HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, STEWARD, GLEESON AND JAGOT JJ

BRIAN XERRI APPELLANT

AND

THE KING RESPONDENT

Xerri v The King
[2024] HCA 5
Date of Hearing: 18 October 2023
Date of Judgment: 6 March 2024
S76/2023

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

N M Steel with R J Rodger for the appellant (instructed by Ryan Payten Le)

H R Roberts SC with B A Hatfield SC and E S Jones for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Xerri v The King

Criminal law – Sentence – Calculation – Statutory interpretation – Maximum penalty – Persistent child sexual abuse offence – Where s 66EA of *Crimes Act 1900* (NSW) came into effect from 1 December 2018 with maximum penalty of life imprisonment – Where previous s 66EA of *Crimes Act* provided for maximum penalty of 25 years – Where appellant pleaded guilty to offence of being an adult who had maintained an unlawful sexual relationship with child – Where appellant sentenced under current s 66EA to eight years imprisonment – Where maximum penalty of life imprisonment served as "valuable guidepost" in sentencing – Where appellant's offending occurred prior to commencement of current s 66EA and appellant pleaded guilty after current s 66EA commenced – Whether replacement of s 66EA of *Crimes Act* constituted new offence or increase in penalty for "offence" which already existed for purposes of s 19 of *Crimes (Sentencing Procedure) Act 1999* (NSW) ("Procedure Act") – Meaning of word "offence" in s 19 of Procedure Act – Where retrospective operation of s 66EA offence – Whether maximum penalty for offence committed by appellant remained 25 years imprisonment by operation of s 19 of Procedure Act – Whether significant differences between former and current s 66EA of *Crimes Act* such that they are not same offence.

Words and phrases – "child sexual abuse", "differences of substance", "increased penalty", "life imprisonment", "maximum penalty", "new offence", "offence", "persistent sexual abuse of a child", "retrospective", "retrospective offence", "sentence".

Crimes Act 1900 (NSW), s 66EA.
Criminal Legislation Amendment (Child Sexual Abuse) Act 2018 (NSW).
Crimes (Sentencing Procedure) Act 1999 (NSW), ss 19, 25AA.

1 GAGELER CJ AND JAGOT J. This appeal turns on the proper construction of the new s 66EA of the *Crimes Act 1900* (NSW) ("the Crimes Act"), which was introduced by the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) as part of a suite of legislative reforms responsive to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse ("the Royal Commission").[1] It also raises the proper construction of s 19(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the CSP Act"), which regulates the effect of any Act or statutory rule that increases the penalty for an offence.

2 On 15 January 1999, years before the Royal Commission, a provision of the Crimes Act, also numbered s 66EA(1), commenced.[2] It provided that a "person who, on 3 or more separate occasions occurring on separate days during any period, engages in conduct in relation to a particular child that constitutes a sexual offence is liable to penal servitude for 25 years". This earlier version of s 66EA is referred to as the "predecessor offence" in the new s 66EA.[3]

3 The Royal Commission considered the predecessor offence (and versions of it across Australia) and concluded that it had not achieved its intended objective of facilitating the prosecution of persistent or repeated sexual abuse of a child.[4] In the Second Reading Speech explaining the suite of legislative reforms responsive to the recommendations of the Royal Commission, the Attorney-General said that the predecessor offence was "introduced in 1999 as a tool to assist the prosecution of the most terrible cases of abuse where many largely indistinguishable incidents of abuse made it difficult for victims to recall specific occasions with sufficient particularity for individual charges" but that it had not "fulfilled this objective", necessitating further legislative reform.[5]

4 The new s 66EA(1), which commenced on 1 December 2018, provides that an "adult who maintains an unlawful sexual relationship with a child is guilty of an offence". Section 66EA(1) also provides that the maximum penalty for that

---

1 *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW); New South Wales, *Commencement Proclamation*, 2018 No 671, 28 November 2018.

2 Section 66EA was introduced by the *Crimes Legislation Amendment (Child Sexual Offences) Act 1998* (NSW).

3 *Crimes Act 1900* (NSW), s 66EA(15).

4 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017), Parts III-VI at Ch 11.

5 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 June 2018 at 5.

offence is "[i]mprisonment for life". Section 66EA(2) provides that an "unlawful sexual relationship" is a "relationship in which an adult engages in 2 or more unlawful sexual acts with or towards a child over any period". By s 66EA(15), an "unlawful sexual act" is an act that would constitute an offence under other provisions, but this definition does not include the predecessor offence.

