IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY **No. A20 of 2019**

BETWEEN: **KMC**

Applicant

and

10 **DIRECTOR OF PUBLIC PROSECUTIONS (SA)**

Respondent

SUBMISSIONS OF THE RESPONDENT AND THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

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Part I: INTERNET PUBLICATION

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

Part II: ISSUES ON APPEAL

2. The issue on appeal is whether s 9(1) of the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) ("**the Amendment Act**") validly applies to the Applicant's appeal against his sentence for one count of persistent sexual exploitation of a child, committed contrary to s 50(1)[1] of the *Criminal Law Consolidation Act 1935* (SA) ("***CLCA***").

3. That issue raises whether, properly construed, s 9(1):

10 3.1. applies to the Applicant's appeal; and

3.2. if it does so apply, is invalid for offending Ch III of the Constitution because:

3.2.1. it constitutes a legislative direction to a court as to the manner and/or outcome of the exercise of its appellate jurisdiction;

3.2.2. it purports to withdraw from the Supreme Court of South Australia its power to grant relief for jurisdictional error committed by an inferior court of record, namely the District Court of South Australia; or

3.2.3. it impairs the institutional integrity of a court by retrospectively authorising the sentencing court, where the acts of sexual exploitation found proved by the jury are unknown, to sentence on the basis of the acts found proved

20 beyond reasonable doubt to the satisfaction of the sentencing judge.

Part III: SECTION 78B OF THE *JUDICIARY ACT 1903*

4. Notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) has been given.

5. The Attorney-General for the State of South Australia intervenes pursuant to s 78A of the *Judiciary Act 1903* in support of the Respondent. These submissions are made jointly by the Respondent and the Attorney-General for the State of South Australia.

Part IV: CONTESTED MATERIAL FACTS

6. The Applicant's statement of material facts is accepted.

Part V: ARGUMENT ON APPEAL

Summary of contentions

30 7. The Applicant's applications for an extension of time and for permission to appeal are

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[1] As in force prior to its substitution by s 6 of the Amendment Act. References in these submissions to s 50 of the *Criminal Law Consolidation Act 1935* (SA) are references to the provision as then in force.

not opposed. However, the Applicant's appeal ought to be dismissed.

8. Section 9(1) of the Amendment Act, on its terms, applies to the appeal.

9. Properly construed, s 9(1) effects a substantive change to the sentencing law governing the Applicant's sentence. It is a valid enactment of the South Australian Parliament.

   9.1. Section 9(1) does not constitute a legislative direction as to the manner and outcome of the exercise of its appellate jurisdiction.

   9.2. The supervisory jurisdiction of the Supreme Court of South Australia remains unaffected.

   9.3. Section 9(1) is relevantly distinguishable from s 9(2). *Question of Law Reserved (No.1 of 2018)*[2] was, in any event, wrongly decided.

Section 9(1) of the Amendment Act: Context

10. As the source of the only mischief to which s 9(1) is directed,[3] *Chiro v The Queen*[4] provides essential context to the construction exercise.

Chiro*: Two issues of common law principle*

11. *Chiro* raised "*two issues of common law principle*".[5] The first concerned the proper exercise of the discretion to ask questions of a jury concerning the acts of sexual exploitation it found proved, as the basis for its verdict of guilty on a charge pursuant to s 50(1).[6] The second concerned the appropriate factual basis for sentencing for such an offence where the acts of sexual exploitation the jury found proved are unknown.[7]

12. As to the first, a majority of this Court held that when an accused is tried before a judge and jury for an offence against s 50(1) and the jury returns a general verdict of guilty, for the purposes of sentencing "*the judge should request that the jury identify the underlying acts of sexual exploitation that were found to be proved unless it is otherwise apparent to the judge which acts of sexual exploitation the jury found to be proved*".[8] Failure to do so may amount to an error in the exercise of the discretion.[9]

13. As to the second, this Court enunciated a common law solution to the problem of

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[2] [2018] SASCFC 128 ("***Question of Law Reserved***").
[3] See the Amendment Act s 9, Note.
[4] (2017) 260 CLR 425 ("***Chiro***").
[5] *Chiro v The Queen* (2017) 260 CLR 425, [61] (Bell J).
[6] *Chiro v The Queen* (2017) 260 CLR 425, [1], [46] (Kiefel CJ, Keane and Nettle JJ), [61] (Bell J).
[7] *Chiro v The Queen* (2017) 260 CLR 425, [52]-[53] (Kiefel CJ, Keane and Nettle JJ), [68], [74] (Bell J).
[8] *Chiro v The Queen* (2017) 260 CLR 425, [1] (Kiefel CJ, Keane and Nettle J), [67] (Bell J).
[9] See *Chiro v The Queen* (2017) 260 CLR 425, [46] (Kiefel CJ, Keane and Nettle JJ).

sentencing for an offence against s 50(1) "*where the judge does not or cannot get the jury ... to identify which of the alleged acts of sexual exploitation the jury found to be proved*".[10] Its solution was a requirement that the sentencing court sentence "*on the basis most favourable to the offender*".[11] The common law mandate of this solution is the mischief to which s 9(1) is directed.

14. This Court's solution was consequent upon its intermediate finding that, as a matter of construction, Parliament had "*signified*"[12] by the form of s 50(1) that an offender was to be sentenced on the basis of the acts of sexual exploitation found by the jury to have been proved beyond reasonable doubt.[13] Two key integers of reasoning underpinned that intermediate finding.

