HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

BRIAN XERRI S76/2023
Appellant

and

THE KING
Respondent

APPELLANT'S AMENDED SUBMISSIONS

Part I: Certification

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

Part II: Statement of Issues Presented by the Appeal

2. The issue which is presented by the appeal is whether a new maximum penalty of imprisonment for life has retrospective application for an offence contrary to s 66EA of the *Crimes Act 1900* (NSW) ("*Crimes Act*") of persistent sexual abuse of a child. The New South Wales Court of Criminal Appeal ("CCA") held by majority (Bell P and Price J) that although the current offence covers broadly the same subject matter as the predecessor offence, it is not a re-enactment of the predecessor offence with an increased maximum penalty. The majority Judges further held that it is a different offence to which s 19(1) of the *Crimes (Sentence Procedure) Act 1999* (NSW) ("*CSP Act*") has no application and the maximum penalty of imprisonment for life is intended to apply to offenders who have engaged in two or more sexual acts towards a child before the current offence commences.

3. The Judge in the minority (Hamill J) held that the amendments to the *Crimes Act* and the *CSP Act* that came into effect at different times in the later part of 2018 did not have the effect of rendering s 19(1) of the *CSP Act* inoperative in respect of offences under s 66EA of the *Crimes Act*. The minority Judge found that to have that impact such a fundamental provision would have to have far clearer language than that which was contained in the relevant parts of the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* ("the Amendment Act"). The minority Judge concluded that the appropriate maximum

penalty to which the applicant was liable was 25 years, not imprisonment for life, and that the sentencing Judge was led into error by the parties appearing at the sentencing hearing.

4. The following questions arise for consideration? S76/2023

   a. Was the s 66EA offence, as amended, an existing offence that had been reformulated, refined and improved, as opposed to it being a "new offence"? **(Question 1)**

   b. Where it may be ambiguous as to whether an offence is a "new offence", in that it essentially covers the same criminal conduct, is the correct approach to apply the normal principles of statutory interpretation to determine the intention of Parliament as to the applicability or otherwise of a new increased maximum penalty? **(Question 2)**

   c. Does of s 19(1) of the *Crimes (Sentencing Procedure) Act 1999* preclude the retrospective application of an increased maximum penalty for an offence without express provision in the offence as to the disapplication of s 19(1)? **(Question 3)**

   d. Was the maximum penalty 25 years imprisonment for the purposes of sentencing the Appellant? **(Question 4)**

5. The Appellant's position is that the answer to each of these four questions is "yes".

Part III: Section 78 of the Judiciary Act 1903 (Cth)

The Appellant does not consider that any notice is required under s 78B of the *Judiciary Act 1903* (Cth) to the Attorneys-General of the States and Territories.

Part IV: Citation of the Judgment of the Court Below

The decision in the New South Wales Court of Criminal Appeal is *Xerri v R* [2021] NSWCCA 268.

Part V: Relevant Facts

6. On 29 August 2019 the Appellant pleaded guilty in the Newcastle District Court to an offence of persistent sexual abuse of a child between 9 November 2016 and 14 July 2018 contrary to s 66EA(1) of the *Crimes Act.*

7. In pleading guilty the appellant admitted that he had maintained an unlawful sexual relationship with a teenage girl. The victim was 14 years old when the offending commenced, and she was 15 years of age when it ceased due to the arrest of the Appellant. In sentencing the Appellant, the sentencing Judge took into account the Appellant's low level of intellectual functioning in finding that this matter was not a particularly good example for general deterrence.[1]

8. In the proceedings on sentence neither the Crown nor the then legal representative for the Appellant raised the issue of the maximum penalty applicable for the s 66EA offence at the time of offending, namely 25 years imprisonment. The Crown sentence summary referred to the maximum penalty as life imprisonment, as did the written submissions by the Appellant's legal representative.

9. On 12 February 2020 the Appellant was sentenced by Wass J in the District Court at Newcastle. Wass J noted that the matter was never set down for trial and only issues of fitness delayed the plea.[2] The Appellant was sentenced for the 66EA offence to a term of imprisonment of 8 years with a non-parole period of 4 years and 9 months. The Appellant was also sentenced to a fixed term of 4 months imprisonment for contravening an Apprehended Violence Order and this sentence was fixed to commence two months prior to the sentence for the 66EA offence.

10. In sentencing the Appellant, the Sentencing Judge stated that the offence carried a maximum penalty of life imprisonment, and that the maximum penalty serves as a valuable guidepost in the overall sentencing process.

