IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A20 of 2019

BETWEEN:

KMC

Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS (SA)

Respondent

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

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PART I, II & III: CERTIFICATION AND INTERVENTION

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

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

PART IV: ARGUMENT

A. SUMMARY OF ARGUMENT

3. The cause removed raises two questions: whether s 9(1) of the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) (**the Amending Act**) on its proper construction applies to the applicant's sentence; and whether s 9(1) is inconsistent with Ch III of the Constitution and therefore invalid. Victoria makes no submissions as to the first of those questions. As to the second, Victoria submits that s 9(1) of the Amending Act is a valid law of the Parliament of South Australia. In particular, Victoria makes the following submissions.

4. **First**, on its proper construction, s 9(1) effects a retrospective change in the substantive law applicable to sentencing for the offence contrary to s 50(1) of the *Criminal Law Consolidation Act 1935* (SA), as in force prior to the enactment of the Amending Act. Accordingly:

   (1) s 9(1) does not direct the manner or outcome of the appellate jurisdiction of the Supreme Court of South Australia (or of this Court) at all, or in any way that is repugnant to that Court's institutional integrity; and

   (2) s 9(1) does not exclude the supervisory jurisdiction of the Supreme Court of South Australia. Rather, the consequence of s 9(1) is that a sentence imposed on an offender for an offence against s 50(1) on the basis that the offender had committed the acts of sexual exploitation found by the sentencing judge beyond reasonable doubt is not for that reason affected by legal error (jurisdictional or otherwise). Thus no question of invalidity on the basis of *Kirk*[1] arises.

5. **Second**, the change in substantive law does not impair the institutional integrity of the Supreme Court of South Australia (or indeed of any State court) such that it is no longer a fit repository of federal jurisdiction.

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1 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

B. BACKGROUND

B.1 District Court proceedings

6. On 28 June 2017, the applicant was convicted after a trial before a jury on one count of persistent sexual exploitation of a child, contrary to s 50(1) of the *Criminal Law Consolidation Act 1935* (SA) as previously in force.[2] The information upon which the applicant was convicted alleged that he had, between 1 March 2013 and 6 February 2016, committed more than one act of sexual exploitation of the complainant, a person under the age of 17. The information particularised four acts of sexual exploitation.[3]

7. The offence contrary to s 50(1) was committed if an adult "over a period of not less than 3 days, commit[ed] more than 1 act of sexual exploitation of a particular child under the prescribed age". The jury was directed, in accordance with authority,[4] that it had to be unanimous not only as to its verdict, but also to the same two or more acts of sexual exploitation.[5]

8. The jury returned a verdict of guilty. The trial judge did not ask the jury which of the acts of sexual exploitation particularised in the information had been proven.

9. On 17 August 2017, the applicant was sentenced to ten years and three days' imprisonment with a non-parole period of five years.[6] In imposing sentence, the sentencing judge referred to "three distinct occasions of sexual offending" recalled by the complainant as well as to the complainant's evidence "of other abuse that she said occurred frequently".[7]

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2 Section 6 of the Amending Act substituted a new s 50 of the *Criminal Law Consolidation Act* effective as of 24 October 2017. Under the substituted provision, "[a]n adult who maintains an unlawful sexual relationship with a child is guilty of an offence".

3 The information is at Core Appeal Book (**CAB**) 5.

4 *R v Little* (2015) 123 SASR 414 at 417 [11], 420 [19] (Kourakis CJ, Sulan, Kelly, Peek and Lovell JJ). See also *KBT v The Queen* (1997) 191 CLR 417 at 422 (Brennan CJ, Toohey, Gaudron and Gummow JJ).

5 Directions to the Jury at 9 [51] (CAB 15). In *Chiro v The Queen* (2017) 260 CLR 425 this was referred to as the "extended unanimity" requirement: at 435-438 [19]-[24] (Kiefel CJ, Keane and Nettle JJ).

6 Sentencing Remarks (CAB 29-31).

7 Sentencing Remarks (CAB 29).

B.2 *Chiro v The Queen*

10. On 13 September 2017, this Court handed down judgment in *Chiro v The Queen*.[8] It held, by majority, that the trial judge should have asked the jury to "specify which of the particularised acts of sexual exploitation they were agreed had been proved".[9] The Court further held that, the jury not having been so interrogated, the sentencing judge should have imposed sentence "on the view of the facts most favourable to the [offender]".[10]

11. The effect of the Court's judgment was that the approach to fact-finding in sentencing approved in *Cheung v The Queen*, which did not require an offender to be sentenced on the most favourable view of the facts,[11] had to be departed from in the particular context of s 50(1) of the *Criminal Law Consolidation Act 1935*. That was because, in the judgment of Kiefel CJ, Keane and Nettle JJ, "the underlying acts of sexual exploitation are the actus reus of the offence and it is for the jury to find the acts which comprise the actus reus".[12] Bell J, agreeing in the result, after referring to *Cheung*, held that "[t]o sentence the appellant on the basis that he committed all of the particularised acts upon which issue was joined is to deprive the requirement of consistency with the verdict of practical content".[13]

12. The Court's ruling had both prospective and retrospective effect. In the absence of contrary legislative intervention, judges imposing sentence for an offence contrary to s 50(1) after 13 September 2017 had to do so consistently with the Court's decision. Further, sentences imposed prior to that date which had not followed the approach articulated in *Chiro* were revealed to be erroneous.[14] Such sentences would therefore be susceptible to being set aside on appellate review for specific error (subject to obtaining leave to appeal out of time where required).