15. The *first integer* was that s 50(1) required the jury to agree upon the acts of sexual exploitation it found proved beyond reasonable doubt.[14] This requirement for extended jury unanimity followed as a matter of statutory implication from Parliament providing that the *actus reus* of the offence was the doing of two or more underlying acts of sexual exploitation to a child over the course of three or more days.[15]

16. The *second integer* was the relevance of the principle recognised by this Court in *R v De Simoni*,[16] that "*no one should be punished for an offence of which he has not been convicted*".[17] That principle was described by the plurality as "*instructive*" in light of the relevance to sentencing of the sexual offences that proscribe the conduct comprising the underlying acts of sexual exploitation.[18]

17. Importantly, the principle in *De Simoni* did not apply directly to compel sentencing only for the acts of sexual exploitation the jury found proved, as "*an offence under s 50(1) is but one single offence*".[19] Notwithstanding the implication that the acts found by the jury ought to govern the factual basis for sentencing, and consistently with the

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[10] *Chiro v The Queen* (2017) 260 CLR 425, [52] (Kiefel CJ, Keane and Nettle J).
[11] *Chiro v The Queen* (2017) 260 CLR 425, [52] (Kiefel CJ, Keane and Nettle J), see also [74] (Bell J).
[12] *Chiro v The Queen* (2017) 260 CLR 425, [51] (Kiefel CJ, Keane and Nettle J).
[13] *Chiro v The Queen* (2017) 260 CLR 425, [44], [51] (Kiefel CJ, Keane and Nettle J), [73] (Bell J).
[14] *Chiro v The Queen* (2017) 260 CLR 425, [19] (Kiefel CJ, Keane and Nettle J), [59] (Bell J); *R v Little* (2015) 123 SASR 414, [11], [19] (the Court).
[15] *Chiro v The Queen* (2017) 260 CLR 425, [19], [51] (Kiefel CJ, Keane and Nettle JJ); see also *KBT v The Queen* (1997) 191 CLR 417, 422 (Brennan CJ, Toohey, Gaudron and Gummow JJ).
[16] (1981) 147 CLR 383, 389.
[17] *Chiro v The Queen* (2017) 260 CLR 425, [72] (Bell J), [26] (Kiefel CJ, Keane and Nettle JJ).
[18] *Chiro v The Queen* (2017) 260 CLR 425, [44] (Kiefel CJ, Keane and Nettle JJ); see also *R v D* (1997) 69 SASR 413, 420-421 (Doyle CJ), 428-429, 430 (Bleby J).
[19] *Chiro v The Queen* (2017) 260 CLR 425, [44] (Kiefel CJ, Keane and Nettle JJ); cf [72] (Bell J).

observation that s 50(1) constitutes a single offence, this Court accepted that where those jury findings are unknown, the verdict nevertheless remains certain[20] and the offender able to be sentenced.[21]

The problem of unknown jury findings

18. The order in *Chiro* to remit the matter for resentence embodies an acceptance that, where the acts found proved by the jury are unknown, sentencing an offender for acts other than those known *in fact* to have been found proved by the jury, is permissible.

19. The problem that the acts of sexual exploitation found proved by the jury are unknown engages difficult issues of public interest. On the one hand, there is the importance of ensuring an offender is not punished for acts not proved beyond reasonable doubt. On the other, there is the interest in ensuring that serious offending that is proved beyond reasonable doubt receives proportionate censure and punishment.[22] The latter issue is exacerbated in the case of s 50(1) offences by the generous statutory plea in bar afforded by s 50(5) to those prosecuted with the offence.

20. In the face of legislative silence on the point,[23] this Court enunciated the common law principle that, where the jury has not identified the acts of sexual exploitation that it found proved, the person is "*to be sentenced on the basis most favourable to the offender*".[24] This was to recognise an exception – grounded in the two integers of reasoning identified above – to the principle enunciated in *Cheung v The Queen*; namely, that a judge can make his or her own findings as to aggravating and mitigating circumstances in a manner consistent with the jury's verdict.[25]

Section 9(1) of the Amendment Act: Construction

21. The avowed purpose of s 9 of the Amendment Act is to "*negate[] the effect of the determination of the High Court in* Chiro".[26] An examination of the text, context and purpose[27] of s 9(1) reveals that it does so by retrospectively altering the substantive

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[20] *Chiro v The Queen* (2017) 260 CLR 425, [46] (Kiefel CJ, Keane and Nettle JJ), [59] (Bell J), [82] (Edelman J).
[21] *Chiro v The Queen* (2017) 260 CLR 425, [52]-[54] (Kiefel CJ, Keane and Nettle JJ), [74] (Bell J).
[22] *Everett v The Queen* (1994) 181 CLR 295, 306 (McHugh J).
[23] See *Nicholas v The Queen* (1998) 193 CLR 173, [38] (Brennan CJ).
[24] *Chiro v The Queen* (2017) 260 CLR 425, [52] (Kiefel CJ, Keane and Nettle JJ).
[25] *Cheung v The Queen* (2001) 209 CLR 1.
[26] Amendment Act s 9, Note.
[27] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69]-[70] (McHugh, Gummow, Kirby and Hayne JJ); *Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings* (2012) 250 CLR 503, [39] (the Court); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, [23]-[24] (French CJ and Hayne J), [88]-[89] (Kiefel J).

sentencing law applicable in matters where a sentence has been imposed on a person in respect of an offence against s 50(1). It alters that sentencing law by retrospectively expanding the range of acceptable sentencing processes to include sentencing that occurs in accordance with the conjunctive process described in s 9(1)(a) and (b).

22. The process described (and authorised) is one in which the acts of sexual exploitation found by the jury to have been proved beyond reasonable doubt are unknown, but where the court has resolved the problem by sentencing on the basis of the acts found by the sentencing court to have been proved beyond reasonable doubt. The effect is a retrospective expansion of the available sentencing processes that may be adopted by a court where a jury returns a general guilty verdict on a charge pursuant to s 50(1).

23. There are three distinct components to s 9(1) .

(i) First, the ***subject*** to which the provision applies, and upon which the operative component of the provision works: "*A sentence imposed on a person, before the commencement of this section, in respect of an offence against s 50 of the* [CLCA] *(as in force before the commencement of section 6 of* [the Amendment] *Act*".

(ii) Second, the compound ***verb*** that identifies the operative work performed on the provision's subject: "*is taken to be, and always to have been*".

(iii) Third, the ***object*** circumstance which the verb attributes to the provision's subject:
"*not affected by error or otherwise manifestly excessive merely because—*
(a) the trial judge did not ask ... ; and
(b) the sentencing court sentenced ...."