11. Section 66EA was repealed and substituted with effect from 1 December 2018 by the Amendment Act. The reconstituted ("current") s 66EA provided for an increased maximum penalty for the offence under s 66EA of imprisonment for life. Section 66EA(7) provides that "*This section extends to a relationship that existed wholly or partly before the commencement of the relevant amendments, or the predecessor offence, if the acts engaged in by the accused were unlawful sexual acts during the period in which the relationship existed*." The Appellant accepts that the effect of s 66EA(7) is that the offence in the current section 66EA has retrospective operation.

12. At the same time the Amendment Act also introduced a new s 25AA with the heading of "Sentencing for child sexual offences" in the CSP Act. Section 25AA(4) provides that

[1] Remarks on sentence, 12 February 2020, Wass J at [38] (CAB 20)
[2] Remarks on sentence, 12 February 2020, Wass J at [30] (CAB 17).

"This section does not affect section 19." Section 19(1) of the *Crimes (Sentencing Procedure) Act 1999* provides: *"If an Act or statutory rule increases the penalty for an offence, the increased penalty applies only to offences committed after the commencement of the provision of the Act or statutory rule increasing the penalty.*

13. An appeal against sentence was brought to the NSW Court of Criminal Appeal. This appeal is only related to Ground 1 of that appeal in relation to the s 66EA(1) offence that: "The Sentencing Judge erred by sentencing the applicant on the basis that the maximum penalty was life imprisonment when the maximum sentence applicable at the time of the offending was twenty five years imprisonment."

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Part VI: Appellant's Argument

14. The Appellant submits that the current s 66EA of the *Crimes Act* is partly retroactive: that is, it operates retrospectively, but for the maximum penalty, due to the operation of s 19(1), as made clear by s 25AA(4) of the *CSP Act*.

15. The current s 66EA(1) of the *Crimes Act* was introduced by the Amendment Act in response to the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse and commenced on 1 December 2018. The effect of s 66EA(7) provides for the offence to have retrospective operation. Subsection (8) specifies that a court imposing a sentence for an offence concerning a relationship that existed wholly

20 or partly before the commencement of the relevant amendments must take into account the maximum penalties for the unlawful sexual acts engaged in, but it does not specify how the previous maximum penalty for the s 66EA offence is to be taken into account.

16. The same amending legislation introduced s 25AA into the *CSP Act,* also to commence on 1 December 2018, which provided in subsection (1) that an offender must be sentenced in relation to the sentencing practices at the time of sentencing and not at the time of the offending. This was a change from the previous sentencing practice. Subsection 4 however, provided that s 25AA does not affect s 19. Section 19 of the *CSP Act* provides as follows:

    (1) If an Act or statutory rule increases the penalty for an offence, the increased

30 *penalty applies only to offences committed after the commencement of the provision of the Act or statutory rule increasing the penalty.*

    (2) If an Act or statutory rule reduces the penalty for an offence, the reduced penalty extends to offences committed before the commencement of the provision of the

Act or statutory rule reducing the penalty, but the reduction does not affect any penalty imposed before that commencement.

(3) In this section, a reference to a penalty includes a reference to a penalty that is expressed to be a maximum or minimum penalty. S76/2023

17. Section 19 was considered by a five judge bench in the CCA in *R v MJR*.[3] Chief Justice Spigelman noted at [19] the following in relation to s 19:

"As can be seen by contrasting s 19(1) and s 19(2), the legislature has applied the policy that offenders receive the benefit irrespective of the change, that is, if the penalty goes up, they are not subject to it, if it goes down, they receive the benefit of it. This applies a notion of fairness which also appears to underlie some of the reasoning in *Samuels v Songaila* where Bray CJ said (at 404): *"It may be that the courts would be more ready to find a retrospective intention in mitigating legislation."*

18. In *Samuels v Songalia,*[4] Bray CJ explained at p. 399 why it would be inconsistent with elementary principles of justice that new increased penalties apply to offences committed before they came into effect as follows:

"Counsel for both parties were agreed that the new penalties created by the Act of 1976 did not apply to offences committed before that Act came into operation. It is to my mind obviously inconsistent with elementary principles of justice that they should. Penalties are imposed in order to deter the forbidden conduct and we have to assume that they have some deterrent effect. A man cannot be deterred from committing a forbidden act by fear of a sanction which is not in existence at the time he commits the act."

19. In *R v MJR* Spigelman CJ observed at [27] that "Section 19 of the *Crimes (Sentencing Procedure) Act* and its predecessor reflects a principle of perceived fairness applicable to maximum and minimum penalties …"

20. The original predecessor of s 19 was originally inserted into the *Interpretation Act 1897* (NSW) by the *Statute Law (Miscellaneous Amendments) Act 1984*, No 153 at s 45.