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8 (2017) 260 CLR 425.

9 *Chiro* (2017) 260 CLR 425 at 448 [46] (Kiefel CJ, Keane and Nettle JJ). See also 455-456 [67] (Bell J).

10 *Chiro* (2017) 260 CLR 425 at 451 [53] (Kiefel CJ, Keane and Nettle JJ). See also 458 [74] (Bell J).

11 (2001) 209 CLR 1 at 9-11 [5]-[10] (Gleeson CJ, Gummow and Hayne JJ).

12 *Chiro* (2017) 260 CLR 425 at 451 [52].

13 *Chiro* (2017) 260 CLR 425 at 457 [71].

14 See, eg, *Achurch v The Queen* (2014) 253 CLR 141 at 146-147 [2] (French CJ, Crennan, Kiefel and Bell JJ) regarding the effect of this Court's decision in *Muldrock v The Queen* (2011) 244 CLR 120.

B.3 Legislative Response to *Chiro*

13. On 24 October 2017, the Amending Act came into operation.

(1) Section 6 of that Act substituted a new s 50 into the *Criminal Law Consolidation Act 1935*, which enacted a new offence of persistent sexual abuse of a child, involving two or more unlawful sexual acts in relation to a child over any period (ss 50(1) and (2)). That new offence does not require extended unanimity where the trier of fact is a jury: see new s 50(4)(c). Further, under new s 50, a sentencing court is not required to sentence in accordance with *Chiro*. Rather, under s 50(11) a sentencing court is to sentence a person "consistently with the verdict of the trier of fact but having regard to the general nature or character of the unlawful sexual acts determined by the sentencing court to have been proved beyond a reasonable doubt"; and the sentencing court is not required to ask the trier of fact any question about the general character or nature of the unlawful sexual acts the trier of fact found proved beyond reasonable doubt.

(2) Section 9 dealt with sentencing for offences contrary to s 50(1) of the *Criminal Law Consolidation Act 1935* as previously in force. Section 9 was directed at two distinct circumstances:

(a) cases where a sentence had already been imposed (s 9(1)); and

(b) cases where an offender had been convicted but not yet sentenced (s 9(2)).

(3) Section 9(3) provided that s 9 does not apply to the matter that was the subject of this Court's determination in *Chiro*; and a note to s 9(3) provided that, except as provided in s 9(3), the section "negates the effect of the determination of the High Court in Chiro v The Queen".

14. Section 9(2) has been held by the Full Court of the Supreme Court of South Australia to be invalid.[15] Section 9(1) is in issue in the present proceeding, the applicant having been sentenced prior to the commencement of the Amending Act. Victoria's submissions assume that, validity aside, s 9(1) applies to the applicant's application for leave to appeal to the Full Court of the Supreme Court of South Australia (Court of Criminal Appeal) out of time (the cause removed). The question then is whether s 9(1) is valid.

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

C. SUBMISSIONS

15. It is necessary at the outset to ascertain what s 9(1) does. In particular, does it, as the applicant contends, direct an appellate court as to the outcome of an appeal? Or does it, as the respondent and Victoria contend, alter the substantive law applicable to sentencing, retrospectively? This is a question of statutory construction and requires attention to the text, context and purpose of s 9(1).

C.1 Text of s 9(1)

16. Section 9 of the Amending Act is headed "Sentencing for offences under previous law".[16] The "previous law" referred to is s 50 of the *Criminal Law Consolidation Act 1935* as previously in force. The opening words of s 9(1) outline its field of operation consistently with that heading. It applies to "[a] sentence imposed on a person, before the commencement of [s 9], in respect of an offence against section 50 [as previously in force]".

17. The stated effect of s 9(1) is that the sentences to which it applies are "taken to be, and always to have been, not affected by error or otherwise manifestly excessive *merely because*" (emphasis added) the sentence was imposed in the manner described in ss 9(1)(a) and 9(1)(b). Thus, a sentence is taken not to bear, and never to have borne, a particular characterisation (affected by error), *merely because* (ie, for the sole reason that) the trial judge/sentencing court acted in the manner described in ss 9(1)(a) and 9(1)(b).

18. Section 9(1)(a) describes a procedure and an outcome which do not comply with this Court's holding in *Chiro*. The section uses the very language employed by Kiefel CJ, Keane and Nettle JJ in describing a failure to "ascertain" which acts of sexual exploitation the jury were agreed were proved, and a sentence that was not imposed "on the view of the facts most favourable to [the offender]".[17]

19. Section 9(1)(b) describes a sentence imposed consistently with the jury's verdict of guilty, but on the basis that the offender had committed the acts of sexual exploitation "determined by the sentencing court to have been proved beyond a reasonable doubt". More particularly, it describes a sentence imposed consistently with the previous

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16 Section 19(2) of the *Acts Interpretation Act 1915* (SA) provides that section headings do not form part of the Act. However, they may be used as an aid to interpretation: *R v Wymond* [2013] SASCFC 12 at [16] (Kourakis CJ, Vanstone and Blue JJ).