24. The ***subject*** confirms that it applies to any matter in which a sentence has been imposed for an offence against s 50(1) prior to 24 October 2017. Section 50(1) was substituted on that same date.[28] Section 9(2) addresses those cases where persons were yet to be sentenced for their offence against s 50(1). Section 9(1) consequently amends the law applicable to the past sentencing of *all* offences against s 50(1).

25. That the provision will only have practical work to do where the course taken by the sentencing court meets the description in subs (1)(a)-(b) is unremarkable, and does not indicate otherwise.[29] When a change in the law applies to a proceeding but is not, as a matter of practicality, engaged by the circumstances, it applies as part of the law that stipulates the contours of the court's powers, but is of no practical moment.

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[28] Amendment Act s 6.
[29] Cf Applicant's Written Submissions ("**AWS**") at [40].

26. For example, if a statute provides that a fine or term of imprisonment may be imposed for a particular offence, but the circumstances of a given case render the imposition of a fine inapt, the provision empowering imposition of a fine does not cease to apply to the sentencing court. The provision still identifies the contours of the court's sentencing powers but simply has no practical effect. The same is true of sentences imposed for s 50(1) prior to the Amendment Act but which were imposed other than in accordance with the circumstances set out in s 9(1)(a) and (b).

27. The ***verb*** deploys a familiar statutory formula that ensures the change operates "*retroactively*"[30] – "*that is, a retrospective law in the true sense ... which 'provides that as at a past date the law shall be* ***taken to have been*** *that which it was not*'".[31]

28. This confirms that s 9(1) effects a retrospective expansion of the sentencing court's powers. The words "*and always to have been*" would have no operation if the change targeted only prospective appellate review. That the provision is expressed to apply only to sentences "*imposed*" does not gainsay this conclusion. Where the substantive change to the sentencing law for a particular offence does not apply to any future sentencing tasks,[32] it would be artificial and misleading to express the provision in terms that suggested it governed future sentencing exercises.[33]

29. The ***object*** circumstance identifies the "*content*"[34] of the change to the applicable body of law; namely, the retrospectively expanded powers of the sentencing court. As a matter of form, it does so by articulating the exact set of conjunctive circumstances that, pursuant to that expansion, do not constitute error.

30. There is no one legislative technique for altering or amending the law.[35] This approach has the advantage of precision. Parliament has ensured that the content of the change effected to the body of substantive sentencing law goes no further than is necessary to negate (by retrospectively authorising an alternative procedure already adopted) the common law approach enunciated in *Chiro*.

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[30] Cf AWS at [40](1).
[31] *R v Kidman* (1915) 20 CLR 425, 443 (Isaacs J), citing *West v Gwynne* (1911) 2 Ch 12 (Buckley LJ) (emphasis added).
[32] Any future sentencing tasks are specifically dealt with by s 9(2) of the Amendment Act.
[33] Cf AWS at [40](3).
[34] Cf AWS at [40](2).
[35] *Duncan v Independent Commissioner against Corruption* (2015) 256 CLR 83, [12] (French CJ, Kiefel, Bell and Keane JJ).

31. This narrow tailoring is borne out by a comparison of the *ratio* with the text of s 9(1):

Ratio of the decision in *Chiro*	**Text of s 9(1)** (*emphasis added*)
A sentence imposed in respect of an offence against s 50(1) …	A sentence imposed on a person, *before the commencement of this section*, in respect of an offence against s 50(1)…
is affected by specific error; and/or is manifestly excessive; [53]	is *taken to be, and always to have been,* ***not*** affected by error or otherwise manifestly excessive
in circumstances where the trial judge did not ask any question of the trier of fact directed to ascertaining the acts of sexual exploitation found proved by the trier of fact beyond a reasonable doubt: [52]	*merely because* (a) the trial judge did not ask any question of the trier of fact directed to ascertaining which acts of sexual exploitation, or which particulars of the offence as alleged, the trier of fact found to have been proved beyond a reasonable doubt
In such circumstances, the person "will have to be sentenced on the basis most favourable to the [person]": [52]	and the person was ***not*** sentenced on the view of the facts most favourable to the person; and
The trial judge does not have a power to sentence having regard to the acts of sexual exploitation determined by the sentencing court to have been proved beyond a reasonable doubt: [50]	(b) the sentencing court sentenced the person consistently with the verdict of the trier of fact but having regard to the acts of sexual exploitation determined by the sentencing court to have been proved beyond a reasonable doubt.

Application to the Applicant's sentence

32. The Applicant's contention that s 9(1) does not apply to his sentence[36] gives the words in s 9(1)(b) "*consistently with the verdict*" an implausible construction.

33. The Applicant's contention assumes that the phrase in s 9(1)(b) means "*on the basis of the acts of sexual exploitation found proved by*" [the trier of fact].[37] That construction is immediately textually unlikely in light of the words that follow: "***but*** *having regard to the acts of sexual exploitation determined by the sentencing court to have been proved beyond a reasonable doubt*" (emphasis added). It becomes untenable once it is observed that it would render s 9(1)(a) and s 9(1)(b) logically incapable of co-existing.

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[36] AWS at [27]-[30].

[37] See AWS at [28]: "*if questions have not been asked of the jury, it could not be known what the verdict actually was*"; see also AWS at [29]: "*it cannot be known in the present case whether the trial Judge 'sentenced [the applicant] consistently with the verdict of the trier of fact*'".

As it would render s 9(1) otiose, the Applicant's construction ought not to be adopted.[38]

34. Rather, the "*consisten[c]y*" referred to in s 9(1)(b) necessarily refers to consistency with the ascertainable content of the general verdict delivered by the trier of fact in the absence of questions being asked. For example, where a guilty verdict was returned, a sentencing judge could not have concluded that only one act of sexual exploitation had been committed, or that multiple acts of sexual exploitation occurred but over a period of only 48 hours. This meaning of "*consisten[c]y*" is equivalent to the constraint on a sentencing court following a guilty plea to an offence against s 50(1); "*facts implicit in the verdict or the plea of guilty cannot be controverted*".[39]

10 35. The condition in s 9(1)(b) is satisfied. Section 9(1) applies to the Applicant's sentence.

