No. A20 of 2019

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

KMC
Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS (SA)
Respondent

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

Filed on behalf of the Attorney-General for the State of Queensland (intervening)
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PART I: Certification

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

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland ('Queensland') intervenes in this proceeding in support of the respondent, pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

PART IV: Submissions

SUMMARY OF ARGUMENT

4. The applicant was convicted and sentenced for one count of persistent sexual abuse of a child. His sentence was determined in a manner which this Court's decision in *Chiro v The Queen* establishes was erroneous.[1] He now applies for leave to appeal out of time against sentence to the Full Court of the Supreme Court of South Australia. That Court (or, on removal of the appeal, this Court) must dismiss an appeal against sentence unless 'it thinks that the sentence is affected by error such that the defendant should be re-sentenced.'[2] Section 9(1) of the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) ('the Amendment Act') provides that a sentence is 'taken to be, and always to have been, not affected by error or otherwise manifestly excessive' because it was arrived at in the manner held to be erroneous in *Chiro*.

5. Queensland makes the following submissions:

   (a) The sentences which are the subject of s 9(1), including that imposed upon the applicant, are not 'by hypothesis' affected by jurisdictional error.[3] The principle in *Kirk v Industrial Court* is not engaged.[4]

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1 (2017) 260 CLR 425 ('*Chiro*').

2 Section 158(7)(a) of the *Criminal Procedure Act 1921* (SA).

3 Applicant's submissions, 15 [57].

4 (2010) 239 CLR 531 ('*Kirk*').

(b) Section 9(1) adopts a statutory formula long accepted to effect a substantive change to the law with retrospective effect. In doing so, it does not offend the principle in *Kable v Director of Public Prosecutions (NSW)*.[5]

(c) Even if s 9(1) does not operate retrospectively, it does not invalidly direct an appellate court as to the exercise of its jurisdiction. Appeals are creatures of statute, and their nature and extent are matters for the legislature.[6] It is open to the legislature to provide that particular errors will be unavailable to ground relief on appeal.

STATEMENT OF ARGUMENT

The proper construction of s 9(1)

Section 9(1) operates upon sentences which are not necessarily affected by jurisdictional error

6. It is necessary to begin by identifying the legal operation s 9(1) of the Amendment Act.[7] That question first requires consideration of the status, in law, of the sentences which are the grammatical subject of s 9(1).

7. The applicant submits that those sentences, including his own, are 'by hypothesis' affected by jurisdictional error.[8] If that submission is correct, two consequences follow. First, the order sentencing the applicant to his present term of imprisonment 'has no legal force'.[9] Second, the word 'sentence' in s 9(1) must be read to mean (or at least include) 'purported sentence'. Neither of those consequences follow, because the applicant's submissions on this point ought to be rejected.

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5 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 ('*Kable*').

6 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 596 [56] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Lacey*').

7 *Re Macks; Ex parte Saint* (2000) 204 CLR 158, 175 [13] (Gleeson CJ) ('*Re Macks*'); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 581 [11] (French CJ, Kiefel and Bell JJ) ('*NAAJA*').

8 Applicant's submissions, 15 [57].

9 *New South Wales v Kable* (2013) 252 CLR 118, 140 [56] (Gageler J) ('*Kable No 2*') (although the *fact* that it was made 'may yet have some status in law': *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 133 [24] (Kiefel CJ, Gageler and Keane JJ) ('*Hossain*')); cf *Edwards v Director of Public Prosecutions* (2012) 44 VR 114, 161-2 [228]-[235] (Weinberg JA and Williams AJA).

8. Sentencing is normally a 'discretionary decision, subject to any statutory constraints such as a specified maximum penalty'.[10] At common law, there was no appeal against conviction, nor against the exercise of the sentencing discretion.[11] In the Australian States, as in England, judgments in criminal cases could be challenged by 'proceedings in error for error manifest on the record', although 'the most vital objections to a verdict and judgment [did] not appear on the record'.[12] Consequently, the remedy applied 'only to that very small number of legal questions which concern the regularity of the proceedings themselves.'[13] Perhaps because of those limitations, the writ of error does not appear to have enabled review of sentences.[14]

9. The State Supreme Courts, like the Court of Queen's Bench in England, could also at federation grant certiorari to confine inferior courts within their jurisdiction.[15] It is apparent, however, that the jurisdiction to grant certiorari for jurisdictional error did *not* enable the quashing of sentences which were excessive because the judge proceeded according to a wrong principle. Instead, the *only* mechanism for review of a sentence was the prerogative of mercy.[16] Hence, it could be said in 1924:[17]

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10 *Cheung v The Queen* (2001) 209 CLR 1, 9 [4] (Gleeson CJ, Gummow and Hayne JJ).

11 *Lacey* (2011) 242 CLR 573, 578 [8] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also South Australia, *Parliamentary Debates,* Legislative Council, 16 October 1924, 1105 (AA Kirkpatrick).