17 *Chiro* (2017) 260 CLR 425 at 451 [53].

approach to sentencing for an offence against s 50, whereby "a jury would simply deliver a general verdict of guilty or not guilty, and the judge would determine which of the factual allegations contained within the charge should be regarded as having been proved",[18] and findings of fact adverse to the offender must be made beyond reasonable doubt.[19]

20. The effect of s 9(1) is that a sentence is "taken to be, and always to have been, not affected by error or otherwise merely excessive *merely because*" (emphasis added) the sentencing court:

(1) did not follow the course mandated by *Chiro* (see s 9(1)(a)); and

(2) made its own findings beyond reasonable doubt as to which acts of sexual exploitation the offender had committed and sentenced the offender accordingly (see s 9(1)(b)).

21. It is also important to state what s 9(1) does **not** do. It does not in terms limit or remove the jurisdiction of any appellate court. Nor is its effect to oust appellate jurisdiction. An appellate court may review the exercise of the sentencing discretion for specific error or manifest excess, but on the basis that a sentence imposed consistently with s 9(1)(b) (ie contrary to *Chiro*) is not, for that reason alone, affected by such error. Nor does the section prevent an appellate court from concluding that a sentencing judge erred by finding, beyond reasonable doubt, that a particular act of sexual exploitation had been committed.[20]

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18 *Martin (a Pseudonym) v The Queen* [2019] VSCA 60 at [49] (Ferguson CJ, Beach and Weinberg JJA) (their Honours described this approach as being of "longstanding practice"); *Cheung* (2001) 209 CLR 1 at 9-11 [5]-[10] (Gleeson CJ, Gummow and Hayne JJ).

19 *Cheung* (2001) 209 CLR 1 at 13 [14] (Gleeson CJ, Gummow and Hayne JJ) quoting *R v Isaacs* (1997) 41 NSWLR 374 at 377-378; *R v Olbrich* (1999) 199 CLR 270 at 281 [25]-[27] (Gleeson CJ, Gaudron, Hayne and Callinan JJ); *Filippou v The Queen* (2015) 256 CLR 47 at 69 [64] (French CJ, Bell, Keane and Nettle JJ).

20 *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128 at [120] (Hinton J) (referring to s 9(2)(b)). As to the nature of that kind of appellate review in the context of the exercise of the sentencing discretion, see *Willis v The Queen* (2016) 261 A Crim R 151 at 170 [94] (Weinberg and Beach JJA): "Self-evidently, a challenge to a finding of fact made by a sentencing judge in the course of sentencing an offender will involve an appeal in the strict sense. An appellate court will not substitute for any such finding its own view of what the facts disclose unless it concludes that the finding made below was not reasonably open." (citations omitted). Cf *R v Strbak* [2019] QCA 42 at [25] (McMurdo JA).

C.2 Context of s 9(1)

22. Section 9(1) should not be read in isolation.[21] It forms part of a broader legislative response to *Chiro*,[22] together with s 9(2) and the substitution of a new s 50 of the *Criminal Law Consolidation Act 1935*. Those provisions assist in understanding the mischief to which s 9(1) was directed.

(1) New s 50, as well as enacting the new offence of persistent sexual abuse of a child, also provided for sentencing for that offence in a manner consistent with the previous sentencing practice and inconsistent with *Chiro*. Section 50(11) was undoubtedly intended to set out the substantive law applicable to the sentencing task.

(2) Section 9(2) laid down substantive rules that were to apply prospectively to sentencing for offences contrary to the old s 50(1). Likewise, s 9(2) was intended to set out the substantive law applicable to the sentencing task.[23]

(3) Section 9(1) operated with respect to sentences for the offence contrary to the old s 50(1) that had already been imposed before commencement of the Amending Act. Victoria contends that it, too, was intended to lay down substantive rules.

23. It is apparent from the above that Parliament intended to address the universe of sentencing for the offence of persistent sexual exploitation of a child in the same way, and in a manner inconsistent with *Chiro*:

(1) future offending (under the new offence of persistent sexual abuse of a child) was to be sentenced in accordance with s 50(11), by providing for the substantive law as to sentencing for the offence;

(2) past, unsentenced offending was to be sentenced in accordance with s 9(2); and

(3) past, sentenced offending, which had occurred in a manner inconsistent with *Chiro*, was to be dealt with by s 9(1).

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21 *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315 (Mason J): "to read the section in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context".

22 As noted above, s 9(3) expressly confirms that the Amending Act is intended to respond to *Chiro* and to "negate" its effects.

23 The fact that s 9(2) has been held to be invalid by the Full Court of the Supreme Court of South Australia is no bar to relying on the enactment of s 9(2) as part of the context in which s 9(1) was enacted and as illuminating the purpose of s 9.

24. In that context, it is apparent that s 9(1) was intended to give effect to similar substantive rules as those found in new s 50(11) and in s 9(2), in the context of sentences which have already been imposed. That is, it applies those sentencing rules retrospectively.

C.3 Legislative purpose

25. After this Court's decision in *Chiro*, the legislature was faced with a policy choice between two approaches to sentencing for an offence contrary to s 50(1). Subject to questions of constitutional competence, the matters which led the majority of this Court to adopt the approach it did in *Chiro* as correct at law did not compel the legislature to make the same decision. It was open to the legislature to prefer an approach whereby the sentencing judge is not required to sentence on the view of the facts most favourable to the offender, but on findings of fact made by the trial judge as to the circumstances of the offending, where proved beyond reasonable doubt.[24] Factors relevant to the legislative policy decision included the potential consequences of *Chiro* that Edelman J outlined in his Honour's dissenting reasons in that case.[25]

C.4 Conclusion on construction: s 9(1) effects a change to the substantive law

26. Having regard to considerations of text, context and purpose as outlined above, the effect of s 9(1) can be reduced to the following: it was not an error for a sentencing judge to impose sentence for an offence contrary to s 50(1) "consistently with the verdict of the trier of fact" but on the basis that the offender had committed those acts of exploitation alleged in the information which the sentencing judge found, beyond reasonable doubt, to have been proved.