Validity

36. The Applicant alleges s 9(1) to be invalid on three distinct bases. The success of the first two bases depends in each case upon whether, as a matter of construction, s 9(1) effects a substantive retrospective change to the body of sentencing law applicable to sentences imposed for offences against s 50(1).

First alleged basis: Legislative direction

37. The Applicant argues that s 9(1) is best characterised as a legislative direction to the Supreme Court, or this Court, as to the manner and outcome of the exercise of the appellate jurisdiction. He contends that s 9(1) "*compel[s] an appellate court to hold*
20 *that a sentence affected by error of the kind identified in pars (a) and (b) of s 9(1) (ie, error of the kind identified in* Chiro*) is not affected by error.*"[40]

38. It is uncontroversial that, at the State level as much as the Federal:

> *If a court ... makes a decision which involves the formulation of a common law principle or the construction of a statute, the Parliament ... can ... pass an enactment which changes the law as declared by the court. Moreover, such an enactment may be expressed so as to make a change in the law with deemed operation from a date prior to the date of its enactment.*[41]

39. The Applicant's allegation of an impermissible legislative direction to appellate courts thus depends upon characterising s 9(1) as failing to effect a retrospective substantive

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[38] *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297, 321 (Mason and Wilson JJ); *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565, 574 (Gummow J).

[39] *R v Storey* [1998] 1 VR 359, 366 (Winneke P, Brooking and Hayne JJA and Southwell AJA). See also *Chiro v The Queen* (2017) 260 CLR 425, [120] (Edelman J).

[40] AWS at [38].

[41] *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, [50] (French CJ, Crennan and Kiefel JJ).

change to the body of law governing sentencing for offences against s 50(1). That characterisation ought to be rejected.

40. For the reasons advanced above, properly construed, s 9(1) retrospectively expands the powers of a court imposing a sentence for an offence against s 50(1) so as to include within those powers the ability to sentence in accordance with the process identified in s 9(1)(a) and (b). In doing so, it retrospectively modifies the common law sentencing principle enunciated by this Court in *Chiro*.

41. The Applicant proffers several reasons[42] for denying that this characterisation is reasonably open. None is persuasive.

(1) The change to the law is given retrospective effect by the words "*taken ... always to have been*". If the provision purported only to direct prospective appellate exercises of jurisdiction, these words would have no operation.[43]

(2) The new substantive content of the law is articulated by setting out in s 9(1)(a) and (b) the precise process of sentencing the provision brings within the power of a sentencing court.[44] It is formalistic and illusory to suggest that the sentencing process authorised by s 9(1) is incapable of being determined until after a sentence has been passed.[45]

(3) That the change in the law is articulated by identifying the circumstances that do not amount to error has the advantage of precision. It ensures that no broader expansion to the sentencing courts' powers is effected than the minimum necessary to authorise retrospectively the course described in paras (a) and (b).

(4) That this drafting technique presupposes that the sentences to which it applies have already been imposed does not deny it the character of retrospectively amending the law governing those sentencing courts.[46] Rather, it represents a truism that all of the sentences to which the provision applies have, as a matter of fact, already been imposed. Where the operation of a retrospective change to the substantive body of law is triggered by a past event (here, a sentence imposed on a person before the commencement of s 9 for an offence against s 50(1)), the provision effecting that

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[42] AWS at [40].
[43] See above at [27]-[28]. Cf AWS at [40](1).
[44] See above at [29]-[31]. Cf AWS at [40](2).
[45] AWS at [40](5).
[46] Cf AWS at [40](3), (5).

change can obviously be expected to be cast in terms that recognise that the triggering event has already occurred.[47]

(5) The Applicant's suggestion that, by using the phrase "*is **taken** to be*", Parliament has failed to make the one change to the law it set out to make[48] echoes the submission rejected by this Court in *Duncan v Independent Commissioner of Corruption*.[49] There, the provision provided that anything done or purported to have been done by the Commission that would have been validly done if corrupt conduct for the purposes of the Act included "*relevant conduct*", was "*taken to have been, and always to have been, validly done*". The legislation did not explicitly declare that corrupt conduct had always included "*relevant conduct*". Nevertheless, this Court held that "*Parliament thereby changed the meaning of 'corrupt conduct', as a matter of substantive law, from the meaning given to that expression in Cuneen*".[50] There, as here, the notion that "*the brief but comprehensive provisions missed the only target at which they were directed*"[51] is indicative of an implausible construction.[52]

(6) The subject matter to which s 9(1) applies its change in sentencing law is *all* sentences imposed for offences against s 50(1) prior to the commencement of the Amendment Act. The provision redraws the contours of the sentencing court's powers in all sentencing for offences against s 50(1). That the provision will only have practical operation in circumstances where the course described in paras (a) and (b) was actually taken is unremarkable.[53]

42. Finally, s 22A(1) of the *Acts Interpretation Act 1915* (SA) requires the provision to be construed "*so as not to exceed the legislative power of the State*". Unless s 9(1) is incapable reasonably of being construed as effecting a retrospective alteration to the substantive sentencing law applicable in matters where a sentence has been imposed

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[47] See, eg, the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW) considered in *Duncan v Independent Commissioner Against Corruption* (2015) 256 CLR 83; *Paliflex Pty Ltd v Commissioner of State Revenue* [2002] NSWCA 351, [151]-[154] (Spigelman CJ, Stein and Heydon JJA agreeing).
[48] AWS at [40](3).
[49] (2015) 256 CLR 83.
[50] *Duncan v Independent Commissioner Against Corruption* (2015) 256 CLR 83, [12] (French CJ, Kiefel, Bell and Keane JJ).
[51] *Duncan v Independent Commissioner Against Corruption* (2015) 256 CLR 83, [8] (French CJ, Kiefel, Bell and Keane JJ).
[52] *Duncan v Independent Commissioner Against Corruption* (2015) 256 CLR 83, [10] (French CJ, Kiefel, Bell and Keane JJ).
[53] See above at [25]-[26]. Cf AWS at [40](4).

for an offence against s 50(1), then that is the construction it ought to be given.