45 Effect of alterations in penalties

(1) *Where an Act or instrument made under an Act increases the penalty or maximum penalty for an offence, the penalty or maximum penalty as increased applies only to offences committed after the commencement of the provision of the Act or instrument increasing the penalty or maximum penalty*.

[3] (2002) 54 NSWLR 368; (2002) 130 A Crim R 481 (ABFM 45).
[4] (1977) 16 SASR 397 (ABFM 84).

21. In the Second Reading Speech of the Bill the then Attorney General (NSW) stated the following in relation to the new provision: *"The amendment also will ensure that unless otherwise stated, where penalties are increased under an Act, the increase will only apply to penalties imposed for offences committed after the increase takes effect. Conversely, should a penalty be reduced, that reduction will apply to penalties imposed after the reduction takes effect, even though the offence may have been committed prior to the reduction."*[5]

22. The *Interpretation Act* 1897 (NSW) was subsequently repealed and replaced by the *Interpretation Act* 1987 in which the former s 45 was replicated in s 55. As Spiegelman CJ noted in *R v MJR* at [18] in New South Wales this provision is now found in s 19 of the *Crimes (Sentencing Procedure) Act 1999*.

23. In the course of delivering the Second Reading Speech in the Legislative Assembly on 6 June 2018, in relation to the *Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018*, the Honourable Mark Speakman, then Attorney General (NSW) stated as follows with regard to the new s 66EA: "*The offence will apply retrospectively as long as the sexual acts that make up the unlawful sexual relationship were illegal at the time they were committed. This was a key part of the royal commission's recommendation. It will ensure that the new provision can be used from the time of its commencement to prosecute long-term ongoing abuse."*

24. Whilst it is clear that the provision is intended to apply retrospectively in order to capture offending behaviour that occurred prior to the enactment, the current section does not expressly state that the intent of Parliament was to also make the maximum penalty retrospective thereby departing from the sentencing practice in relation to all other offences of sexual assault of children in New South Wales.

25. On the contrary, the following limitation was commented on in the Second Reading Speech by the Attorney General in relation to the new s 25AA: *"The new provision will ensure that sentences meet community expectation, to the extent possible within the upper limit of the maximum penalty from the time of the offence."*

26. The Appellant submits that the majority Judges in the CCA, Bell P (as his Honour then was) and Price J, erred in finding at [111] that the maximum penalty was imprisonment for life because: *"... although the current offence covers broadly the same subject*

[5] The Honourable Mr Landa, Attorney General, Second Reading Speech, *Statute Law (Miscellaneous Amendments) Bill* 1984 (NSW) (Hansard), 18 October 1984 at 2177 (ABFM 226).

matter as the predecessor offence, it is not a re-enactment of the predecessor offence with an increased maximum penalty. It is a different offence to which s 19 of the CSP Act has no application and the maximum penalty of life imprisonment is intended to apply." S76/2023

27. Whilst imprisonment for life was the maximum penalty for this offence at the time of sentence, no assistance was provided to the sentencing Judge by the Crown or the Defence regarding the maximum penalty at the time of the offence between 9 November 2016 and 14 July 2018, which was 25 years imprisonment.

28. Although s 66EA(8) specified that a court imposing a sentence for an offence concerning a relationship that existed wholly or partly before the commencement of the relevant amendments must take into account the maximum penalties for the unlawful sexual acts engaged in, it did not specify how the previous maximum penalty for the 66EA offence is to be taken into account.

29. It is clear from s 66EA(7) that the intention of the NSW Parliament was that the current s 66EA offence was to apply retrospectively in order to ensure the offence would encompass offending behaviour that occurred both prior to and after the amendments. However, the Appellant submits that it is far from clear that it was the intention of Parliament that the new maximum penalty of imprisonment for life was to also have retrospective application as there is no express statement in the provision to this effect, and there is no provision in the section that provides for the disapplication of s 19(1) of the *CSP Act*.

30. The applicant submits that the maximum penalty for an offence under s 66EA at the time his offending of 25 years imprisonment was the correct applicable maximum penalty for the purposes of his sentencing. This is because his offending conduct occurred before the commencement of the current s 66EA when the lower maximum penalty was in force.

31. The Appellant relies on s 19(1) of the *CSP Act* which provides that an increased penalty only applies to an offence committed after the commencement of an Act or Statutory rule increasing the penalty. Section 19 provides as follows:

> *(1) If an Act or statutory rule increases the penalty for an offence, the increased penalty applies only to offences committed after the commencement of the provision of the Act or statutory rule increasing the penalty.*
> *(2) If an Act or statutory rule reduces the penalty for an offence, the reduced penalty extends to offences committed before the commencement of the provision of the Act or statutory rule reducing the penalty, but the reduction*

does not affect any penalty imposed before that commencement.