12 *R v Snow* (1915) 20 CLR 315, 349 (Isaacs J). The writ of error was 'in substance ... not readily distinguishable from certiorari for error of law on the face of the record': McPherson, *Supreme Court of Queensland* (Butterworths, 1989), 122, n 320.

13 *R v Snow* (1915) 20 CLR 315, 349-50 (Isaacs J), citing Lord Blackburn et al, *Report of the Commission on the Criminal Code 1879* ('*Code Report*'). Examples of such irregularities include an 'alleged irregularity in empanelling the jury (*Mansell v R*) or in discharging the jury (*Winsor v R*) or a defect appearing upon the face of the indictment (*Bradlaugh v R*)': *Code Report*, 37. See also the discussion in *Conway v The Queen* (2002) 209 CLR 203, 209 [8] (Gaudron A-CJ, McHugh, Hayne and Callinan JJ) ('*Conway*').

14 The *Code Report* and the *Report of the Council of Judges* both suggest this writ of error was not available against sentences: *Code Report,* 37; Great Britain, Council of Judges of the Supreme Court, *Return of Report of the Judges in 1892 to the Lord Chancellor, Recommending the Constitution of a Court of Appeal and Revision of Sentences in Criminal Cases* (1894), 7 ('*Report of the Council of Judges*').

In respect of convictions only, two other remedies were available at common law: the 'motion in arrest of judgment' which led to the entry of an acquittal; and 'an order made upon a motion for a new trial': *Conway* (2002) 209 CLR 203, 211 [13]-[14] (Gaudron A-CJ, McHugh, Hayne and Callinan JJ). In addition, there was the process, on a statutory basis in England from 1848, of referring a question of law to the Court of Crown Cases Reserved: *Conway* (2002) 209 CLR 203, 210 [10] (Gaudron A-CJ, McHugh, Hayne and Callinan JJ). A process based on that model was available in South Australia prior to 1924: see South Australia, *Parliamentary Debates*, Legislative Council, 16 October 1924, 1103 (AA Kirkpatrick).

15 *Kirk* (2010) 239 CLR 531, 580 [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

16 *Report of the Council of Judges*, 7.

17 South Australia, *Parliamentary Debates*, Legislative Council, 16 October 1924, 1105 (AA Kirkpatrick).

> At present the only redress a prisoner has in South Australia if he has been too severely punished is to petition the Governor to exercise the prerogative of mercy in his favour.

10. As had been earlier recognised in England,[18] the lack of any curial system for review of sentences resulted in 'an appalling amount of incongruity in the sentences'.[19] Those considerations led to the innovation of appeals against sentence, recommended by the Report of the Council of Judges of the Supreme Court in 1894.[20]

11. Shortly after a right of appeal against sentence was introduced in the United Kingdom (by the *Criminal Appeal Act* 1907 (UK)), the Court of Criminal Appeal held that 'the Court would not interfere with a sentence unless it was apparent that the judge at the trial had proceeded upon wrong principles, or given undue weight to some of the facts proved in evidence'.[21] When, after federation, the *Criminal Appeal Act* was replicated in the Australian States,[22] this Court adopted the same approach, so that an appeal would be allowed only if the sentence was 'obviously' excessive 'because, for instance, the Judge has acted on a wrong principle.'[23]

12. In light of that history, it cannot be said that it was a 'defining characteristic'[24] of State Supreme Courts at federation to grant certiorari whenever a judge acted on a 'wrong principle' and imposed a manifestly excessive sentence.[25] Instead, the 'accepted doctrine at the time of federation'[26] was that the only avenue for relief against excessive

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[18] *Lacey* (2011) 242 CLR 573, 578 [8] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Report of the Council of Judges,* 7.

[19] Queensland, *Parliamentary Debates,* Legislative Council, 5 November 1912, 2156 (EWH Fowles). See also South Australia, *Parliamentary Debates,* Legislative Council, 16 October 1924, 1105 (AA Kirkpatrick); Victoria, *Parliamentary Debates,* Legislative Council, 26 August 1914, 1052 (Mr Blackburn).

[20] *Report of the Council of Judges*, 7.

[21] *R v Sidlow* (1908) 1 Cr App R 28, 29 (Lord Chief Justice).

[22] *Lacey* (2011) 242 CLR 573, 579 [10] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See *Criminal Appeal Act 1912* (NSW); *Criminal Code Amendment Act 1913* (Qld); *Criminal Appeals Act 1924* (SA); *Criminal Code Act 1924* (Tas); *Criminal Appeal Act 1914* (Vic); *Criminal Code Amendment Act 1911* (WA).

[23] *Skinner v The King* (1913) 16 CLR 336, 340 (Barton ACJ). See also *House v The King* (1936) 55 CLR 499, 505 (Dixon, Evatt and McTiernan JJ): 'If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed ...'.

[24] *Kirk* (2010) 239 CLR 531, 580-1 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[25] Cf Applicant's submissions, 10-1 [42].