43. So construed, the provision does not constitute a legislative direction to any Court as to the exercise and outcome of their appellate jurisdiction. The first alleged basis of invalidity ought to be rejected.

Second alleged basis: Preclusion of review for jurisdictional error

44. The Applicant's complaint that s 9(1) purports to withdraw from the Supreme Court of South Australia its power to grant relief for jurisdictional error, like his complaint as to legislative direction, turns upon whether the provision effects a retrospective alteration to the substantive body of sentencing law applicable for offences against s 50(1).[54]

10 45. The provision effects a substantive alteration to the applicable sentencing law. The relevantly entrenched[55] supervisory jurisdiction of the Supreme Court is unaffected.

Third alleged basis: Impermissible impairment of court's institutional integrity

46. By invoking the reasoning in *Question of Law Reserved (No 1 of 2018)*[56], the Applicant invokes the doctrine in *Kable v Director of Public Prosecutions (NSW)*.[57]

47. The implied limitation on State legislative power recognised by the *Kable* doctrine prevents a State Parliament from legislating so as to impair the "*institutional integrity*" of State courts as potential repositories of federal jurisdiction. The impairment of "*institutional integrity*" may be evident if the legislative provision removes or abrogates one of "*the defining characteristics of a court*",[58] principal among them the reality and

20 appearance of the court's decisional independence and impartiality from the political branches of government.[59] However, the *Kable* doctrine "*is not a surrogate for the application of a separation of powers doctrine to the States*".[60]

48. South Australia gives two responses to the Applicant's invocation of the reasoning in

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[54] AWS at [41].
[55] See *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[56] [2018] SASCFC 128.
[57] (1996) 189 CLR 51.
[58] *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, [63] (Gummow, Hayne and Crennan JJ).
[59] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [39]-[40] (French CJ, Kiefel and Bell JJ); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, [63]-[64] (Gummow, Hayne and Crennan JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, [44] (French CJ and Kiefel J).
[60] *Wainohu v New South Wales* (2011) 243 CLR 181, [52] (French CJ and Kiefel J); see also *Pollentine v Bleijie* (2014) 253 CLR 629, [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [124] (Hayne, Crennan, Kiefel and Bell JJ).

Question of Law Reserved. First, s 9(1) is relevantly distinguishable from s 9(2). Secondly, the reasoning in *Question of Law Reserved* is wrong.

Section 9(1) is relevantly distinguishable from s 9(2)

49. The *ratio* in *Question of Law Reserved*[61] is that s 9(2) comprised a legislative "*direction*"[62] or "*command*"[63] to a court in the process of adjudicating and punishing criminal guilt, that "*requires*"[64] or "*instructs*":[65] **(i)** that a "*controversy* [the findings of the jury concerning the acts of sexual exploitation committed] *resolved in the exercise of judicial power be re-opened and retried*";[66] **(ii)** "*because the outcome as determined in accordance with the law is unpalatable to the legislature*";[67] and in circumstances where **(iii)** that retrial of the issue is "*without a jury and the protections a jury provides*".[68] This was said to impair the institutional integrity of that court.[69]

50. Fundamental to the attempt to deploy the same reasoning in relation to s 9(1)[70] is the premise that legislative "***authorising** and **requiring***" can be equated.[71] However, there is an important distinction between (a) a change to the law that operates to expand retrospectively the permissible limits of the sentencing court's powers so as to *authorise* sentencing in accordance with an alternative solution to that espoused in *Chiro*, and (b) legislation that intercedes in a part-heard criminal proceeding, "*deems*" the verdict to have a particular content,[72] and *requires* that instead of adopting the *Chiro* solution, the sentencing court adopt a different basis for sentence.

51. "[A]*s a general proposition, it may be accepted that legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals*".[73] However, there is a "*distinction between a legislative grant of*

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[61] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, comprising Hinton J with whom Lovell J agreed. Vanstone J wrote separately.
[62] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [174].
[63] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [169].
[64] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [169], [175].
[65] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [172].
[66] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [169]-[170].
[67] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [175].
[68] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [172].
[69] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [175].
[70] AWS, [63].
[71] AWS, [59], [63] (emphasis added).
[72] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [38] (Vanstone J), [114] (Hinton J).
[73] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, [39] (Gummow, Hayne, Heydon and Kiefel JJ).

jurisdiction" and such a legislative direction.[74] Further, even if a relevant direction is established, the question for *Kable* purposes is whether such a direction impermissibly erodes the institutional integrity of a State court.[75]

52. The *Kable* principle is "*functionalist rather than formalist in character*".[76] Whether an enactment impairs the institutional integrity of a court depends upon "*the effect of the law upon the* ***functioning*** *of the courts*";[77] that is whether the legislation "***requires*** *the Court to* ***do something*** *which is not consistent with the assumption of independence and impartiality of courts underlying Ch III of the Constitution*".[78]

53. In operating retrospectively to change the law and thereby authorise past sentencing performed in a particular way, s 9(1) did not intersect with any judicial process pending at its commencement.[79] It speaks to prospective appellate proceedings and retrospectively to courts that have discharged the sentencing function. The intersection in each case simply changes the applicable sentencing law. For prospective appellate proceedings, the court's jurisdiction and functions remain identical. It is commonplace that appellate courts[80] apply the law as it stands at the time of the appeal, including any retrospective change effected by legislation passed since the original decision.[81]

54. The fundamental distinction is that, where s 9(1) applies, the sentencing court *determined for itself* the approach to be taken where the jury's findings as to the acts of sexual exploitation were unknown.[82] An appellate court examining such sentences for error applies, in an orthodox fashion, the applicable sentencing law that now governs those matters. Under s 9(2), the legislation intercedes in a part-heard proceeding and *requires* the court to sentence on the basis of the acts it found proved.

