HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 15 Apr 2026 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	C2/2026
File Title:	O'Connell v. Director of Public Prosecutions
Registry:	Canberra
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	15 Apr 2026

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

C2/2026

IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

BETWEEN: MICHAEL O'CONNELL
Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS
Respondent

APPELLANT'S REPLY

Part I: Form of Submissions

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

Part II: Reply submissions

The appellant's case at trial

2. Contrary to the respondent's submission (**RS**) at [10], defence counsel in his closing address used the words "the evidence doesn't *on any view* support [the appellant] having a reckless indifferent state of mind": emphasis added, T544.30-.42 **ABFM 87**. The appeal should be determined on the basis that the appellant's state of mind was in issue at trial.

Scope of s 37O(1)(d) *Supreme Court Act 1933* (ACT)

3. A further grant of special leave is not required for the appellant to advance the argument set out in the Appellant's Submissions (**AS**) at [23]-[30]. The appellant has been granted special leave to appeal from the whole of the judgment of the ACT Court of Appeal (**CA**) in *O'Connell v DPP (No 4)* [2025] ACTCA 41 (**Second J**) on the grounds set out in the Notice of Appeal. The first ground of appeal, as framed, is capable of encapsulating the argument advanced: AS [23]. The argument is not a "new argument" as it was advanced before the CA: see Second J [6] **CAB 149**; J [47]-[48] **CAB 158**. In any event, the argument advanced concerns whether the CA has the power to substitute a verdict under s 37O of the *Supreme Court Act 1933* (***SC Act***) which raises a question

of law of general importance to the determination of convictions appeals in the ACT and, if required, special leave should be granted to advance this argument.

4. The principle that a provision conferring judicial power should be construed "liberally" does not operate at large but within the bounds of what the "terms and context…permit",[1] and is subject to competing considerations:[2] cf. RS [17], [19]. There is a principled basis for construing s 37O(1)(d) as not conferring power on the CA to substitute a verdict for an alternative offence namely, to protect an appellant's right to trial by jury[3] and a recognition that in criminal matters, the jury is the Constitutional tribunal of fact: cf. RS at [17]. Moreover, in the ACT, unlike jurisdictions like NSW, murder and manslaughter are excluded from the operation of the trial by judge alone provisions: ss 68A and 68B, Sch 2 *SC Act*; cf. RS at [28]. The appellant's construction does not produce either an "inconvenient" or "improbable" approach – it simply means that a person who successfully appeals against his conviction must be re-tried before a jury for any alternative offence (subject to s 297 of the Crimes Act): cf. RS [17]. The CA's ability to order a new trial is another contextual matter relevant to the scope of s 37O(1)(d) since it means the Court is not left without any option where the verdict for a primary offence is set aside and an alternative offence was not considered by the jury.

5. The relevance of a comparison to other jurisdictions is that those provisions confer a substitution power in clear terms. Section s 37O, as introduced in 2001, was modelled on s 28 of the *Federal Court of Australia Act 1976* (Cth) (***FC Act***): RS [18] and Second J [49] **CAB 159**. However, s 28 of the *FC Act* was repealed in 2009 following the introduction of the more specific powers the Federal Court now has in appeals against conviction in s 30BB including an express power to "substitute a guilty verdict for an offence…other than the offence to which the appeal relates…" after a conviction has been set aside in s 30BB(3). The federal legislature has therefore moved away from the ambiguous form of power in s 37O to something similar to the common form appeal provisions. The legislative history, while providing some explanation for the difference

---

[1] *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313 per Brennan J, Gaudron and McHugh JJ.

[2] *Achurch v The Queen* (2014) 253 CLR 141 is one example of this Court reading down a broadly expressed power for a court to reopen criminal proceedings where it had imposed a penalty that was "contrary to law" in light of competing considerations including the principle of finality and the need to avoid a the boundaries between correction and appeal becoming "porous", and despite the possible "practical benefits" of a broader reading: at [36].

[3] A right which "ought not be diminished save by language which is reasonably capable of no other construction": *Tassel v Hayes* (1987) 163 CLR 34 at 41 per Mason, Wilson and Dawson JJ citing *Sargood Brothers v The Commonwealth* (1910) 11 CLR 258 at 279.

between the position in the ACT and other jurisdictions, does not ultimately assist on the construction of the provision: cf. RS [18]-[19].

Decision to substitute the verdict

6. The respondent, like the majority, takes as its starting point that the jury found the appellant acted with reckless indifference towards Ms Jordan's life and reads into that finding a positive conclusion as to the different state of mind required to prove manslaughter: RS [32]-[33]. This approach fails to take into account that the finding the jury must have made was "unassailably impugned" by the majority's conclusion that it was unreasonable (Second J [62] **CAB 162**), and ignores the fact that the states of mind for each offence were, and were presented to the jury as, distinct from one another: AS at [36]-[37]

7. In contending that the state of mind for manslaughter was subsumed by the state of mind for murder the respondent suggests that proof that the appellant "knew that it was probable or likely" that Ms Jordan would fall from the bonnet of the vehicle as a consequence of his act or had "foresight" of the same would suffice to prove an "intent" (to dislodge her from the bonnet) at common law: RS [34], [37], [38]. This is incorrect,[4] since there is no presumption that a person intends the natural or probable consequences of their actions.[5] Whilst *Zaburoni v The Queen* (2016) 256 CLR 482 concerned the meaning of intent under the Queensland *Criminal Code*, the discussion of the ordinary meaning of intention and the use of that term in the criminal context makes clear that the concept of foreseeability of outcome is separate from intention: cf. RS at [34]. In any event, the jury were not directed that the appellant's intention for the "unlawful" act underpinning manslaughter could be established in that way and were directed that to find an unlawful act they must be satisfied he intended for Ms Jordan to fall from the vehicle or be dislodged: MFI 31 **ABFM 91** and SU 555.6-.12 **CAB 18**. It is also incorrect, particularly given the directions to the jury, to characterise the "intention to dislodge" Ms Jordan as a "step along the way" to a finding of guilt for murder, since that intention was only discussed in the context of the elements for manslaughter: cf. RS [32], [35]. The question is not whether the jury might have convicted the appellant