[26] Cf *Kirk* (2010) 239 CLR 531, 580 [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

sentences was an exercise of the prerogative of mercy. Judicial review of sentences imposed on a 'wrong principle', and for manifest excess, was not available until the enactment, well after federation, of legislation providing for appeals against sentence. That is not to suggest that criminal sentencing forms an exception to the principle articulated in *Kirk*: rather, it demonstrates that acting on a 'wrong principle' has long been regarded as *within* a sentencing court's jurisdiction.

13. As the authorities to which the applicant refers[27] show, a sentencing decision will be affected by jurisdictional error where a court imposes a sentence which is unavailable[28] or fails to fulfil a statutory pre-condition on the exercise of the power.[29] A sentence will also be affected by jurisdictional error where the conviction itself was imposed in excess of jurisdiction.[30] However, none of the cases relied upon by the applicant deny what history demonstrates: that the imposition of a manifestly excessive sentence by reference to a 'wrong principle' is *not* an error going to jurisdiction (unless made so by the relevant statutory provision).

14. Three further points should be made.

15. *First,* ordinary principles support the same conclusion. In *Craig v South Australia*,[31] this Court made clear that questions about jurisdiction – that is, 'the scope of authority that is conferred on a repository'[32] – must be approached bearing in mind the 'critical distinction which exists between administrative tribunals and courts of law'.[33] It is true that at 'a State level that distinction may not always be drawn easily'.[34] Yet as *Burns v*

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27 Applicant's submissions, 15 [56] n 65.

28 *DPP v Edwards* (2012) 44 VR 114 (where the statute did not provide for a suspended sentence); *R v Hannan; Ex parte Abbott* (1986) 29 A Crim R 178; *Attorney-General (NSW) v Dawes* [1976] 1 NSWLR 242 (where the sentences exceeded the statutory maximum).

29 *Firth v County Court (Vic)* (2014) 244 A Crim R 374; *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1.

30 *Kirk* (2010) 239 CLR 531, 574-5 [74] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Collier v Director of Public Prosecutions* (NSW) [2011] NSWCA 202.

31 (1995) 184 CLR 163 ('*Craig*').

32 *Hossain* (2018) 264 CLR 123, 132 [23] (Kiefel CJ, Gageler and Keane JJ).

33 *Craig* (1995) 184 CLR 163, 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

34 *Kirk* (2010) 239 CLR 531, 573 [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Corbett shows,[35] the distinction must be drawn because it is critical in determining questions of jurisdiction. The conclusion that the District Court of South Australia is a 'court of law' may be drawn 'readily'.[36] The fact that a body is a 'court' has long been relevant to the construction of statutes conferring jurisdiction.[37]

16. *Craig* establishes that where a court goes wrong in identifying the relevant issues or formulating the relevant questions, fails to take into account a relevant matter or relies on some irrelevant matter, the errors 'will not ordinarily involve jurisdictional error.'[38] That is because courts are ordinarily 'entrusted with authority to identify, formulate and determine' questions of law, fact and evidence.[39]

17. The approach in *Craig* does not attempt to describe any 'metaphysical absolute'.[40] It was informed by, and accommodates, practical considerations and the constitutional context. As to the constitutional context, the Court in *Craig* noted that:[41]

> [T]he inferior courts of this country are constituted by persons with either formal legal qualifications or practical legal training. They exercise jurisdiction as part of a hierarchical legal system entrusted with the administration of justice under the Commonwealth and State Constitutions.

18. As to practical considerations, relevant in *Craig* (as in *Parisienne Basket Shoes*), was the fact that a narrow approach to the jurisdiction of inferior courts to decide legal and factual questions has the result that 'the validity of the proceedings and orders must always remain an outstanding question until some other court or tribunal, possessing power to determine that question' decides it.[42] Considerations of inconvenience[43] are

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35 *Burns v Corbett* (2018) 92 ALJR 423, 435 [43], 437 [50] (Kiefel CJ, Bell and Keane JJ), 441 [68]-[69] (Gageler J), 457 [146] (Nettle J), 466 [199] (Gordon J). See also *Attorney-General (NSW) v Gatsby* (2018) 99 NSLWR 1; *Attorney-General (SA) v Raschke* [2019] SASCFC 83; *Owen v Menzies* [2013] 2 Qd R 327.

36 *Kirk* (2010) 239 CLR 531, 573 [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

37 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, 391-2 (Dixon J) ('*Parisienne Basket Shoes*').

38 *Craig* (1995) 184 CLR 163, 180 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

39 *Craig* (1995) 184 CLR 163, 180 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

40 *Hossain* (2018) 264 CLR 123, 131 [19]-[20] (Kiefel CJ, Gageler and Keane JJ); *Kirk* (2010) 239 CLR 531, 570-1 [64] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

41 *Craig* (1995) 184 CLR 163, 176 (Brennan, Deane, Toohey, Gaudron and McHugh JJ). See also *Burns v Corbett* (2018) 92 ALJR 423, 432-3 [20]-[22] (Kiefel CJ, Bell and Keane JJ).