27. So understood, s 9(1) effects a retrospective change to the substantive law. The applicant's argument to the contrary at AS [31]-[41], made in support of his submission that s 9(1) directs the manner or outcome of the appellate jurisdiction, should be rejected for the following reasons.

(1) **First**, as noted above, s 9(1) is not expressly directed at the manner of exercise of appellate jurisdiction or its outcome. It does not refer to any particular court proceedings, or the bringing of any appellate proceeding by a person sentenced

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24 *Cheung* (2001) 209 CLR 1 at 13 [14] (Gleeson CJ, Gummow and Hayne JJ) quoting *R v Isaacs* (1997) 41 NSWLR 374 at 377-378.

25 (2017) 260 CLR 425 at 470-476 [108]-[121].

for an offence contrary to s 50(1). There is simply no mention of any court (or any other person or body) at which any such "direction" contended for by the applicant might be targeted.[26]

(2) **Second**, while s 9(1) adopts the language of appellate conclusion — "affected by error" and "manifestly excessive" — that language is a consequence of the post-sentence context of s 9(1) where the only legal issue that may arise is whether the sentence was affected by error (subject to any resentencing), and is descriptive of the effect of the retrospective change to substantive law that s 9(1) enacts.

(3) **Third**, as outlined above, the statutory context in which s 9(1) was enacted demonstrates that the legislative intention underpinning s 9 as a whole was to apply the substantive law relating to fact-finding on sentence described in s 9(1)(b) of the Act in preference to that laid down in *Chiro* (non-compliance with which is described in s 9(1)(a)) to all offences against the old s 50 (as well as to apply a similar approach to sentencing for offences against the new s 50).

(4) **Fourth**, s 9(1) should be interpreted in a way that is constitutionally valid, if that interpretation is reasonably open.[27] The interpretation for which the respondent[28] and Victoria contend — that s 9(1) effects a change to the substantive law of sentencing — is open in the present case.

C.5 Section 9(1) does not direct the manner or outcome of judicial power

28. The applicant submits that s 9(1) of the Amending Act is invalid because it requires the South Australian Supreme Court to "act in accordance with a legislative direction as to the manner or outcome of the judicial process".[29] That submission should be rejected.

29. As noted above, s 9(1) of the Amending Act is not addressed to the Court of Criminal Appeal. It does not direct that Court in the manner or outcome of its appellate jurisdiction, or confer power on the Court to make any particular order. It does not

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26 Cf s 54R of the *Migration Act 1958* (Cth), considered in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 which provided that "[a] court is not to…".

27 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Baker v The Queen* (2004) 223 CLR 513 at 523-524 [14] (Gleeson CJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11] (Gummow, Hayne, Heydon and Kiefel JJ). See also *Acts Interpretation Act 1915* (SA), s 22A(1).

28 See RS at [40].

29 At AS at [31].

require any particular order to be made on the appeal.[30] The Court of Criminal Appeal may still find error, or conclude that the sentence was manifestly excessive, and set aside the sentence — but not for breach of the principles laid down in *Chiro.*

30. In that regard, s 9(1) is quite different from s 54R of the *Migration Act 1958* (Cth) (the law in issue in *Chu Kheng Lim*), which provided that that "[a] court is not to order the release from custody of a designated person", and which this Court held was "[i]n terms ... a direction by the Parliament to the courts as to the manner in which they are to exercise their jurisdiction".[31]

31. More fundamentally, once it is accepted that the effect of s 9(1) is to alter the substantive law as to sentencing, it necessarily follows that the section does not constitute an impermissible legislative direction as to the outcome of the judicial process.

32. In *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*, which concerned a challenge to a law of the Parliament of Western Australia, Gummow, Hayne, Heydon and Kiefel JJ stated that:[32]

> As 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.

33. Section 9(1) of the Amending Act does not have that effect. For the reasons outlined in Part C.4, above, the section modifies the substantive law as to sentencing for a particular offence, and does so retrospectively. It has the effect that "at a past date the law shall be taken to have been that which it was not".[33]

34. Chapter III of the Constitution does not prevent the enactment of retrospective laws.[34] Nor does Ch III contain any "prohibition, express or implied, that rights in issue in legal

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30 The Amending Act makes no change to s 158(7) of the *Criminal Procedure Act 1921* (SA), which provides that the Full Court must "if it thinks that the sentence is affected by error such that the defendant should be re-sentenced..." quash the sentence first imposed and either resentence the offender or remit the matter for resentencing.

31 *Chu Kheng Lim* (1992) 176 CLR 1 at 36 (Brennan, Deane and Dawson JJ).

32 (2008) 234 CLR 532 at 560 [39]. See also *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 352-353 [50]-[51] (French CJ); *South Australia v Totani* (2010) 242 CLR 1 at 63 [132] (Gummow J).

33 *R v Kidman* (1915) 20 CLR 425, 443 (Isaacs J), quoting *West v Gwynne* (1911) 2 Ch 1 at 12 (Buckley LJ).