5 While the predecessor offence was in force, the appellant engaged in the conduct proscribed by that provision. By the time the appellant pleaded guilty on 29 August 2019, the new s 66EA had commenced.

6 The appellant was sentenced on the (then) undisputed basis that the maximum penalty for the offence against the new s 66EA(1) to which he had pleaded guilty was life imprisonment. The appellant appealed against his sentence on the basis that, while the relevant offence was that created by the new s 66EA(1), the maximum penalty for the offence remained 25 years' imprisonment by operation of s 19(1) of the CSP Act.

7 Section 19(1) of the CSP Act, at all material times, provided:

> "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."

8 Section 25AA(1) of the CSP Act, relevant to the appellant's argument, was also introduced as part of the response of the New South Wales Parliament to the recommendations of the Royal Commission.[6] Section 25AA(1), at all material times, provided that a "court must sentence an offender for a child sexual offence in accordance with the sentencing patterns and practices at the time of sentencing, not at the time of the offence".[7]

9 A majority of the Court of Criminal Appeal of New South Wales (Bell P and Price J) held that: (a) s 19(1) of the CSP Act did not apply to the new s 66EA, which creates a new offence different from the predecessor offence; and (b) the new s 66EA of the Crimes Act operates retrospectively and applies to an adult who has maintained an unlawful sexual relationship with a child before, during, and

---

6 *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW), Sch 3, item 6.

7 Sub-section (1) of s 25AA has since been repealed, with s 21B being introduced: *Crimes (Sentencing Procedure) Amendment Act 2022* (NSW), Sch 1.

after the commencement of the predecessor offence.[8] They ordered the appeal against conviction to be dismissed. In dissent, Hamill J concluded that, when construed in context, including s 25AA of the CSP Act, s 19(1) applied to the new s 66EA of the Crimes Act, with the consequence that the maximum penalty for the appellant's offence against that provision was 25 years' imprisonment, not life imprisonment.[9]

10 This Court granted the appellant special leave to appeal against the order dismissing his appeal to the Court of Criminal Appeal. The Crown filed a notice of contention contending that, even if s 19(1) of the CSP Act does apply to the new s 66EA of the Crimes Act, s 66EA(7) (discussed below) operates to exclude or impliedly repeal s 19(1).

11 For the reasons below, the reasoning of the majority in the Court of Criminal Appeal is correct. The new s 66EA of the Crimes Act creates a new retrospective offence carrying a maximum penalty of life imprisonment. Accordingly, the appeal should be dismissed.

Construing the provisions

12 Section 19(1) of the CSP Act, in referring to the condition for its operation – "[i]f an Act or statutory rule increases the penalty for an offence" – and the consequence of satisfaction of that condition – "the increased penalty applies only to offences committed after the commencement of the provision ... increasing the penalty" – assumes that the "offence" (that is, the offence which has been the subject of the increase in penalty) continues to exist.

13 An "offence" may mean "what the law proscribes under penalty", which involves the "concatenation of elements which constitute a particular offence", or "the facts the existence of which render an actual offender liable to punishment", which involves "the concatenation of facts which create such a liability".[10] *Cooper v Western Australia*,[11] on which the appellant relied, is consistent with the former approach. In that case, one question was whether the elements constituting the repealed offence (rape) continued to be an offence (sexual penetration without consent) at the time the accused was charged. It was held that this requirement was

---

8 *Xerri v The Queen* (2021) 292 A Crim R 355 at 357 [1], 376 [112]-[113]. See also 368-376 [76]-[111].

9 *Xerri v The Queen* (2021) 292 A Crim R 355 at 386 [169].

10 *R v Barlow* (1997) 188 CLR 1 at 9. See also *Kingswell v The Queen* (1985) 159 CLR 264 at 292.

11 (2020) 286 A Crim R 28.

satisfied because the elements of the repealed offence were the same as the offence as existing at the time of the charge.[12]

14 It is not in dispute that an offence may continue to exist for the purposes of s 19(1) of the CSP Act if a provision creating an offence is repealed and re-enacted, transferred to another statute, or amended. The dispute is whether the predecessor offence was merely "reformulated, refined and 'improved'"[13] by the new s 66EA of the Crimes Act so that it may be said that the penalty for the predecessor offence has been increased within the meaning of s 19(1) of the CSP Act.

15 The requirement to focus on the substance of the elements of the predecessor offence and of the new s 66EA(1) offence, rather than the form of those provisions, inevitably leads to the conclusion that the reasoning of the majority in the Court of Criminal Appeal is correct. The predecessor offence ceased to exist on the commencement of the new s 66EA(1). The offence created by the new s 66EA(1) is not the predecessor offence.