42 *Parisienne Basket Shoes* (1938) 59 CLR 369, 391-2 (Dixon J). See also *Kable No 2* (2013) 252 CLR 118, 135 [39] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

particularly acute in the context of sentencing. If every erroneous and excessive sentence imposed by an inferior court was affected by jurisdictional error:[44]

> ... the successful appellant against the length of sentence would be a person who had been unlawfully imprisoned as from the date of his conviction and removal to gaol until the time when the Court of Criminal Appeal so pronounced; and all measures of restraint exercised on him (not merely by retaining him in gaol but in other ways) in that interim period would be, at least in theory, tortious wrongs committed against him.

19. As was observed in *New South Wales v Kable*, there 'must come a point in any developed legal system where decisions made in the exercise of judicial power are given effect despite the particular decision later being set aside or reversed. That point may be marked in a number of ways'.[45] One of the ways that point is marked is by treating as within jurisdiction, errors of law made by inferior courts in determining sentencing principles, and the imposition of manifestly excessive sentences.[46]

20. *Second*, the error of the sentencing court in the applicant's case was no more than the identification and application of a 'wrong principle', leading to a manifestly excessive sentence.

21. In *R v D* (to which Slattery DCJ referred in sentencing the applicant) Doyle CJ correctly recognised that, for offences such as that created by s 50(1), the sentence would need to be determined by reference to each act of sexual exploitation, as if the accused had been

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[43] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 392 [97] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*'); *Parisienne Basket Shoes* (1938) 59 CLR 369, 391-2 (Dixon J).

[44] *Hancock v Prison Commissioners* [1960] 1 QB 117, 125-6 (Winn J), cited in *Director of Public Prosecutions (DPP) v TY* (2009) 24 VR 705 ('*TY*'). Justice Winn's comments were directed to the consequences that would follow from treating a sentence 'quashed' on appeal as void ab initio. The Court in *TY* observed that: 'It is necessary that a court order imposing sentence be – and be treated as – valid and enforceable unless and until it is set aside (whether after a successful conviction appeal or after a successful sentence appeal)': at 712 [27].

[45] *Kable No 2* (2013) 252 CLR 118, 135 [38] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[46] The applicant relies upon Deane J (in dissent) in *Veen v The Queen (No 2)* (1988) 164 CLR 465. His Honour there spoke of 'the power' of a Court in imposing punishment being 'limited to what is justified as punishment for the crime itself': at 491. It is doubtful that his Honour intended to identify a *jurisdictional* limit beyond which a sentence imposed would be 'invalid', as opposed to affected by appellable error. Similar observations apply to the applicant's reliance upon statements in *Cheung v The Queen* (2001) 209 CLR 1. See Applicant's submissions at 13 [50]-[52].

convicted of each of those offences.[47] However, Doyle CJ also said that it would be 'sufficient [for the judge] to make an assessment in a general way of the frequency of the offending'.[48] In *R v Chiro*, the Full Court of the Supreme Court of South Australia, applying the principle in *Cheung v The Queen*,[49] had held that 'the factual basis for sentence is a matter for the trial judge', and 'the usual rules as to the judge's approach to sentencing applied'.[50] In sentencing the applicant, the judge was bound to apply the authorities as they stood.

22. Those statements of principle are now known to have been wrong. In *Chiro* – decided after the applicant had been sentenced – this Court held that, in light of the principle in *R v De Simoni*,[51] an offender convicted of an offence against s 50(1), 'will have to be sentenced on the basis most favourable to the offender' (unless the jury has indicated which acts of sexual exploitation it found to be proved).[52]

23. Accordingly, it may be accepted that the District Court acted on a 'wrong principle' when it applied the authorities as they stood at the time. However, in doing so, the Court did not 'misconceive the nature of [its] function',[53] which was to determine the applicable sentencing principles and then to sentence the applicant for the offence of which he had been convicted. Nor does it follow from the fact that the applicant should have been sentenced in accordance with the different principle, subsequently stated by this Court in *Chiro*, that he was not sentenced 'for the offence' of which he was convicted.[54]

24. *Third*, nothing in the statutes conferring authority on the District Court to sentence the applicant indicates that the Parliament intended that an error of the kind made by the sentencing court, 'means invalidity' for the sentence.[55]

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47 *R v D* (1997) 69 SASR 413, 420-1 (Doyle CJ). See *Chiro* (2017) 260 CLR 425, 447 [44] n 62.

48 *R v D* (1997) 69 SASR 413, 420 (Doyle CJ).

49 *Cheung v The Queen* (2001) 209 CLR 1.

50 *R v Chiro* (2015) 123 SASR 583, 591 [35] (Vanstone J), 592 [42] (Kelly J), 592 [43] (David AJ).

