencing law, the question remains whether s 9(1) impairs institutional integrity in a degree incompatible with its role as a State court, and a repository of federal judicial power, by reference to considerations of substance, form and context.

10 5.2. It is important to consider *how* the legislation intersects with past, pending or future litigation: *AEU v General Manager of Fair Work Australia* (2012) 246 CLR 117 at [85], [87]. Here, the effect upon completed or pending litigation is not merely consequential; s 9(1) is directed to past exercises of judicial power, and has no meaningful operation other than to constrain appellate or other consideration of whether past sentences are to be taken to be erroneous or manifestly excessive.

5.3. Section 9(1) is concerned with the adjudication and punishment of criminal guilt.

5.4. Insofar as s 9(1) might be taken to retrospectively expand the sentencing judge's power or discretion with respect to sentencing, the corollary is that it:

20 (a) retrospectively diminishes the effect of the jury's verdict (and the role played by the jury) in a completed trial in which the defendant has elected to put himself upon his country — the vice correctly identified in *Question of Law (No 1)* [2018] SASFC 128, which was correctly decided;

(b) involves treating the sentencing judge as having exercised a discretion without positively considering whether to do so and hearing submissions;

(c) requires an appellate court to uphold as not erroneous a sentence which was erroneous when pronounced. (AS [58]-[68], AR [3(5)])

5.5. It is irrelevant that the interference with litigation and judicial process is asserted to have the effect of upholding a position believed by courts to have been permissible prior to *Chiro*, or that Parliament may have abolished appeals.

30 **6. Disposition of the appeal**

6.1. Permission to appeal should be granted. The appeal should be allowed and the sentence set aside; the remainder of the cause should be remitted to the Full Court of the Supreme Court of South Australia.