16 First, the predecessor offence required the accused to have engaged in conduct in relation to a particular child that constituted a sexual offence on three or more separate occasions occurring on separate days during any period. The new s 66EA(1) requires an adult to maintain an unlawful sexual relationship with a child, meaning maintain a relationship with a child in which the adult engages in two or more unlawful sexual acts with or towards a child over any period.

17 Second, the predecessor offence, by s 66EA(6)(c) (as it was), required that if more than three separate occasions were relied on as evidence of the commission of the offence, the jury had to be unanimously satisfied beyond reasonable doubt about the same three occasions of the conduct constituting the sexual offence in relation to the child. The new s 66EA(5)(a) and (c) respectively provide that while the jury must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship existed, the members of the jury are not required to agree on which unlawful sexual acts constitute the unlawful sexual relationship. That is, provided that each member of the jury is satisfied that the accused maintained a relationship in which the accused engaged in two or more unlawful sexual acts with or towards a child over any period, the members do not need to agree that the same two or more unlawful sexual acts occurred.

---

12 (2020) 286 A Crim R 28 at 55 [125].

13 *Xerri v The Queen* (2021) 292 A Crim R 355 at 383 [156].

18 Third, the predecessor offence operated by reference to a "person", whereas the new s 66EA requires the accused to be an "adult", being a person of or above the age of 18 years.[14]

19 Fourth, the predecessor offence operated by reference to a "child", defined as a person under the age of 18 years.[15] In contrast, the new s 66EA operates by reference to a "child", defined as a person under the age of 16 years.[16]

20 Fifth, the predecessor offence, by s 66EA(5)(b), required the charge to "describe the nature of the separate offences alleged to have been committed by the accused during that period". The new s 66EA(4)(a) provides that the Crown "is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence".

21 Sixth, the predecessor offence operated prospectively, from its commencement on 15 January 1999. The new s 66EA operates retrospectively. By s 66EA(7), "[t]his 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".

22 These are differences of substance. The differences involve the creation of a different offence from the predecessor offence. Section 19(1) of the CSP Act, on its terms, cannot apply to the new s 66EA offence. That the appellant's conduct would have satisfied the elements of the predecessor offence and also constituted the new s 66EA offence is not to the point. It means only that the appellant's conduct was capable of engaging both provisions, not that the predecessor offence continued in the form of the new s 66EA.

23 Contrary to the appellant's submissions, the new s 66EA expressly provides for the maximum penalty of life imprisonment to apply to offences committed before its commencement. It does so in s 66EA(7) which states that "[t]his section extends to a relationship that existed wholly or partly before the commencement of the relevant amendments". The words "[t]his section" include that part of s 66EA(1) which states "[m]aximum penalty – [i]mprisonment for life". There is no justification for ignoring this clear statement in the legislation.

---

14 *Crimes Act 1900* (NSW), s 66EA(15).

15 *Crimes Act 1900* (NSW), s 66EA(12).

16 *Crimes Act 1900* (NSW), s 66EA(15).

24 Equally, there is no justification for ignoring the clear statement in s 66EA(8) that a court, when imposing a sentence, "must take into account (but is not limited by) the maximum penalty for the unlawful sexual acts engaged in by the accused during the period in which the unlawful sexual relationship existed". The appellant's argument involves rewriting this provision to exclude from its ambit any unlawful sexual acts engaged in by the accused during the period in which those unlawful sexual acts would have constituted the predecessor offence. To rewrite the provision in this way, however, would directly conflict with the definition of an "unlawful sexual act" in s 66EA(15), which omits the predecessor offence.

25 To explain further, an element of the offence created by the new s 66EA is an adult engaging in two or more "unlawful sexual acts with or towards a child over any period". An "unlawful sexual act" is defined in s 66EA(15) to mean "any act that constitutes, or would constitute" an offence as specified, but omitting the predecessor offence. The retrospective operation of the new s 66EA, effected by s 66EA(7), depends on the acts engaged in by the accused having been unlawful sexual acts during the period in which the unlawful sexual relationship existed. By s 66EA(8), the maximum penalty to be taken into account is not the maximum penalty for the predecessor offence (which is excluded from the definition of "unlawful sexual acts") but "the maximum penalty for the unlawful sexual acts engaged in by the accused during the period in which the unlawful sexual relationship existed".