(3) In this section, a reference to a penalty includes a reference to a penalty that is expressed to be a maximum or minimum penalty.

32. Section 19(1) reflects the common law in relation to the approach to be adopted when the maximum penalty for an offence is increased as explained by Bray CJ in *Samuels v Songalia.* S76/2023

33. The Appellant also relies on the introduction of the new s 25AA "Sentencing for child sexual offences" into *Crimes (Sentencing Procedure) Act (NSW)* by the same amending Act that resulted in the amendments to s 66EA. It commenced at the same time as the current s 66EA offence on 1 December 2018. The meaning of child sexual offences was defined in s 25AA(5) and this includes an offence under s 66EA.

34. Importantly section 25AA(4) specifically preserved the operation of s 19(1) in relation to child sexual offences. The significance of s 25AA was noted by Hamill J at [147] as follows: *"Section 25AA represents a legislative change to the common law principle that a sentencing Judge should apply the sentencing patterns that existed at the time of the offending, rather than the time of sentence. … Section 25AA plainly and specifically overturned the prevailing judicial approach, but it did so with two significant limitations. The first is that if there was a standard non-parole period for an offence, the standard non-parole period existing at the time of the offence is to apply: s 25AA(2). The second is that s 25AA "does not affect section 19": s 25AA(4)."*

35. The NSW Attorney General on the second reading of the bill in the NSW Legislative Assembly said the following in relation to the new s 25AA: *"Schedule 3 [6] inserts a new section [25AA] into the Act to implement one of the royal commission's key recommendations. This new section will require courts sentencing for historical offences to apply current sentencing practices and standards and our modern understanding of the trauma caused to children by sexual abuse. The purpose of this new provision is to override the current common law rule that a court must apply the sentencing standards from the time of the offence. In historical cases of child sexual abuse, this is resulting in lower sentences and discounts applied to reflect the leniency of sentencing for these offences in times past. This perpetuates our past lack of understanding of how seriously these offences should be treated and our past lack of understanding of the significant impact they have on the victim. The new provision will*

ensure that sentences meet current community expectations, to the extent possible within the upper limit of the maximum penalty from the time of the offence."[6]

36. The Attorney General further stated the following in the Second Reading Speech in relation to the retrospective application of s 66EA: *"The offence will apply retrospectively as long as the sexual acts that make up the unlawful sexual relationship were illegal at the time they were committed. This was a key part of the Royal Commission's recommendations. It will ensure that the new provision can be used from the time of its commencement to prosecute long term ongoing abuse."*[7] S76/2023

37. It is submitted that had the intention of Parliament been to retrospectively apply the increased the maximum penalty of life imprisonment, an express statement to this effect would have been warranted, which would have been expected to have included a reference to s 19(1) not applying to the current s 66EA offence. There was no such provision included in s 66EA and no statement by the Attorney General in the second reading speech to this effect.

38. Given that the operation of s 19(1) is a provision the courts in NSW must take into account when sentencing an offender where there has been an increase in the maximum penalty, it is submitted that clear language would be needed in a provision to indicate that it was the intention of the legislature that section 19(1) was not to apply where a penalty has been increased in relation to the retrospective application.

39. The applicant submits that the majority Price J and (Bell P agreeing) erred in finding at [100] that "Subsections 66EA(7)-(8) support a conclusion that the current offence is a new offence with retrospective effect to which s 19 of the *Crimes (Sentencing Procedure) Act 1990* does not apply."

40. <u>The issue as to whether the amended Section 66EA was a new offence</u>

The majority Judges considered that an important question, when determining what the intention of Parliament was when s 66EA(1) commenced on 1 December 2018, was whether it was enacted as a new offence and was not simply a reenactment of the predecessor offence with an increased maximum penalty.

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[6] New South Wales Legislative Assembly, Second Reading Speech, Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018 (NSW) (Hansard), 6 June 2018 at 7 (ABFM 232).

[7] New South Wales Legislative Assembly, Second Reading Speech, Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018 (NSW) (Hansard), 6 June 2018 at 5 (ABFM 230).