51 (1981) 147 CLR 383. See *Chiro* (2017) 260 CLR 425, 447-8 [44] (Kiefel CJ, Keane and Nettle JJ).

52 *Chiro* (2017) 260 CLR 425, 451 [52] (Kiefel CJ, Keane and Nettle JJ).

53 *Craig* (1995) 184 CLR 163, 177-8 (Brennan, Deane, Toohey, Gaudron and McHugh JJ). Cf Applicant's submissions, 14 [55].

54 Applicant's submissions, 13-4 [50]-[55].

55 *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83, 100 [35] (Gageler J) ('*Duncan*'), citing *Hickman; Ex parte Fox* (1945) 70 CLR 598, 616 (Dixon J).

25. Section 9(1) of the *District Court Act 1991* (SA) gives the District Court jurisdiction to try any offence other than offences of treason or murder. Section 9(2) provides that that Court 'has jurisdiction to convict and sentence, or to sentence, a person found guilty on trial, or his or her own admission, of such an offence'.

26. The jurisdiction conferred in the *District Court Act* is governed by the *Sentencing Act 2017* (SA). Section 10(1) of that Act provides that 'in determining the sentence for an offence, a court must apply (although not to the exclusion of any other relevant principle) the common law concepts reflected in the following principles

(a) proportionality;

(b) parity;

(c) totality;

(d) the rule that a defendant may not be sentenced on the basis of having committed an offence in respect of which the defendant was not convicted.'

27. It is to be doubted that s 10(1) is a statutory constraint intended to lead to invalidity wherever a court misapplies the 'common law concepts reflected in' the principles of proportionality, parity or totality.[56] Such errors ground relief on appeal,[57] but remain 'authorised'. The same may be said of the 'common law concepts reflected in ... the rule' articulated in s 10(1)(d). As the history of the litigation in *Chiro* demonstrates, the common law concepts reflected in that rule, their interaction with 'any other relevant principle', and how they apply in any particular case, are contestable.[58] In light of the principle in *Parisienne Basket Shoes*,[59] it is not possible to construe s 10(1) as identifying jurisdictional limits on the discretion of a sentencing court.

28. For those reasons, sentences affected by errors which are identified in paragraphs (a) and (b) of s 9(1), are not necessarily affected by jurisdictional error.

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[56] Cf *Project Blue Sky* (1998) 194 CLR 355, 391 [95] (McHugh, Gummow, Kirby and Hayne JJ).

[57] *House v The King* (1936) 55 CLR 499, 505 (Dixon, Evatt and McTiernan JJ).

[58] *Chiro v The Queen* (2015) 123 SASR 583, 590-1 [34]-[35] (Vanstone J), 592 [42] (Kelly J), 592 [43] (David AJ); *Chiro* (2017) 260 CLR 425, 460-5 [83]-[92] (Edelman J).

[59] (1938) 59 CLR 369, 391-2 (Dixon J).

Section 9(1) enacts a retrospective and substantive change to the law

29. Section 9(1) engages two relevant principles of construction.[60] First, in South Australia (as elsewhere[61]) 'a construction [of a statutory provision] that would promote the purpose or object of the Act ... must be preferred'.[62] Second, where a choice is available, a court must choose a construction that will not result in invalidity.[63]

30. The purpose of s 9(1) is readily identified: it is to 'negate the effect of the determination of the High Court in *Chiro v The Queen* [2017] HCA 37.'[64] In order to achieve that purpose, s 9(1) has been drafted in a form similar to other provisions which this Court has held to 'attach new legal consequences and a new legal status to things done which otherwise would not have had such legal consequences or status.'[65]

31. Prior to the enactment of s 9(1), the sentence imposed on the applicant had the legal consequence of authorising his imprisonment.[66] That is not the 'new' legal consequence which s 9(1) attaches to the sentence. Instead, s 9(1) identifies certain sentences,[67] and then attaches to those sentences the additional legal consequences of a sentence which is *unaffected by error* and is not *manifestly excessive* 'merely because' of the errors identified in paragraphs (a) and (b) of s 9(1).[68] In this way, s 9(1) should be read 'as if it said that the rights and duties [of persons] should be the same as they would be',[69] as if the sentences were (and always had been) unaffected by the identified (non-jurisdictional) errors.

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60 *Duncan* (2015) 256 CLR 8, 100-1 [39] (Gageler J).

61 Cf *CIC Insurances Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

62 See s 22, *Acts Interpretation Act 1915* (SA).

63 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 644 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also s 22A, *Acts Interpretation Act 1915* (SA).

64 See the note to s 9(3).

65 *Duncan* (2015) 256 CLR 83, 98 [25] (French CJ, Kiefel, Bell and Keane JJ). See also *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495, 579 (Dixon J) ('*Nelungaloo*'); *Re Humby; Ex parte Rooney* (1973) 129 CLR 231, 239 (McTiernan J), 243-4 (Stephen J), 248-50 (Mason J) ('*Re Humby*').