55. To effect "*simply a retrospective validation of an administrative act*" the validity of

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[74] *South Australia v Totani* (2010) 242 CLR 1, [133] (Gummow J).
[75] *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [55] (French CJ), [77] (Gummow and Bell JJ), [159] (Heydon J); *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522, [44]-[45] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[76] *Wainohu v New South Wales* (2011) 243 CLR 181 at [52] (French CJ and Kiefel J).
[77] *Kuczborski v Queensland* (2014) 254 CLR 51, [231] (Crennan, Kiefel, Gageler and Keane JJ) (emphasis added).
[78] *South Australia v Totani* (2010) 242 CLR 1 at [74] (French CJ), see also [213] (Hayne J).
[79] As at the time of its commencement, there was no pending appeal to which s 9(1) purported to apply.
[80] Insofar as their jurisdiction is properly construed as an appeal by way of rehearing.
[81] *Victorian Stevedoring and General Contracting Company v Dignan* (1931) 46 CLR 73, 107 (Dixon J); *United States v Schooner Peggy* 5 US 103, 110 (1801), cited in *AEU v General Manager, Fair Work Australia* (2012) 246 CLR 117, [80] (Gummow, Hayne and Bell JJ).
[82] In accordance with the common law approach prevailing at that time: see *R v Warsap* (2011) 111 SASR 232; *R v Fleming* [2011] SASCFC 75; *R v F, AD* [2015] SASCFC 130.

which is in issue in proceedings is permissible.[83] Section 9(1) does not even go that far.

56. That s 9(1) operates retrospectively cannot impair the institutional integrity of an appellate court called upon to apply the changed law. This is not "*a matter where society in general, or this [applicant] in particular, has ordered their affairs on a basis that is withdrawn, infringed or negatived by retrospective legislation.*"[84] To the contrary, the process authorised by s 9(1) merely reflects the common law solution to the problem of unknown jury findings that prevailed at the time, and which mirrored the role adopted by a sentencing judge on a plea to a s 50(1) offence where there was a dispute as to the acts of sexual exploitation committed.

57. Further, this Court will "*inevitably and necessarily*"[85] determine points of law that alter the perceived character of past judicial acts with retrospective, not prospective, effect.[86] That being an essential characteristic of the judicial method, as Leeming JA noted in *Lazarus v Independent Commissioner against Corruption*, "*it is difficult to see how legislation which reverses the effects of those retrospective alterations to the perceived character of past acts could be antithetical to the institutional integrity of courts*".[87]

In any event, Question of Law Reserved *was wrongly decided*

58. *Question of Law Reserved* does *not* establish the universal proposition that a State Parliament cannot validly authorise a judge (whether prospectively or retrospectively) to sentence on the basis of the acts of sexual exploitation he or she finds proved beyond reasonable doubt, where a jury has determined guilt under s 50(1) but the acts it found proved remain unknown. In any event, none of the features relied upon[88] establishes that s 9 effects an impermissible interference with the "*adjudgment and punishment of*

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[83] *Nelungaloo v Commonwealth* (1948) 75 CLR 495, 579 (Dixon J); *Duncan v Independent Commissioner Against Corruption* (2015) 256 CLR 83. See also *Haskins v Commonwealth* (2011) 244 CLR 22, [31] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), referring to the "*long history of enactment of statutes which may treat as effective transactions which when conducted lacked legal authority*".

[84] *Minogue v Victoria* (2018) 264 CLR 252, [111] (Gordon J). The common law approach prevailing at that time was for a defendant to be sentenced on the basis of the acts of sexual exploitation found proved by the sentencing court: see *R v Warsap* (2011) 111 SASR 232; *R v Fleming* [2011] SASCFC 75; *R v F, AD* [2015] SASCFC 130.

[85] *Lazarus v Independent Commissioner against Corruption* (2017) 94 NSWLR 36, [133] (Leeming JA, McColl and Simpson JJA agreeing).

[86] *Ha v State of New South Wales* (1997) 189 CLR 465, 504 (Brennan CJ, McHugh, Gummow and Kirby JJ).

[87] *Lazarus v Independent Commissioner against Corruption* (2017) 94 NSWLR 36, [133] (Leeming JA, McColl and Simpson JJA agreeing).

[88] See [49] above.

criminal guilt by the District Court such as to offend the Kable principle".[89]

(i) "Re-opened and Retried"

59. The majority imports separation of powers principles from *AEU v General Manager, Fair Work Australia*[90] and *Plaut v Spendthrift Farm Inc*[91] into the *Kable* doctrine without sufficiently accounting for "*differences in constitutional context*"[92] or the core concept of institutional integrity.[93] The lead judgment of Scalia J in *Plaut* has been described as reflecting a constitutional "*high formalism*",[94] and has been criticised.[95] Great caution is required before importing such strict and formalist separation of powers jurisprudence from the United States into the *Kable* doctrine.

10 60. In any event, the majority takes too broad a view of *Plaut*. The legislation there *directed* the *reinstatement* of a cause of action[96] that had been *finally dismissed* by judicial order. The impugned law operated directly upon a final judgment and directed the Court to reverse the outcome. The Supreme Court distinguished as valid a retrospective alteration to the rules of evidence affecting the pending case, even "*after they have been applied in a case but before final judgment has been entered*".[97]

61. It is not accurate to describe (even as a matter of "*substance*") the power conferred by s 9 to sentence on the basis of the acts of sexual exploitation the judge finds proved beyond reasonable doubt, as operating upon a final judgment of the jury, much less as directing the re-opening and reversal of that final judgment.