34 *Kidman* (1915) 20 CLR 425 at 442-443 (Isaacs J), 451 (Higgins J); *Polyukhovic v Commonwealth* (1991) 172 CLR 501 at 539 (Mason CJ).

proceedings shall not be the subject of legislative declaration or action".[35] Further, it is "well settled" that a State law "which alters substantive rights does not involve an interference with judicial power contrary to Ch III of the Constitution even if those rights are in issue in pending litigation".[36] Thus the mere fact that an Act changes the law applicable to sentencing between sentence and an appeal against that sentence does not render that Act invalid as an usurpation of judicial power. That is so even if the change in the law has the practical consequence that a particular ground of appeal that an offender might have relied upon can no longer be maintained.

35. It is uncontroversial that the purpose of s 9(1) is to "validate" sentences imposed prior to its commencement which, due to the retrospective effect of this Court's judgment in *Chiro*, would otherwise be affected by error. This Court has on multiple occasions upheld retrospective legislative "validation" of judicial and administrative acts.[37]

36. *Duncan v Independent Commission Against Corruption* is illustrative. In that case this Court rejected an argument that Sch 4 Pt 13 cl 35 of the *Independent Commission Against Corruption Act 1988* (NSW), as inserted by the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW), was invalid either on the basis that it was incompatible with the institutional integrity of the Supreme Court, or on the basis that it removed from the Supreme Court the power to grant relief for jurisdictional error.

37. The impugned legislation was a response to this Court's decision in *Independent Commission Against Corruption v Cunneen,*[38] which concerned the construction of the phrase "corrupt conduct" in s 8 of the *Independent Commission Against Corruption Act.* The particular clause of the validation legislation in issue in *Duncan* provided that "anything done or purporting to have been done by the Commission" before the date of this Court's decision in *Cunneen* "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".

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35 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250 (Mason J). See also *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547; *Duncan* (2015) 256 CLR 83 at 96-98 [20]-[26] (French CJ, Kiefel, Bell and Keane JJ).

36 *Duncan* (2015) 256 CLR 83 at 98 [26] (French CJ, Kiefel, Bell and Keane JJ).

37 See, eg, *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495; *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117; *Duncan* (2015) 256 CLR 1.

38 (2015) 256 CLR 1.

38. French CJ, Kiefel, Bell and Keane JJ[39] held that the impugned clause effected a "retrospective alteration of the substantive law which is to be applied by the courts in accordance with their ordinary processes".[40] The Court rejected the submission that the impugned clause "attach[ed] new legal consequences to [the administrative act concerned] while accepting that the act remains invalid".[41] As Gageler J stated, that was simply not what the impugned clause said.[42]

39. The "validation" clause in *Duncan* was in the following form:

> an administrative act, A,
>
> that would have been validly done if statutory definition B included C,
>
> is taken to have been, and always to have been, validly done.

40. Section 9(1) of the Amending Act has this form:

> a judicial act, X (a sentence imposed),
>
> is taken to be, and always to have been, not affected by error,
>
> merely because the sentencing court applied substantive law Y (the pre-*Chiro* law) rather than substantive law Z (that effected by *Chiro*).

41. Despite the different structure of each provision, there is no principled distinction such that the first can be said to effect a retrospective alteration to the substantive law but the second cannot. Both provisions attach "new legal consequences and a new legal status" (validity/being free of error) to things done (administrative act/judicial decision) "which otherwise would not have had such legal consequences or status".[43]

42. In *Duncan*, this Court perceived no relevant distinction between the impugned clause there considered and the provision the validity of which was contested in *Australian*

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39 The other members of the Court (Gageler, Nettle and Gordon JJ) agreed in the result.

40 *Duncan* (2015) 256 CLR 83 at 98 [28] (French CJ, Kiefel, Bell and Keane JJ). The case was therefore distinguishable from *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, in which the impugned legislation required courts to proceed on an ex parte basis. See also *Lazarus v Independent Commission Against Corruption* (2017) 94 NSWLR 36, where the New South Wales Court of Appeal held that the validation Act considered in *Duncan* applied to retrospectively validate past actions including where those actions were in issue in pending criminal proceedings.

41 See *Duncan* (2015) 256 CLR 83 at 100 [37] (Gageler J). Substantially the same submission is made in this case at AS [40(3)].

42 *Duncan* (2015) 256 CLR 83 at 100 [38].

43 *Duncan* (2015) 256 CLR 83 at 98 [25] (French CJ, Kiefel, Bell and Keane JJ).

Education Union v General Manager of Fair Work Australia (**AEU**).[44] That case concerned Commonwealth legislation enacted following the 2006 decision of the Full Court of the Federal Court in *Australian Education Union v Lawler*.[45] The Full Court had held in that case that the registration of an organisation under the *Workplace Relations Act 1996* (Cth) was invalid because the organisation's rules did not have the effect of terminating the membership of persons no longer qualified for membership. Section 26A of the *Fair Work (Registered Organisations) Act 2009* (Cth) provided, relevantly, that if "an association was purportedly registered" before the commencement of s 26A and "the association's purported registration would [but for s 26A] have been invalid merely because, at any time, the association's rules did not have the effect of terminating the membership of ... persons who were persons of a particular kind ... that registration is taken, for all purposes, to be valid and to have always been valid".

43. This Court unanimously rejected the submission that s 26A impermissibly directed the manner or outcome of Commonwealth judicial power. French CJ, Crennan and Kiefel JJ held that s 26A "states a rule attaching legal consequences to an entry in the Register" kept under the *Fair Work (Registered Organisations) Act 2009*.[46] Their Honours accepted the submission of the Commonwealth that there is no interference with the judicial power of the Commonwealth "if Parliament enacts legislation which attaches new legal consequences to an act or event which the court had held, on the previous state of the law, not to attract such consequences".[47]

44. For these reasons, s 9(1) does not direct the manner and outcome of judicial power and no question of *Kable* invalidity arises on that basis.