---

[4] *R v Woollin* [1999] 1 AC 82 (***Woollin***) at 89, 95 per Lord Steyn.
[5] *Parker v The Queen* (1963) 111 CLR 610 at 632 per Dixon J disapproving of statements to this effect in *Director of Public Prosecutions v Smith* [1961] AC 290 and endorsing the view in *Stapleton v The Queen* (1952) 86 CLR 358 at 365 that such a presumption was "seldom helpful and always dangerous".

of manslaughter if they reasoned in a particular way - it is whether they must have done so.

8. The question in *Spies* is also not whether there is a "principled basis to substitute another verdict" or "whether it is appropriate...in a given case": cf. Intervener Submissions (**IS**) at [13]. There was no limiting of the issues in the trial of a type that may have "foreclose[d] the consideration of factual issues by the jury and, in the result, the invocation of the substitution power…": cf. IS at [42]. The appellant otherwise agrees with the South Australian Director of Public Prosecutions' statement of principles at IS [43]-[45].

10

Section 297 of the *Crimes Act 1900* (ACT)

9. The respondent relies on *Sio v The Queen* (2016) 259 CLR 47 and *AJS v The Queen* (2007) 235 CLR 505 in responding to the appellant's argument as to the scope of s 297 *Crimes Act 1900* (ACT) (*Crimes Act*): RS [54]. Neither decision considered the effect of a provision in the same terms as s 297: AS [47]. Nor did *R v PL* (2009) 199 A Crim R 199 consider the NSW equivalent of s 297: cf. RS at [47].

10. The respondent's submission that the purpose of s 297[6] is "to give effect to the principle of *autrefois acquit* in the context of alternative offences" is not borne out by the terms of the provision. If the purpose of the provision was simply to give effect to the principle
20 at common law then it would have no work to do since the doctrine of *autrefois acquit* would allow an accused to make a plea in bar at least in circumstances where the offences involve identical or wholly overlapping elements.[7] Nothing in the *Crimes Act* precludes the application of the common law, rather s 283, which contemplates a plea of *autrefois acquit* in respect of a subsequent prosecution for the same offence, suggests that the common law continues to apply.

---

[6] The provision dates back to at least 1883: see s 362 of the *Criminal Law Amendment Act 1883* (NSW) which became s 426 *Crimes Act 1900* (NSW). The NSW *Crimes Act* applied in the ACT until it was converted to an ACT Act in 1989 by s 34(4) *Australian Capital Territory (Self-Government) Act 1988* (Cth). Section 297 is in substantially similar term to s 426 of the NSW Crimes Act was at that time save for it now refers to "an offence" instead of a "felony".

[7] *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1305 and 1307 (Lord Morris), 1361 (Lord Pearce); *R v Carroll* (2002) 213 CLR 635 at [37]-[40]; *Pearce v The Queen* (1998) 194 CLR 610 at 616-618; *Sio* at [76]. An attempt to rely on evidence from the first prosecution might also give rise to complaints falling short of a plea in bar but arising from the incontrovertibility of the acquittal or *res judicata*.

11. In *AJS v The Queen* (2007) 235 CLR 505 the plurality considered at [18]-[19] that the common law did not protect an accused from a subsequent trial for an alternative offence that was left to the jury but not reached following an acquittal on appeal for the primary offence. In the ACT (and NSW), that position is modified by s 297 (and the NSW equivalent) to provide that a person acquitted of the principal offence cannot be re-tried for the alternative offence.

12. The appellant accepts that the position in RS [46] follows from its construction, however that result will only arise in cases where the CA takes the step of entering an acquittal for the substantive offence: cf. *R v Murrell* (2001) 123 A Crim R 54; *Sio; Grogan v R* [2016] NSWCCA 168. In the appellant's case, the CA exercised its power in s 37O(1)(d) to set aside the guilty verdict for murder and enter a verdict of not guilty in its place and entered orders to that effect on 27 June 2025, thereby perfecting the orders of the appeal:[8] **CAB 146.** The formal entry of the orders in June enlivened the principle of finality as a matter of form and substance.[9] Once the orders were perfected, the appellant had been "tried" for the purposes of s 297 (the charge on the indictment being finally determined): cf. RS [43]-[44] (leaving aside the separate issue of whether the CA could exercise the power in s 37O(1) more than once as it purported to do).

Dated: 15 April 2026

Bret Walker
Fifth Floor St James' Hall
(02) 8257 2527
caroline.davoren@stjames.net.au

Georgia Huxley
Forbes Chambers
(02) 9390 7777
ghuxley@forbeschambers.com.au

Chelsea Brain
Maurice Byers Chambers
(02) 8233 0300
c.brain@mauricebyers.com

[8] *NH v Director of Public Prosecutions for the State of South Australia* (2016) 260 CLR 546 (***NH***) at [30], [99].
[9] *NH* at [99]; *Burrell v The Queen* (2008) 238 CLR 218 at [15]-[16], [18].