20 62. Criminal proceedings consist of a *single* justiciable controversy comprised of two sequential components: the adjudication of guilt and, where guilt is found, the determination of any punishment.[98] The adjudication of guilt occurs on conviction or acquittal when the sentencing court accepts the jury's verdict. *AEU* demonstrates the importance of identifying with precision the "*orders*"[99] said to have been "*dissolved or*

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[89] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [161].
[90] *AEU v General Manager, Fair Work Australia* (2012) 246 CLR 117 ("***AEU***").
[91] *Plaut v Spendthrift Farm, Inc*, 514 U.S. 211 (1995), 229 ("***Plaut***").
[92] *AEU v General Manager, Fair Work Australia* (2012) 246 CLR 117, [51] (French CJ, Crennan and Kiefel JJ).
[93] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [175].
[94] Peter Gerangelos, *The Separation of Powers and Legislative Interference with Judicial Functions: A Comparative Analysis* (2004, University of NSW), 196.
[95] *Nicholas v The Queen* (1998) 193 CLR 173, [141] fn 210 (Gummow J).
[96] Providing that "*any private civil action ... which was dismissed ... **shall be reinstated***" (emphasis added).
[97] *Plaut v Spendthrift Farm, Inc*, 514 U.S. 211 (1995), 229.
[98] *Magaming v The Queen* (2013) 252 CLR 381, [63] (Gageler J).
[99] *AEU v General Manager, Fair Work Australia* (2012) 246 CLR 117, [90] (Gummow, Hayne and Bell JJ).

reversed". Section 9 merely empowers sentencing on the basis of the acts of sexual exploitation found proved by the trial judge: the guilty verdict remains.

63. This basis *might* not reflect the findings of the jury underlying the verdict. The same may be said of the basis espoused in *Chiro*. *Question of Law Reserved* posits that, unlike s 9(2), the *Chiro* solution "*does not involve any repeated exercise of judicial power*".[100] However, that a jury returns a general verdict of guilty does not mean that it was necessarily satisfied that the "*most favourable*" set of acts were proved.[101]

64. Where a general verdict is returned and accepted, the first stage of the justiciable controversy is over. The sentencing judge then commences the judicial task of determining the appropriate factual basis for sentence. That involves consideration of matters of law and fact. The discretion to ask which acts of sexual exploitation the jury found proved, or to determine whether those findings are "*otherwise apparent*";[102] the formulation of those questions; and the interpretation of the answers,[103] all form part of that exercise of judicial power.

65. Where the questions are not asked or not answered, the common law solution enunciated in *Chiro* provides a principle to guide the task of determining the factual basis for sentence. That too involves the exercise of judicial power. The obligation to determine the "*most favourable basis*" for sentencing will involve consideration of the evidence, and may be contested.[104] Critically, it requires a judicial "*re-opening*" of the jury's determination of the acts that were proved beyond reasonable doubt, at least as much as the process authorised under s 9. The difference is that under *Chiro,* the common law *directs* the basis for sentencing, whereas under s 9 the sentencing judge *determines* the basis of sentencing on the criminal standard.

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[100] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [171].
[101] The jury may have accepted only a different, more serious subset of acts. Indeed, accepting that sexual offending usually escalates over time, the least serious acts will typically have occurred whilst the victim is younger and with a less reliable memory.
[102] *Chiro v The Queen* (2017) 260 CLR 425, [1] (Kiefel CJ, Keane and Nettle JJ).
[103] See eg the reasoning deployed by Widgery LJ in *Jama* (1968) 52 Cr App R 498, 501-2 cited in Fox and O'Brien, "Fact Finding for Sentencers" (1975) 10(2) *Melbourne University Law Review* 163, 175.
[104] For example, in the present case, the question will arise whether "*filleting some part of the complainant's evidence from other parts*" is permissible to determine the most favourable basis: *Chiro v The Queen* (2017) 260 CLR 425, [118] (Edelman J). The Applicant's proposed basis is that he committed two acts of gross indecency only in three or more days: AWS, [73]. However, the complainant gave evidence of only a single incident of urination alone, and later occasions involving other sexual acts together with urination. The Applicant also submitted at sentencing that the "*allegation of urinating on her without any other sexual contact seemed bizarre*": ABFM, pg 222 ln 19-22. See also the different "*most favourable bases*" proffered by the parties in the remitted resentencing in *Chiro* itself: *Chiro v The Queen* [2017] SASCFC 144, [7]-[10].

(ii) "Outcome unpalatable to the legislature"

66. The relevant "*outcome*" of the exercise of judicial power by the jury was not the result that the accused "*was to be punished in accordance with the High Court's decision in* Chiro".[105] It was the jury's findings as to the proved acts of sexual exploitation. This outcome was unknown. By eliding the distinction between the jury's (unknown) findings, and the solution enunciated in *Chiro* to the problem of sentencing where those findings are unknown, the majority erroneously concluded that the "*outcome*" of the jury's exercise of power was "*unpalatable to the legislature*".[106]

67. In any event, all legislation reflects policy decisions. A legislative instruction to apply a law implementing such policy does not impermissibly interfere with the judicial process.[107] The problem of sentencing for a s 50(1) offence where the acts found by the jury to have been proved are unknown raises difficult public interest considerations. Resolution of that problem devolved to this Court while Parliament was silent; that silence is now filled by s 9.[108]

(iii) "A jury and the protections a jury provides"

68. The majority held that Parliament, by adopting the form of s 50(1), had granted to an accused who "*puts him or herself upon the country*"[109] protection "*from punishment for*" any acts of sexual exploitation not found proved by the jury.[110] The "*re-opening and retrying*" required by s 9(2) was said to deprive the accused of that protection.[111]

69. However, the majority explicitly acknowledged that to sentence an offender in accordance with the solution enunciated in *Chiro* "*may be to sentence on a basis that does not accord with the jury's findings*".[112] It considered the difference in approach to lie in the "*measure*" of punishment imposed, with the *Chiro* resolution ensuring that punishment never "*exceeds*" that for which the jury may have found proved.[113] That is, the jury "*protections*" operated not to mandate sentencing for the acts *in fact* found

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[105] Cf *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [141], [175].
[106] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [175].
[107] *Public Service Association (NSW) v Director of Public Employment* (2012) 250 CLR 343, [44]-[45] (French CJ), [55] (Hayne, Crennan, Kiefel and Bell JJ), [70] (Heydon J).
[108] *Nicholas v The Queen* (1998) 193 CLR 173, [38] (Brennan CJ).
[109] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [135].
[110] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [172].
[111] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [172].
[112] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [113].
[113] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [113].

proved by the jury, but sentencing the severity of which *does not risk being greater than* that which would be proportionate to the acts in fact found by the jury.[114]

70. This "*upper limit*" protection, and the conclusion that its abrogation was repugnant to the institutional integrity of the sentencing court, appears to have been sourced by the majority in the "*decisional and institutional independence of the jury*".[115] However, the conclusion in *Chiro* that, where the jury's findings are unknown, the offender "*will have to be sentenced on the basis most favourable*", derived from an application of common law principles,[116] not constitutional necessity.