C.6 Section 9(1) does not purport to preclude review for jurisdictional error

45. The applicant submits, in reliance upon *Kirk*, that s 9(1) is invalid on the basis that it purports to exclude the Supreme Court's power to grant relief in respect of a sentence imposed by the District Court which is infected by jurisdictional error: AS [42]-[57].

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44 (2012) 246 CLR 117.

45 (2008) 169 FCR 327.

46 *AEU* (2012) 246 CLR 117 at 141 [48].

47 *AEU* (2012) 246 CLR 117 at 143 [53]. Gummow, Hayne and Bell JJ stated, to similar effect, that s 26A "altered the law by providing, in effect, that the organisations with which it dealt were to be treated as having had the status of registered organisation from the time when the organisation in question was first purportedly entered on the register": at 154 [90].

46. As the plurality observed in *Duncan*, the decision in Kirk "did not deny the competence of State legislatures to alter the substantive law to be applied by [State] agencies and courts". Thus the plurality held that Sch 4 Pt 13 of the *Independent Commission Against Corruption Act* was valid because, properly understood, it effected an alteration in the substantive law as to what constitutes corrupt conduct; it did not withdraw any jurisdiction from the Supreme Court. The Court of Appeal remained seized of the proceedings pending before it. Accordingly, Pt 13 did not contravene the *Kirk* principle.[48]

47. The applicant's reliance on Kirk as a basis of invalidity should be rejected for the same reason. As submitted above, s 9(1) alters, with retrospective effect, the substantive law applicable to sentencing for an offence contrary to the old s 50(1). It does not withdraw any jurisdiction from the Supreme Court. Rather, it amends the body of law that Court is to apply in exercising its appellate jurisdiction.

B.6 Section 9(1) does not render the South Australian courts unfit repositories of federal jurisdiction

48. The applicant contends that if, contrary to his primary submission, s 9(1) effects a change to the applicable substantive law, it is nevertheless invalid on the basis that it undermines the institutional integrity of the courts of South Australia and so infringes Chapter III of the Constitution: AS [58]-[68]. As does his primary submission, this submission invokes the principle laid down in *Kable v Director of Public Prosecutions (NSW)*.[49] The applicant's submission should be rejected.

49. In *Attorney-General (NT) v Emmerson*, six Judges of this Court explained the principle in the following terms:[50]

> because the Constitution establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, *State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid.*

50. It is important always to recall that *Kable* does not erect a separation of powers at State level; nor does it apply all of the Ch III restrictions concerning the exercise of federal judicial power, and the requirement for trial by jury found in s 80 of the Constitution, to

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48 *Duncan* (2015) 256 CLR 83 at 99 [29] (French CJ, Kiefel, Bell and Keane JJ).

49 (1996) 189 CLR 51.

50 (2014) 253 CLR 393 at 424 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (emphasis added, citations omitted).

the States and to State offences. Rather it requires attention to whether legislation substantially impairs the State court's institutional integrity. Alteration of the substantive law to be applied by a court in the exercise of its jurisdiction will rarely, if ever, have such an effect; and s 9(1) does not have that effect.

51. At AS [58], the applicant states that if s 9(1) effects a substantive change to the law of sentencing, then it must be a change that involves one of the two possibilities listed at AS [58(1)-(2)]. Victoria submits that those formulations should not be accepted. In particular, there is nothing in the text of s 9(1) which supports any *deeming* of equivalency between a sentencing judge's finding as to which acts of sexual exploitation the offender had committed and the jury's finding as to which acts had been committed.[51]

52. Rather, the change effected by s 9(1) can be put in the following terms: it is not an error for a sentencing court to sentence the offender consistently with the jury's verdict of guilty of the offence contrary to s 50(1), but having regard to the acts of sexual exploitation determined by the sentencing court to have been proved beyond a reasonable doubt. That formulation is consistent with the text of s 9(1)(b). To that extent it may be said that the sentencing court is "authorised" to impose a sentence in that way (and that the "authorisation" is retrospective).

53. Victoria makes the following submissions by way of preliminary observation:

(1) **First**, the mere fact that s 9(1) of the Amending Act, as part of the legislative response to *Chiro*, retrospectively changes the law that applies in a pending criminal proceeding is not sufficient to render it repugnant to the institutional integrity of the Supreme Court of South Australia so as to infringe the *Kable* principle.[52]

(2) **Second**, the purpose of s 9(1) of the Amending Act is to revert the substantive law that applied when sentencing for an offence contrary to s 50(1) to the state it was understood to have been in prior to *Chiro*. The effect of *Chiro* was

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51 Indeed s 9(1) may be distinguished from s 9(2) because it does not *deem* the jury's verdict to have any particular content: see RS at [50].