41. Price J stated at [84] that case law supports the conclusion that s 19 of the *CSP Act* will have no role to play when a new offence is created. The cases referred to in this regard were *R v Ronen* [2006] NSWCCA 123; (2006) 161 A Crim R 123 and *Woodward v R* [2017] NSWCCA 44. S76/2023

42. Section 25AA was not operative at the time of the decisions in *Ronen* and *Woodward*. Indeed, R A Hulme J at [75] of *Woodward* (Beazley P and Bellew J agreeing) found that the correct approach was to have regard to the sentencing norms at the time of the offence (inconsistent with the current requirements of s 25AA) and Howie J at [74] of *Ronen* (Spigelman CJ and Kirby J agreeing) found the correct approach to be a consideration of norms at the time of sentencing (consistent with s 25AA).

43. Neither of the cases of *Ronen* or *Woodward* involved consideration of an amendment to, or a replacement of, an existing offence that was to have a retrospective effect. Neither case involved an offender being subject to an increased maximum penalty from a new provision and as such a consideration of the effect of s 19(1). Rather they involved sentencing for repealed offences where s 19(2) was sought to be relied upon by offenders where new, possibly comparable, offences with lower maximum penalties had been enacted as part of a suite of legislative reforms. In each of these cases the Court held that as the offences were new offences with different elements the offenders were not entitled to be sentenced based on the lower maximum penalty. However, in each instance, it was indicated that the court should sentence the offenders based on the applicable higher maximum penalty from the time of offending, but in doing so they should have regard to the fact that the current comparable offence has a lower maximum penalty.[8]

44. The Appellant submits there are textual indications in the Amendment Act that indicate that Parliament did not intend for the new maximum penalty of imprisonment for life to be retrospective.

45. In *Stephens v The Queen* [2022] HCA 31 Keane, Gordon, Edelman, and Gleeson JJ agreeing at [37]-[38], held that s 80AF of the *Crimes Act* has limited retroactive effect, having been enacted to respond to difficulties in the prosecution of historic sex offences, and that to construe s 80AF as wholly retroactive would disturb reasonable expectations as to implementation "in the teeth of textual indications to the contrary." The "textual indications to the contrary" relevant to the retrospective application of the increased

[8] *Ronen* at [74] (ABFM 82) and *Woodward* at [75] (ABFM 163).

maximum penalty for the current s 66EA are s 19(1) (that the increased penalty extends to offences committed after commencement) and s 25AA(4) (that the operation of s 19 is not affected by the new provision requiring that an offender be sentenced consistent with sentencing patterns and practices at the time of the sentence rather than at the time of the offending). S76/2023

46. It is not conceded that these two cases support the conclusion that s 19(1) of the *CSP Act* had no role to play in the amendments that were made to s 66EA of the *Crimes Act*. Firstly, it is submitted that the 66EA offence of persistent sexual abuse of a child was not replaced, but rather that it was amended or reconstituted. Secondly, the amended s 66EA offence was not simply forward looking it was both prospective and retrospective. Thirdly, the penalty for the offence was not decreased it was increased and as such s 19(1) is engaged. Fourthly, the same legislation that amended s 66EA introduced s 25AA and subsection 4 of this provision specifically preserved the operation of section 19(1) to sentencing in respect of child sexual offences.

47. Price J recognised at [77]-[78] that the Crown's contention that the applicable maximum penalty is life imprisonment faced two hurdles. The first hurdle was the general assumption that legislation is not to act retrospectively. Price J noted that this "most strictly applied in relation to Acts creating an offence because of the manifest injustice that an alternative approach would bring about".[9] The second hurdle was s 19 of the *CSP Act*. Price J indicated that prior to the enactment of s 19 there had been a debate regarding the presumption against retrospectivity when there had been an increase in the maximum penalty and he noted that the issue had been resolved by 19 of the *CSP Act*.

48. Whilst it must be acknowledged that the current offence has different elements, many of the amendments were as Hamill J described at [144] *"... largely facilitative and responsive to the difficulties of proofs and decisions of the courts which created obstacles to the prosecution and conviction of people, like the applicant, that engaged in the persistent sexual abuse of a child."* Hamill J did identify at [145] other amendments of more substance, such as the change of the age of a "child" from a person under the age of 18 years" to "a person under the age of 16 years". The current offence can only be committed by an adult over the age of 18 years.

[9] At [77] citing Dennis Pearce, Statutory Interpretation in Australia (9th ed, 2019, LexisNexis Butterworths) at 332 (CAB 42).

49. Another was the expression "unlawful sexual relationship" being defined as a "relationship in which an adult engages in two or more unlawful sexual acts with or towards a child over any period". Hamill J noted that both the new and old provisions defined the expressions of "unlawful sexual act" and "sexual offence" by reference to the relevant offences under the *Crimes Act* and that the list of sections was close to identical although the terms of many of the offences themselves had changed due to a raft of amendments made by the same Amendment Act. Hamill J concluded at [156] that the current s 66EA offence was not a new offence but rather it was a "reformulated, refined and improved" existing offence.