71. The question posed is this: is it beyond the power of a State legislature to authorise a court's imposition of a sentence for an offence against s 50(1) that *may* be greater than that which would be proportionate to the (unknown) acts found by the jury, where:

    (i) the *prima facie* requirement to sentence on the basis of the acts found by the jury itself arose as a matter of statutory implication; and

    (ii) the sentence was imposed on the basis of acts the judge found proved beyond reasonable doubt, consistently with the general guilty verdict?

72. The following considerations disclose that the answer to that question is "*no*".

73. First, at the State level the significance of the jury's role as community representatives may be regarded as "*symbolically*"[117] attracting a particular legitimacy to its verdict, but the jury is not constitutionally entrenched.[118]

74. Second, *Chiro* establishes that a State Parliament may alter, expressly or impliedly, the rules governing fact-finding for sentencing, including the repository for that fact-finding function as between judge and jury.[119] The legislature is competent to create a "*relationship*" offence that does not require extended unanimity as to underlying acts.[120] Had the appellant been tried in respect of such a charge, no aspect of sentencing would have differed materially from that authorised under s 9.

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[114] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [113].
[115] *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [130], and equally the importance of the "*participation of ordinary members of the community in the administration of criminal justice*": [174].
[116] See *Chiro v The Queen* (2017) 260 CLR 425, [44], [52] (Kiefel CJ, Keane and Nettle JJ), [61], [72] (Bell J); "[V]*ery few common law rules were the manifestation of some fundamental characteristic of judicial power*": *TCL Airconditioner* (2013) 251 CLR 533, [35] (French CJ and Gageler J).
[117] *MFA v The Queen* (2002) 213 CLR 606, [48] (McHugh, Gummow and Kirby JJ).
[118] *Byrnes v The Queen* (1999) 199 CLR 1, [70] (Gaudron, McHugh, Gummow and Callinan JJ); *Gould v Brown* (1998) 193 CLR 346, [321] (Kirby J), see also [123] (McHugh J).
[119] *Chiro v The Queen* (2017) 260 CLR 425, [51] (Kiefel CJ, Keane and Nettle JJ).
[120] Such as the current s 50 of the *CLCA*.

75. Third, the legislature is competent to enact an offence increasing the accused's exposure to punishment depending upon the presence of an aggravating feature, without making that feature an element of the offence. While the common law "*rule of practice*" formulated in *Kingswell v The Queen* requires such features to be pleaded in the information and submitted for a jury verdict, the rule is capable of legislative abrogation.[121]

76. Fourth, it is open to the legislature to achieve retrospectively that which it could undoubtedly achieve prospectively, even if this creates an exposure to punishment that did not exist at the time of the acts.[122] In *Emmerson,* legislation requiring the judicial imposition of "*additional punishment*" upon a convicted person was upheld,[123] because the Supreme Court was not required to act at the behest of the executive or "*give effect to government policy without following ordinary judicial processes*".[124]

77. Fifth, under s 9 the sentencing court must be satisfied beyond a reasonable doubt of the acts of sexual exploitation, will provide reasons for any decision, and follow a "*process bearing all the hallmarks of the ordinary judicial process*"[125]. Indeed, the process mirrors that on a guilty plea under s 50(1).

78. In any event, the "*bare fact*" that legislation might invest a court with jurisdiction "*repugnant to the traditional judicial process will seldom, if ever compromise the institutional integrity of that court*" to such an extent as to engage the *Kable* principle.[126] Rather, "*[t]hat conclusion is likely to be reached only when other provisions of the legislation or the surrounding circumstances* ***as well as*** *the departure from the traditional judicial process indicate that the State court might not be an impartial tribunal that is independent of the legislative and the executive arms of government*".[127]

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[121] *R v Courtie* [1984] AC 463, 468 (Lord Diplock), cited in *Kingswell v The Queen* (1985) 159 CLR 264, 275 (Gibbs CJ, Wilson and Dawson JJ); *Langdon v Kelemete-Leoli-McLean* (2011) 206 A Crim R 368, [94].
[122] *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 534, 540 (Mason CJ), 643-4 (Dawson J), 719,721 (McHugh J); *Nicholas v The Queen* (1998) 193 CLR 173, [114] (McHugh J), [149] (Gummow J).
[123] *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, [72] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[124] *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, [69] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[125] [2018] SASCFC 128, [158]. See also *R v Granger* (2004) 88 SASR 453, [49]-[52] (Doyle CJ); *Nicholas v The Queen* (1998) 193 CLR 173, [23]-[24] (Brennan CJ), [74] (Gaudron J).
[126] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [41] (McHugh J).
[127] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [42] (McHugh J).

Conclusion

79. On any view, and in any event, the sentencing process authorised by s 9(1) was, in all cases, adopted by the courts as an incontrovertibly independent exercise of judicial power. There is no basis to conclude that s 9(1) impairs the institutional integrity of any court.

Orders sought

80. Orders should be made extending time and granting permission to appeal. The appeal should be dismissed.

Part VI: NOTICE OF CONTENTION

10 81. Not applicable.

Part VII: TIME ESTIMATE

82. The Respondent and the Attorney-General for the State of South Australia estimate that two hours will be required for their oral argument.

Dated: 25 October 2019

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IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY No. A20 of 2019

BETWEEN: **KMC**

Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS (SA)

Respondent

ANNEXURE TO THE SUBMISSIONS OF THE RESPONDENT AND THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

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ANNEXURE: LIST OF RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS

1. The relevant constitutional provisions, statutes and statutory instruments referred to in these submissions are:
   1.1. Ch III of the Constitution;
   1.2. *Criminal Law Consolidation Act 1935* (SA) (at historical version 23 October 2017); and
   1.3. *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) (at the current version as assented to on 24 October 2017).