52 See *Nicholas v The Queen* (1998) 193 CLR 173. That case concerned s 15X of the *Crimes Act 1914* (Cth) and so did not raise a *Kable* point as such. This Court held that the section, which was a legislative response to this Court's decision in *Ridgeway v The Queen* (1995) 184 CLR 19, was valid. The section, in its application to the accused's trial, affected pending criminal proceedings by restricting the application of the common law discretion to refuse to admit illegally obtained evidence. See also *Lazarus v Independent Commission Against Corruption* (2017) 94 NSWLR 36 at 62-3 [116] (Leeming JA).

retrospectively to render erroneous those sentences which had not been imposed in compliance with the approach it endorsed. As Leeming JA observed in *Lazarus v Independent Commission Against Corruption,* it is "difficult to see how legislation which reverses the effects of" such a retrospective alteration "could be antithetical to the institutional integrity of courts".[53]

(3) **Third**, this Court's conclusion in *Chiro* that the "orthodox" approach to fact-finding described in *Cheung* (or, at least, a particular interpretation of the effect of that case) did not apply to an offence contrary to s 50(1) was not a conclusion that legislation requiring that approach to be taken would impair the institutional integrity of the Supreme Court.[54] *Chiro* was not a case about Chapter III of the Constitution.

54. The question of validity arises in the context of a judge's power to find facts relevant to the imposition of sentence. It requires consideration of the division of fact-finding responsibilities as between judge and jury on a trial on indictment for an offence against a law of a State.

55. This Court has emphasised the role of the jury as the "constitutional tribunal for deciding issues of fact" on a trial on indictment and the "abiding importance of the role of the jury as representative of the community in that respect".[55] In *Chidiac v The Queen*, Mason CJ referred to "[t]he constitutional responsibility of the jury to decide upon the verdict".[56] These references to the jury as a "constitutional" tribunal, which has a "constitutional" responsibility are not to be understood as recognising that the jury has any particular role under the Constitution in a trial for an offence contrary to the law of a State.[57] Rather, the term "constitutional" refers to the constitution of the court by judge and jury. Nor is it appropriate to assess the application of the *Kable* doctrine by reference to cases concerning the requirement for trial by jury under s 80 of the Constitution.[58]

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53 (2017) 94 NSWLR 36 at 66 [133] (Leeming JA).

54 Cf *Question of Law Reserved* [2018] SASCFC 128 at [43] (Vanstone J).

55 *R v Baden-Clay* (2016) 258 CLR 308 at 329 [65] (French CJ, Kiefel, Bell, Keane and Gordon JJ); *Director of Public Prosecutions Reference No 1 of 2017* (2019) 93 ALJR 424 at 436 [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

56 (1991) 171 CLR 432 at 443.

57 Cf Constitution, s 80.

58 Cf *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128 at [140]-[147] (Hinton J).

56. Nothing in s 9(1) interferes with the jury's verdict that the offender is guilty of an offence contrary to s 50(1). The verdict is left intact. That is not merely a matter of form rather than substance.[59] The change in substantive law effected by s 9(1) does not permit the sentencing judge to impose sentence on a basis that is inconsistent with the jury's verdict.[60] The jury "still has the function of deciding whether or not the accused committed an offence"[61] — namely the offence of persistent sexual exploitation of a child (rather than any series of individual offences relating to discrete occasions of sexual offending). The jury's verdict represents the performance of its function as "as bulwark of liberty",[62] standing between the prosecution and the accused. In a case where the complainant's credibility was in issue, the verdict of the jury necessarily means that it concluded that the complainant was a witness of truth such that it was able to accept the complainant's account at least in respect of two acts of sexual exploitation.

57. As a general principle, a State legislature is capable of re-assigning the fact-finding functions as between judge and jury in a criminal trial. So, for example, under State law a trial for an offence against a law of a State may occur before a judge alone, and that possibility does not render the Supreme Court of a State an unfit repository of federal jurisdiction.[63] If that general principle is correct, it is difficult to see how a provision such as s 9(1), which provides that a sentence is not affected by error merely because a sentencing judge undertook that fact-finding responsibility for the purposes of sentencing, could be invalid. That is, at one end of the spectrum of possible divisions of functions, a State legislature may enact legislation providing that trials on indictment may be conducted by judge alone. In this matter, the legislature has not gone that far along the spectrum. It has left the determination of guilt or innocence with the jury, but has provided that determining exactly which acts of exploitation the offender committed *for the purpose of sentence* is a matter for the sentencing court.

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59 Cf Hinton J's reasons in *Question of Law Reserved* [2018] SASCFC 128 at [170], concerning s 9(2).

60 The Amending Act, s 9(1)(b).

61 *Kingswell v The Queen* (1985) 159 CLR 264 at 277 (Gibbs CJ, Wilson and Dawson JJ). Their Honours (with whom Mason J relevantly agreed at 282) concluded that a provision that left it to the sentencing judge to determine the existence of facts which attracted a higher maximum penalty for an offence, but which were not "ingredients" of the offence, did not offend against s 80 of the Constitution.

62 *Brown v The Queen* (1986) 160 CLR 171 at 179 (Gibbs CJ).

63 Of course, by reason of s 80 of the Constitution, legislation providing for a judge alone trial will not be "picked up" and applied by s 68 of the *Judiciary Act 1903* (Cth) to a trial on indictment for an offence against the law of the Commonwealth: *Alqudsi v The Queen* (2016) 258 CLR 203.

58. Further, the fact-finding role of the sentencing judge that s 9(1) provides is taken to be "not affected by error" is not repugnant to the judicial process for the following reasons.