50. Price J noted at [68] the Crown observation that it was uncontroversial that the courts will give effect to a clear intention that a new statutory regime will operate retrospectively and cited *Siganto v The Queen*.[10]

51. The Appellant agrees with this statement of principle in *Siganto,* however, it is noted that the intention must be clear and the issues in that case were far removed from those that arise in this matter. This case differs significantly, as it involves the application of an increased maximum penalty of imprisonment for life, where the reasonable expectation would be, unless there was a clear indication to the contrary, s 19(1) of the *CSP Act* would operate so that the liability of the Appellant would be governed by the maximum penalty at the time of his offending which was 25 years imprisonment.

52. Whilst it is evident from s 66EA(7) that Parliament intended for the current offence to have retrospective effect, it is unclear that Parliament intended for the new maximum penalty of life imprisonment to apply retrospectively and for s 19(1) of the *CSP Act* to have no application.

53. There are two potential different aspects of retrospectivity under consideration with this provision: one being as to it being an offence having retrospective application and the other as to the retrospective application of a new higher maximum penalty. In regard to the later, the insertion of the new section 25AA in respect of sentencing for child sex offences preserving the operation of s 19(1) is indicative of a lack of Parliamentary intent for new maximum penalties in relation to child sexual assault to have retrospective application.

54. It is submitted that this is particularly so where the current provision is capable of being seen as not a 'new' offence but a "reformulated refined and 'improved' existing offence.

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[10] [1998] HCA 74; (1988) 194 CLR 656 (ABFM 109).

In the Second Reading Speech, the then Attorney General (NSW) stated that: *"This bill makes a suite of reforms, including new offences, improved offences and procedural amendments. Many of them are based on the recommendations of the royal commission."*[11] S76/2023

55. When referring to s 66EA the Attorney General said: *"The Royal Commission made detailed recommendations for a new way of formulating the offence, based on the offence currently provided under Queensland law, which has also been adopted in South Australia. Schedule 1 [20] to the bill amends the Crimes Act 1900 to introduce this model in New South Wales."*[12]

10 56. Hamill J, in the minority, did not agree at [146] that the changes to the terms of s 66EA had the effect that the amended provision created a new offence. Hamill J noted that "There was an existing offence of persistent sexual abuse of a child and he took into account that the facts alleged against the applicant (and admitted by him) also constituted an offence under the old version of s 66EA". Hamill J noted at [154] that the adoption in the Second Reading Speech by the then Attorney General of the language of the Royal Commission in relation to "a new way of formulating the offence" under s 66EA did not support the contention that s 66EA created a new offence. This was particularly so in the context of the Bill introducing a "suite of reforms" that included "new offences, improved offences and procedural amendments".[13] Hamill J noted, in
20 contrast to the language used in relation to s 66EA, that the Attorney General provided specific examples of new offences recommended by the Royal Commission such as s 43B to "introduce a new, forward looking offence covering failure to protect a child from abuse".[14]

57. In *MK v R; RB v R* [2023] NSWCCA 180, the five judge bench, in considering the proper construction of the re-formulated s 66EA noted the "mischief" of the prior formulation as identified by the Royal Commission: "*The purpose or mischief that this aspect of the Royal Commission Report was addressing is clear, namely, the perceived difficulty in providing particulars and securing unanimity amongst the jury in cases*

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[11] New South Wales Legislative Assembly, Second Reading Speech, *Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018* (NSW) (Hansard), 6 June 2018 at 1 (ABFM 228).
[12] Ibid 3 (ABFM 230).
[13] At [153] citing New South Wales Legislative Assembly, Second Reading Speech, *Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018* (NSW) (Hansard), 6 June 2018 at 3 (ABFM 228).
[14] At [153] citing New South Wales Legislative Assembly, Second Reading Speech, *Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018* (NSW) (Hansard), 6 June 2018 at 4 (ABFM 229).

where the evidence of repeated sexual abuse is given by children as required by decisions such as KBT and S v The Queen. However, the Royal Commission Report did not identify any problem or "mischief" that would be overcome by creating an offence that required the establishment of a sexual relationship between the offender or victim over and above the commission of the unlawful sexual acts."[15] That is, to adopt the words of Hamill J, the amendments were *largely facilitative and responsive to the difficulties of proofs and decisions of the courts*. Rather than the creation of a new offence, the amendments constituted the refinement of an existing offence.

