



HIGH COURT OF AUSTRALIA

6 March 2024

XERRI v THE KING
[2024] HCA 5

Today, the High Court unanimously dismissed an appeal from a judgment of the Court of Criminal Appeal of New South Wales. The principal issue was whether the replacement of s 66EA of the *Crimes Act 1900* (NSW) ("the Crimes Act") constituted an increase in the penalty for an "offence" which already existed for the purposes of s 19 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the Procedure Act").

Section 19 of the Procedure Act provides that if an Act "increases the penalty for an offence" the increased penalty only applies to offences committed after the commencement of that Act. Section 66EA in its current form was enacted by the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) ("the 2018 Amendment Act") with effect from 1 December 2018 and provides for a maximum penalty of life imprisonment. The predecessor to s 66EA – also numbered s 66EA – provided for a maximum penalty of 25 years. The 2018 Amendment Act also inserted s 25AA into the Procedure Act, which requires a court to sentence an offender for a "child sexual offence" in accordance with the sentencing patterns and practices as at the time of sentencing rather than as at the time of commission of the offence. Section 25AA(4) stated that s 25AA does not apply to prevent the effect of s 19 of the Procedure Act.

In August 2019, the appellant pleaded guilty to the offence of being an adult who had maintained an unlawful sexual relationship with a child contrary to s 66EA(1) of the Crimes Act. The appellant was sentenced to a term of imprisonment of eight years. While it was not disputed that the offence applied with retrospective force, the appellant argued that he should have been sentenced in accordance with the previous s 66EA. The question for determination was whether the current s 66EA of the Crimes Act constituted an increase in the penalty for the "offence" already created by the previous s 66EA. In appealing the decision of the Court of Criminal Appeal, the appellant argued that the offence created by the current s 66EA is merely a reformulation of an "offence" that had already existed, and because the reformulation included an increase in penalty, s 19 of the Procedure Act applies.

A majority of the Court of Criminal Appeal (Price J, Bell P agreeing, Hamill J dissenting) dismissed the appellant's appeal against sentence. The majority held that s 19 of the Procedure Act did not apply to the offence the appellant was charged with because the current s 66EA created a new and distinct offence. The maximum penalty for the offence was therefore life imprisonment.

The High Court unanimously held that the current s 66EA creates a new and distinct offence. The Court identified significant differences between the current and previous s 66EA and held that s 19 of the Procedure Act does not apply. The current s 66EA was intended to, and does, have retrospective effect. Nothing in former s 25AA of the Procedure Act alters that conclusion.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.