66 Unless it was affected by some other jurisdictional error upon which the applicant has not relied.

67 That is, 'A sentence imposed on a person, before the commencement of this section, in respect of an offence against s 50 of the *Criminal Law Consolidation Act 1935* (as in force before the commencement of section 6 of this Act)'. Cf Respondent's submissions, 5 [23]-[24].

68 Cf *Australia Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, 137 [36] (French CJ, Crennan and Kiefel JJ).

69 *Nelungaloo* (1947) 75 CLR 495, 579 (Dixon J), cited in *Duncan* (2015) 256 CLR 83, 96 [19] (French CJ, Kiefel, Bell and Keane JJ).

32. The sentences which s 9(1) takes as its subject were either valid and legally effective prior to the enactment of s 9(1), or were invalid for reasons which are not cured by s 9(1). It follows that s 9(1) does not 'impose punishment'.[70] The practical consequence of s 9(1)'s regulation of rights and duties is to render appeals against the identified sentences unmeritorious insofar as the appeal relies upon errors of the kind identified in paragraphs (a) and (b) of s 9(1). The applicant, for example, will be unable to show the necessary 'error such that [he] should be resentenced'.[71] It is, however, 'plain enough that the circumstance that a statute affects rights in issue in pending litigation has not been thought to involve any invasion of the judicial power'.[72]

33. So understood, s 9(1) regulates rights and liabilities by reference to certain sentences, but it does not 'affect' the sentences which it takes as its subject.[73] Section 9(1), as the applicant contends, 'contemplates and intends that the original sentence itself will continue to have effect *as a sentence*.'[74]

The applicant's submissions for invalidity fail

Section 9(1) is not an 'impermissible direction' to an appellate court

34. The applicant's first and 'primary' contention is that s 9(1) 'is properly to be characterised as having the purpose and substantive effect of directing an appellate court in relation to the manner and/or outcome of its appellate jurisdiction'.[75] That submission presupposes s 9(1) does not affect any substantive alteration of rights and liabilities, or any retrospective change to the law. Given the matters identified at [29] to

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[70] Cf *Haskins v The Commonwealth* (2011) 244 CLR 22, 37 [26] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). Even if s 9(1) did impose punishment, it would not necessarily follow that it was invalid. The applicant was convicted after a trial by jury which resulted in a verdict of guilty. In that context, it is difficult to see any relevant distinction in substance between a mandatory sentence formally imposed by a judge, and the imposition of a penalty by a State statute after conviction. Such a regime might infringe the separation of powers, but would not engage the functionalist, rather than formalist, concerns of the *Kable* principle: see *Wainohu v New South Wales* (2011) 243 CLR 181, 212 [52] (French CJ and Kiefel J). Cf *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 431 [60] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[71] See s 159(7)(a), *Criminal Procedure Act 1921* (SA) (unless, of course, he can establish some other error).

[72] *Re Humby* (1973) 129 CLR 231, 250 (Mason J). See also *Duncan* (2015) 256 CLR 83, 98 [26] (French CJ, Kiefel, Bell and Keane JJ).

[73] Cf *Re Macks* (2000) 204 CLR 158, 179 [31] (Gleeson CJ).

[74] Applicant's submissions, 8 [37].

[75] Applicant's submissions, 7-8 [34].

[33] above, and what the provisions says,[76] the applicant's construction of s 9(1) should be rejected. Section 9(1) does not direct a court to dismiss an appeal on a basis inconsistent with the actual legal rights of an appellant: instead, it alters those rights.[77]

35. However, even if the applicant were right to submit that s 9(1) effects no retrospective change to rights and liabilities, his submission that s 9(1) is an impermissible direction to an appellate court should be rejected.

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36. A right to appeal (or to apply for leave to appeal) exists only if created by statute.[78] The nature and extent of any appeal is a matter for the legislature which creates the right. As a 'creature of statute … subject to constitutional limitations, the precise nature of appellate jurisdiction will be expressed in the statute creating the jurisdiction or inferred from the statutory context'.[79]

37. The South Australian Parliament has provided for appeals against sentence. The
20 appellate court must dismiss such appeals unless 'it thinks that the sentence is affected by error such that the defendant should be resentenced.'[80] On the assumption (contrary to the above submissions) that s 9(1) does not affect rights or retrospectively alter the law, its effect must be to preclude certain errors from justifying the allowing of an appeal. That is, on the appellant's construction, s 9(1) would become part of the statutory context which identifies 'the precise nature' of the appellate jurisdiction conferred. So much can be seen from the use in s 9(1) of the language of 'error' and
30 'manifestly excessive': those are concepts which (as the history discussed above shows) are peculiar to *appeals* against sentence.

38. Construed in that way, s 9(1) is not an impermissible direction to the courts 'as to the manner and outcome of the exercise of *their* jurisdiction'.[81] It is an unremarkable, and

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[76] In particular, the words 'taken … always to have been' are inconsistent with the applicant's construction.