58. <u>The importance of section 19(1) of the *Crimes (Sentence Procedure) Act*</u>

The Appellant submits that Hamill J was correct in his dissenting Judgement when at [156] he accepted the Appellant's submission that the "… passages in relation to second reading speech support the argument that (1) the Amendment Act did not create a new offence, but reformulated, refined and "improved" an existing offence, and (2) the legislative intention and the language of s 25AA specifically preserved the fundamental provision in s 19 of the *Crimes (Sentencing Procedure) Act."*

59. Hamill J at [146] accepted that it was arguable as Bell P and Price J had concluded, that the changes to the terms of s 66EA had the effect that the amended provision created a new offence, however, he disagreed that the changes to the section were of such significance that this conclusion was correct due to the fact of the pre-existing offence of persistent sexual abuse of a child and that the facts alleged against the applicant constituted an offence under the version predating the amendment.

60. Section 25AA makes it clear that, whilst present day sentencing practices are to guide the courts when imposing sentences on child sex offenders, the courts must still refer to the maximum penalties applicable at the time of offences. If the new maximum penalty of life imprisonment for an offence under s 66EA was to apply retrospectively this would mean that s 66EA would sit wholly outside the sentencing regime for other offences pertaining to child sexual assault for which s 19(1) mandates that any increased penalty only applies to offences that occurred after the commencement of the provision of the Act or statutory rule increasing the penalty.

61. Hamill J found at [157] that to reach the conclusion that s 19 remains determinative of the maximum penalty under s 66EA it is not necessary to resort to the secondary

[15] at [96] per Beech-Jones CJ at CL, Ward P, Price, Wilson and Lonergan JJ agreeing (ABFM 211).

materials, such as the Second Reading Speech, and the Criminal Justice Report by the Royal Commission. Hamill J had noted the limitations on the use of such extrinsic material and had regard to *Re Bolton; Ex Parte Beane* (1987) 162 CLR 514 at 518; [1987] HCA 12, where it was stated that: *"The words of a Minister must not be substituted for the text of the law. Particularly that is so when the intention stated by the Minister but unexpressed in law is restrictive to the liberty of the individual."*

62. The Appellant submits that the approach taken by Hamill J at [159] was correct that "Section s 66EA must be read in the context of the *Amendment Act* and the statutes thereby amended, and read as a whole, including ss 19 and 25AA of the *Crimes (Sentencing Procedure) Act*". In this regard, Hamill J referred to the following at [159] to [161] (citations removed):

> "As Mason J (as his Honour then was) said in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*:
>
> > "…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."
>
> In *Project Blue Sky*, the majority again emphasised that:
>
> > "A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals."
>
> To similar effect is the statement of Kourakis CJ in *Palace Gallery v Workcover Premium Review Panel* that the words of a statute must be read:
>
> > "…in their current statutory context, and so that the statute operates as a coherent whole."

63. Hamill J took into account at [162], that where there appears to be a conflict between the provisions of a statute, the court must "determine which is the leading provision and which the subordinate provision, and which must give way to the other." He noted that the objective of establishing the "hierarchy" was to give effect to the "purpose and language" of the provisions and maintain "the unity of the statutory scheme". Hamill J also identified that if there was any conflict in the provisions under consideration in this matter, which he doubted, it was between the retrospective operation of s 66EA and the and the maintenance of the s 19 of the *Crimes (Sentence Procedure) Act* by s 25AA.

64. It is submitted that Hamill J was correct in his conclusion at [163] that there was in fact no conflict between the retrospective operation of s 66EA of the *Crimes Act* and s 19 of the *CSP Act*. This is because as Hamill J found at [163]-[164] if there was any such perceived conflict:

"... it is readily reconciled, and the legislative scheme given a cohesive and unified operation, once it is accepted that the retrospectivity relates to the offence, while the increase in the maximum penalty is precluded by the overarching sentencing provisions in ss 19 and 25AA "notwithstanding the literal command' of s 66EA. To again adopt the language of the majority in Project Blue Sky*, s 25AA (and in turn, s 19) "provides the conceptual framework in which the functions conferred" by s 66EA operate.*

The conclusion that s 66EA is a reformulation of the existing offence and that s 19 continues to operate is reached by undertaking a plain reading of the text of the Amendment Act, considering that Act and the statutes it amends as a whole, and striving to give effect to Parliament's clear intention to create a single, cohesive legislative scheme."

65. Hamill J recognised at [166] that the traditional approach to the construction of penal statutes to favour the liberty of the subject has been qualified, however His Honour noted that those principles still remain of importance, and he considered that this was particularly so where legislation evinces a clear intention to temper the retrospectivity of a penal statute. Hamill J considered that the courts should still adopt a cautious approach when the statutory construction under consideration involves matters impacting on an individual person's liberty. The Royal Commission did not propose any departure from such an approach as can be seen from Recommendation 76 "State and territory governments should introduce legislation to provide that sentences for child sexual abuse offences should be set in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, but the sentence must be limited to the maximum sentence available for the offence at the date when the offence was committed."

