IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P 21 of 2012

BETWEEN:

Gregory John Yates
Appellant

and

The Queen
Respondent

APPLICANT'S REPLY

Part I:

Publication

1. I certify that this submission is in a form suitable for publication on the internet

Part II:

Reply to the **Respondent's** submissions.

1. The Applicant broadly agrees that there are three issues to be considered as set out in the Respondent's Statement of Argument at paragraph 17.

2. However, the Applicant contends that the questions raised at 17.1 and 17.2 of the Respondent's Argument are in fact questions to be considered by the Court in light of the main question to be considered as outlined in 17.3 of the Respondent's Argument and Part 11(b) of the Appellant's Submissions, namely whether in the circumstances of this case as it appeared at the time of sentencing in 1987, the making of an order for an indeterminate sentence pursuant to s.662 of the *Criminal Code* was justified.

3. Insofar as the extension of time within which to appeal is concerned, the Applicant submits:

   - that it is accepted that 25 years is a lengthy delay;

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- that the Affidavit of Karen Josephine Farley sworn on 19 June 2012 does adequately explain that delay;

- that although the applicant was legally represented at his appeal in July 1987, he did not come to the attention of Legal Aid WA until early 2011; and

- during the interim period, the Applicant who is an intellectually disabled person had been constantly in custody in the State of Western Australia since 1986.

4. The fact of the Applicant's lengthy incarceration, whilst indicative of an explanation as to why this application has been brought so far out of time, does not permit the Respondent to rely upon the history of the Applicant's incarceration and the assessments made by the Prisoner's Review Board in 2011 and 2012 and the Applicant objects to the Respondent's application to tender and rely on the Affidavit of Lindsay Makinson Fox affirmed 10 January 2013 and annexures, as outlined in paragraph 22 of the Respondent's Submissions.

5. The question for this Court is whether, when the Applicant was sentenced on 13 March 1987, there was sufficient cogent evidence before the learned sentencing Judge to justify the making of an order pursuant to s.662 of the *Criminal Code*.

6. The learned sentencing Judge imposed the order upon the Applicant pursuant to s.662 of the *Criminal Code* having had access to:

- the facts of the offences (which were, it is conceded serious);

- a pre-sentence report and criminal history which disclosed only one prior indictable sexual offence, not attended by circumstances of violence;

- a psychological report which predated the relevant offending by some four years;

- a psychiatric report that does not consider whether the Applicant's mental condition makes him a danger to the community, and is based upon an interview only minutes in duration (from Dr Allen German);

- a letter from the Health Department of Western Australia dated 28 February 1985 and prepared with regard to the previous charge of gross indecency; and

- a letter from Dr J Booth (psychiatrist) dated 9 December 1986 which refers to different offences, and a letter from Ms M McHugh dated 3 December 1986 also relating to those unrelated charges.

7. The evidence available to the learned sentencing Judge did not justify the making of the exceptional order under s.662 of the *Criminal Code*. The circumstances of the Applicant and the offending, and in particular his antecedents, character, age, health or mental condition, the nature of the offence or any special circumstances of the case indicate that the making of such an order was neither necessary or justified (cf the circumstances of ***Ciciora v The Queen 1986*** (unrep) WA CCA 1552 of 1986; del 3/2/1986).

8. The Applicant submits that there was clearly insufficient evidence to justify the making of the order. The offending itself was very properly made the subject of a lengthy prison term without parole, notwithstanding that these were the first serious offences committed by the Applicant, and also notwithstanding his relative youth and degree of intellectual disability. There was however insufficient evidence to establish the need for an indeterminate

term over and above the finite term, for the purpose of the protection of the public or for any other purpose, including that of reducing any potential period to be served on parole.

9. In the circumstances the making of that order was unjust and it should not be permitted to stand.

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Dated: 24/1/13.

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