40 [77] *Duncan* (2015) 256 CLR 83, 98 [27] (French CJ, Kiefel, Bell and Keane JJ), 100 [37]-[38] (Gageler J). Cf Applicant's submissions, 8 [34].

[78] *Lacey* (2011) 242 CLR 573, 578 [8] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[79] *Lacey* (2011) 242 CLR 573, 596 [56] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). That 'an appeal does not lie, unless expressly given by statute', has long been recognised: see, for eg, *R v Hanson* (1821) 4 B & Ald 519, 521; 106 ER 1027, 1028 (Abbott CJ).

[80] Section 158(7)(a) of the *Criminal Procedure Act 1921* (SA).

[81] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1998) 176 CLR 1, 36-7 (Brennan, Deane and Dawson JJ). See also Applicant's submission, 7-8 [34].

transparent,[82] regulation of the nature and extent of an appeal against sentence. Section 9(1) does not 'direct an appellate court *that it is to hold*' that certain erroneous and manifestly excessive sentences do not have that character.[83] A court cannot 'hold' anything in relation to these errors, because (on this construction) the effect of the section is simply to remove the errors from those which may justify allowing an appeal.

39. Given that appeals are statutory, there was nothing to prevent the South Australian legislature completely removing the statutory right of appeal against sentence, for any sentence imposed for an offence against section 50 of the *Criminal Law Consolidation Act 1935*. It is therefore difficult to see how s 9(1), which takes the less draconian approach of removing the availability of particular grounds of appeal, might infringe *Kable* or any other limit on State legislative power.

40. Accordingly, even if s 9(1) has no retrospective operation, it is not an impermissible direction to an appellate court, and does not infringe the principle in *Kable v Director of Public Prosecutions*.[84]

Section 9(1) does not infringe the principle in *Kirk*

41. For the reasons given above (at [8] to [28]), the principle articulated in *Kirk* is not engaged. The sentence imposed on the applicant was not affected by jurisdictional error.

42. However, there is an additional reason why the applicant's *Kirk* argument should not succeed, even if it is assumed, in his favour, that s 9(1) has no retrospective operation. In light of s 22A of the *Acts Interpretation Act 1915* (SA), if s 9(1) did operate invalidly to preclude judicial review of jurisdictional error, that invalid operation could be severed from the valid operation of s 9(1) in relation to appeals.[85] Section 9(1) would continue to dictate the result of this appeal, and it would not be necessary for the Court to determine the *Kirk* point in order to 'do justice' in this case.[86] Moreover, there is

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82 Cf Applicant's submissions, 8 [36].

83 Applicant's submissions, 8 [34] (emphasis added). Cf *Nicholas v The Queen* (1998) 193 CLR 173, 188 [20] (Brennan CJ).

84 (1996) 189 CLR 51.

85 *Knight v Victoria* (2017) 261 CLR 306, 324-5 [32]-[35] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Clubb v Edwards* (2019) ALJR 448, 480 [139]-[141] (Gageler J).

86 *Clubb v Edwards* (2019) 93 ALJR 448, 466 [36] (Kiefel CJ, Bell and Keane JJ). See also *Lambert v Weichelt* (1954) 28 ALJ 282.

nothing in the circumstances of this case which would take it outside the ordinary practice of the Court, not to decide constitutional questions in such circumstances.[87]

Section 9(1) does not infringe the principle in *Kable*

43. One consequence of the construction of s 9(1) identified above (at [29] to [33]) is that the applicant will be unable to appeal against his sentence on the basis of the errors identified in paragraphs (a) and (b) of s 9(1). In doing so, s 9(1) does not infringe *Kable*: there is no constitutional requirement that demands the applicant be sentenced in accordance with the principle outlined in *Chiro*. On this point, Queensland adopts the submissions of the Respondent and the Attorney-General for South Australia,[88] and emphasises the following points.

44. *First*, unlike s 9(2) (which has been held to be invalid[89]), s 9(1) does not confer any function on the District Court of South Australia, nor require the performance of a function in a particular way.[90] Instead, in the way described above (at [29] to [33]), s 9(1) preserves the legal relationships created by the sentence imposed by the District Court. The District Court determined for itself, in light of the authorities as they then stood, the manner in which that judicial power was exercised.[91] In contrast, s 9(2) directs courts to approach the sentencing task in a particular way. The applicant's attempt to equate s 9(1) with s 9(2) fails for this reason.[92] Even if *Question of Law Reserved (No 1 of 2018)* is correct, s 9(1) does not impair, let alone 'substantially impair', the 'institutional integrity'[93] of the District Court.

45. *Second*, the joint reasons in *Chiro* suggest that if, for the purposes of sentencing for an offence against s 50(1), a judge determines which underlying acts of sexual exploitation are proved, 'it would not be trial by jury'.[94] That may be accepted, but it does not follow

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87 Cf *Clubb v Edwards* (2019) 93 ALJR 448, 466 [37]-[40] (Kiefel CJ, Bell and Keane JJ).