(1) **First**, any finding that the offender has committed a particular act of sexual exploitation alleged in the information must have been made beyond reasonable doubt and "consistently with the verdict of [the jury]".[64]

(2) **Second**, the finding will be made by an independent and impartial judicial officer after a procedurally fair plea hearing at which the offender has an opportunity to be heard.[65]

(3) **Third**, the reasons for the finding will be recorded in the judge's sentencing remarks.[66]

(4) **Fourth**, the judge's findings of fact must be open having regard to the evidence. In the ordinary course, the sentencing judge will be the judge who presided over the trial and will therefore be familiar with the evidence led at trial.

(5) **Fifth**, as noted above at paragraph 21, nothing in s 9(1) prevents the offender, if dissatisfied with the sentencing judge's finding that he has committed a particular act or acts of exploitation, from appealing against sentence on the basis that there was an error because that finding was not open on the evidence.

59. Ultimately, the function of the jury on a trial for the offence of persistent sexual exploitation of a child is to determine the offender's guilt or otherwise of the *single offence* created by s 50(1).[67] It does not extend to determining, *for the purpose of sentence*, which acts of exploitation had been proven beyond reasonable doubt to have been committed, although the jury would necessarily have concluded that at least two

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64 The Amending Act, s 9(1)(b).

65 Cf the *ex parte* procedure in *International Finance Trust Company Ltd* (2009) 240 CLR 319. As to the application of procedural fairness in sentencing hearings, see *Pantorno v The Queen* (1989) 166 CLR 466.

66 *Criminal Law (Sentencing) Act 1988* (SA), s 9(1); *Sentencing Act 2017* (SA), s 19(1): a "court must, on sentencing a defendant who is present in court ... for an offence or offences, state the sentence that it is imposing for the offence or offences and its reasons for imposing that sentence". See also *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 594 [39.3] (French CJ, Kiefel and Bell JJ); *R v Thomson* (2000) 49 NSWLR 383 at 394 [42] (Spigelman CJ): "Sentencing judges are under an obligation to give reasons for their decisions. Remarks on sentence are no different in this respect from other judgments."

67 *Chiro* (2017) 260 CLR 425 at 447 [44] (Kiefel CJ, Keane and Nettle JJ). The maximum penalty for that one offence is the same whether the offender had committed two, or more than two, acts of sexual exploitation against the victim.

alleged acts of exploitation had been proven in arriving at a guilty verdict. That particular function is, and is taken always to have been, reposed in the sentencing court as a result of the change in substantive law enacted by s 9(1) of the Amending Act. The fact the sentencing court, in carrying out its own judicial function on sentence, may be said to "repeat" the task the jury has already undertaken is not determinative of constitutional validity.[68] Rather, *Kable* requires consideration of the *quality* of the judicial process involved in finding facts relevant to sentence. That question is not answered solely by looking at which constituent part of the court (judge or jury) performs that task. Nor is it determinative that those facts *could have* formed part of the actus reus. For the reasons set out above in paragraph 58, there is nothing about the judicial process of finding facts relevant to sentence described in s 9(1)(b) (as opposed to the process endorsed in *Chiro*) that is repugnant to the institutional integrity of a State court.

60. To the extent that Victoria's submissions are inconsistent with the reasoning in *Question of Law Reserved,* Victoria contends that that case was wrongly decided.

D. CONCLUSION

61. If the question set out in AS [3(2)] arises, it should be answered "no".

PART V: ESTIMATE OF TIME

62. The Attorney-General for Victoria estimates that she will require approximately 20 minutes for the presentation of her oral submissions.

Dated: 29 October 2019

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68 Cf *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128 at [174] (Hinton J, with whom Lovell J agreed).

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A20 of 2019

BETWEEN:

KMC

Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS (SA)

Respondent

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ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (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) *Acts Interpretation Act 1915* (SA) (compilation as at 3 October 2017, including amendments up to Act No 43 of 2016)

(2) *Commonwealth of Australia Constitution Act 1900*, Ch III and s 80 (compilation as at 4 September 2013, taking into account alterations up to Act No 84 of 1977)

(3) *Crimes Act 1914* (Cth) (compilation as at 4 December 1996, including amendments up to Act No 60 of 1996)

(4) *Criminal Law Consolidation Act 1935* (SA) (compilation as at 24 October 2019, including amendments up to Act No 26 of 2019)

(5) *Criminal Law Consolidation Act 1935* (SA) (compilation as at 23 October 2017, including amendments up to Act No 19 of 2017)

(6) *Criminal Law (Sentencing) Act 1988* (SA) (compilation as at 1 July 2017, including amendments up to Act No 67 of 2017)

(7) *Criminal Procedure Act 1921* (SA) (compilation as at 22 October 2018, including amendments up to Act No 9 of 2018)

(8) *Fair Work (Registered Organisations) Act 2009* (Cth) (compilation as at 31 July 2009, including amendments up to Act No 70 of 2009)

(9) *Independent Commission Against Corruption Act 1988* (NSW) (compilation as at 6 May 2015, including amendments up to Act No 1 of 2015)

(10) *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW) (as enacted on 6 May 2015)

(11) *Judiciary Act 1903* (Cth) (compilation as at 25 August 2018, including amendments up to Act No 78 of 2018)

(12) *Migration Act 1958* (Cth) (compilation as at 19 January 1994, including amendments up to Act No 60 of 1994)

(13) *Sentencing Act 2017* (SA) (compilation as at 3 October 2019, including amendments up to Act No 17 of 2019)

(14) *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) (as enacted on 24 October 2017)

(15) *Workplace Relations Act 1996* (Cth) (compilation as at 23 June 2008, including amendments up to Act No 135 of 2008)