66. The Appellant submits that the construction that Hamill J favoured does as he observed at [166] allow the provisions to operate in a cohesive and unified way, and at the same time accord with the older protective principle of the liberty of the subject where a penal statute is involved. Accordingly, it is submitted that the majority erred in upholding that it was correct for the Appellant to be sentenced on the basis that the maximum penalty was life imprisonment when the maximum penalty at the time of his offending was twenty five years imprisonment.

67. Since the Judgement in this matter, the *CSP Act* has been amended to delete subsections 25AA(1)(2) and (4), and insert a new s 21B which commenced on 18 October 2022. Importantly s 21B(5) preserves the operation of s 19(1) like s 25AA did at the time of its introduction. In the Second Reading Speech in relation to the Bill that introduced s 21B the then Attorney General (NSW) stated that: *"A central tenet of the rule of law is that the law should be knowable and able to be obeyed. A corollary of this is the fundamental principle of criminal law that a person may only be punished for an act that would have constituted a criminal offence at the time it was committed and should be given no greater sentence than the maximum penalty that would have been available at that time."*[16]

68. In relation to the continued operation of s 19(1) the Attorney General said the following: *"Proposed section 21B (1) reflects the current drafting of section 25AA (1) except that it is not limited to child sexual offences. Consistent with the approach in section 25AA, proposed section 21B (5) expressly states that the provision does not affect section 19 of the Crimes (Sentencing Procedure) Act 1999."*[17]

71. The reasoning of Hamill J reflects the principles identified by the Attorney General, when introducing the subsequent Bill which continued to preserve the operation of s 19(1) for offences committed after the commencement of the new s 21B(1). As Hamill J pointed out in his minority Judgement at [163] (citations removed):

> "If there is a conflict in the provisions under consideration here, a proposition which I doubt, it is between the retrospective operation of s 66EA of the Crimes Act and the maintenance of s 19 of the *Crimes (Sentencing Procedure) Act* by s 25AA. That conflict is readily reconciled, and the legislative scheme given cohesive and unified operation, once it is accepted that the retrospectivity of s 66EA relates to the offence, while the increase in the maximum penalty is precluded by the overarching sentencing provisions in ss 19 and 25AA "notwithstanding the literal command" of s 66EA. To again adopt the language of the majority in *Project Blue Sky*, s 25AA (and in turn, s 19) "provided the conceptual framework in which the functions conferred" by s 66EA operate."

[16] New South Wales Legislative Assembly, Second Reading Speech, Crimes (Sentencing Procedure) Amendment Bill 2022 (NSW) (Hansard), 10 August 2022 at page 7 (ABFM 235).
[17] Ibid at page 9 (ABFM 236).

Part VII: Orders Sought

The Appellant seeks the following orders: (1) The appeal is allowed. (2) The orders made by the Court of Criminal Appeal of the Supreme Court of New South Wales on 12 November 2021 are set aside and the matter is remitted to the CCA to consider re-sentence in accordance with this Court's reasons.

Part VIII: Estimate of Oral Argument

10 The Appellant estimates that no more than one and half hours will be required for the presentation of its oral argument.

Dated: 1 August 2023

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

BRIAN XERRI
Appellant

and

THE KING
Respondent

ANNEXURE TO APPELLANT'S SUBMISSIONS

Pursuant to Practice Direction No.1 of 2019, the Appellant sets out below a list of the statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
1.	*Crimes Act 1900* (NSW)	Historical version for 2 July 2018 to 12 August 2018	s 66EA
2.	*Crimes Act 1900* (NSW)	As at 13 July 2023	ss 43B, 66EA, 80AF
3.	*Crimes (Sentence Procedure) Act 1999* (NSW)	Historical version for 31 August 2018 to 23 September 2018	s 25AA
4.	*Crimes (Sentence Procedure) Act 1999* (NSW)	As at 14 July 2023	ss 19, 21B and 25AA.
5.	*Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW)	As at 2 December 2018	
6.	*Judiciary Act 1903* (Cth)	As at 18 February 2022	s 78B
7.	*Interpretation Act 1897* (NSW)	Repealed version for 1 May 1987 to 31 August 1987	s 45
8.	*Statute Law (Miscellaneous Amendments) Act 1984* (NSW)	As at 10 December 1984	
9.	*Interpretation Act 1987* (NSW)	As at 1 September 1987	s 55