88 Respondent's submissions, 11-9 [46]-[78].

89 *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128.

90 *Duncan* (2015) 256 CLR 83, 98 [27] (French CJ, Kiefel, Bell and Keane JJ). Cf *NAAJA* (2015) 256 CLR 569, 593-5 [39] (French CJ, Kiefel and Bell JJ).

91 See further Respondent's submissions, 13 [54].

92 Applicant's submissions, 15 [59], 17 [63].

93 'Institutional integrity' is here used in the sense described in *NAAJA* (2015) 256 CLR 569, 593-5 [39] (French CJ, Kiefel and Bell JJ).

94 *Chiro* (2017) 260 CLR 425, 451 [52] (Kiefel CJ, Keane and Nettle JJ).

that it is beyond State legislative power to authorise a sentencing process of that kind. Section 80 of the Constitution does not apply to the trial on indictment (or otherwise) of offences against State laws.[95] Indeed, the terms of s 80 reinforce the conclusion that the South Australian legislature could, if it wished, provide for all trials on indictment to be heard by a judge alone.[96] A State legislature could make the jury the trier of certain facts (for example, the *actus reus*), and the judge the trier of others facts (for example, the *mens rea*). Similarly, a State legislature could treat a jury's verdict on the matters alleged in an indictment 'as a trigger for the court to determine', for sentencing purposes, 'which of [the acts constituting the *actus reus* of an offence] were proven to the court's satisfaction beyond reasonable doubt'.[97] Such a law is no more incompatible with the institutional integrity of State courts, than the common form criminal appeal proviso, which requires an 'appellate court [to] make its own independent assessment of the evidence, and determine whether … the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty'.[98] Moreover, the statements made in this Court regarding the history and importance of trial by jury,[99] were not directed at, and do not assist in, identifying limits on State legislative power.

46. *Thirdly*, the institutional integrity of State courts is not compromised merely because legislation provides for 'novel procedures',[100] or the legislature invests a court with powers which are repugnant to 'the traditional judicial process'.[101] It is therefore difficult to see how the institutional integrity of South Australian courts is impaired by legislation providing that the law in relation to sentencing is as those courts had determined it to be, prior to this Court's decision in *Chiro*.

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95 *Rizeq v Western Australia* (2017) 262 CLR 1, 18 [32] (Kiefel CJ), 20 [41] (Bell, Gageler, Keane, Nettle and Gordon JJ), 74 [204] (Edelman J).

96 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 600 [40] (McHugh J).

97 *Question of Law Reserved (No 1 of 2018)* [2019] SASCFC 128, [140] (Hinton J); Applicant's submissions, 16-7 [61]-[63].

98 *Weiss v The Queen* (2005) 224 CLR 300, 316 [41] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ). It is unclear whether this task could be given to a court in respect of a federal offence which must be tried in accordance with s 80: 317-8 [46] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

99 See the various statements set out in *Question of Law Reserved (No 1 of 2018)* [2019] SASCFC 128, [143]-[147] (Hinton J).

100 *Condon v Pompano* (2013) 252 CLR 38, 100 [157] (Hayne, Crennan, Kiefel, Bell JJ).

101 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 600-1 [41] (McHugh J).

PART V: Time estimate

47. Queensland estimates that 15 minutes will be required for the presentation of oral argument.

Dated: 29 October 2019

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ANNEXURE TO THE WRITTEN SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

List of relevant constitutional provisions, statutes and statutory instruments

1. The relevant constitutional provisions, statutes and statutory instruments referred to in these submissions are:

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(a) *Acts Interpretation Act 1915* (SA) (at current version 3 October 2017);

(b) *Criminal Appeal Act 1907* (UK) (at historical version assented to 28 August 1907);

(c) *Criminal Appeal Act 1912* (NSW) (at historical version assented to 16 April 1912);

(d) *Criminal Appeal Act 1914* (Vic) (at historical version assented to 30 December 1914);

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(e) *Criminal Appeals Act 1924* (SA) (at historical version assented to 6 November 1924);

(f) *Criminal Code Act 1924* (Tas) (at historical version assented to 4 April 1924);

(g) *Criminal Code Amendment Act 1911* (WA) (at historical version assented to 31 December 1911);

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(h) *Criminal Code Amendment Act 1913* (Qld) (at historical version assented to 26 November 1913);

(i) *Criminal Law Consolidation Act 1935* (SA) (at historical version 23 October 2017);

(j) *Criminal Procedure Act 1921* (SA) (at current version 22 October 2018);

(k) *District Court Act 1991* (SA) (at historical version 23 May 2017);

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(l) *Sentencing Act 2017* (SA) (at historical version 18 July 2017); and

(m) *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) (at current version assented to 24 October 2017).