26 The omission of the predecessor offence from the new s 66EA(15) is consistent with the statutory scheme, the effect of which is to repeal the predecessor offence which had failed to fulfil its objective and to create a new offence with a new maximum sentence, operating retrospectively provided that the underlying "unlawful sexual acts" were unlawful at the time they were committed. This scheme reflects the fact that both the predecessor offence and the new s 66EA have at least one thing in common: they are engaged by conduct which is otherwise criminal, their focus being the long-term, repetitive criminal conduct the Royal Commission found to characterise many kinds of child sexual abuse.

27 By these means, the new s 66EA ensures that it operates equally on an accused person irrespective of whether the unlawful sexual relationship which they perpetrated on a child occurred before, during, or after the commencement of the new s 66EA. In all cases, the maximum penalty is life imprisonment but, in cases where the unlawful sexual relationship involved unlawful sexual acts before the commencement of the new s 66EA, the court is to take into account (but is not limited by) the maximum penalty for those unlawful sexual acts during the period of the unlawful sexual relationship.

28 The Second Reading Speech confirms this intended operation of the statutory scheme. The Attorney-General said that the new s 66EA offence:[17]

> "will be punishable by a maximum penalty of life imprisonment. This maximum penalty recognises that some of the constituent acts that make up the unlawful sexual relationship may themselves carry life imprisonment if they were charged as separate sexual offences. … 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."

29 The introduction of s 25AA of the CSP Act by the *Criminal Legislation Amendment (Child Sexual Abuse) Act* also does not assist the appellant's case. As noted, s 25AA(1), on its commencement, provided that a court must sentence an offender for a child sexual offence in accordance with the sentencing patterns and practices at the time of sentencing, not at the time of the offence. Section 25AA(4) provided that s 25AA does not affect s 19 of the CSP Act.

30 Consistently with the operation of the statutory scheme discussed above, s 25AA(1) of the CSP Act rectified a particular problem. The problem was that sentencing principles in New South Wales meant that, when sentencing, a court did so by reference to sentencing patterns at the time the offence had been committed, rather than sentencing patterns at the time of sentence.[18] The Royal Commission had exposed how common it was for child victims to take decades after becoming adults to be able to acknowledge and confront what had happened to them.[19] As a result, sentencing by reference to sentencing patterns at the time the offence was committed involved imposing sentences which manifestly failed to fulfil contemporary community expectations. This sentencing approach also provided an increasing advantage to a child sexual offender who successfully concealed their crimes for longer,[20] concealment of such crimes and coercion of the child into silence being common characteristics of such offending. In the

---

17 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 June 2018 at 5.

18 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 June 2018 at 7.

19 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017), Parts III-VI at 3.

20 eg, *R v MJR* (2002) 54 NSWLR 368 at 377 [57]-[60].

Second Reading Speech, the Attorney-General explained that the purpose of s 25AA "is to override the current common law rule that a court must apply the sentencing standards from the time of the offence. ... 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."[21]

31 Section 25AA of the CSP Act, and the Attorney-General's explanation of its purpose, need to be understood in the context that the *Criminal Legislation Amendment (Child Sexual Abuse) Act* involved not just the introduction of the new s 66EA, but also both "a significant reworking of the sexual offences in the Crimes Act" and the introduction of "a number of new and novel offences".[22] While s 25AA applied to a "child sexual offence", which is defined in s 25AA(5)(a) to include an offence under a provision of Div 10 of Pt 3 of the Crimes Act, and the predecessor offence was and the new s 66EA is in Div 10 of Pt 3 of the Crimes Act, there are many other offences within that Division, some of which had maximum sentences of life imprisonment and others of which had lesser sentences. Conceived of as a coherent whole, the statutory scheme operates so that, to the extent that an offence within, for example, Div 10 of Pt 3 continues to exist, s 19 of the CSP Act operates so that any increased penalty for such an offence would apply only to those offences committed after the increase and any reduced penalty would apply to those offences committed before and after the reduction. Section 25AA would also operate on any such offence so that, by s 25AA(1), the sentencing court must sentence in accordance with sentencing patterns and practices at the time of sentencing, not at the time of the offence, albeit also applying the relevant maximum penalty having regard to the operation of s 19.

32 The first point is that the new s 66EA is not a continuation of a pre-existing offence. This means that the interaction between ss 19 and 25AA of the CSP Act has nothing to do with the operation of the new s 66EA.

33 The second point is that the new s 66EA contains its own provision about sentencing (as it must, once it is appreciated that ss 19 and 25AA of the CSP Act are immaterial to its operation). That provision is s 66EA(8) which provides that a "court, when imposing a sentence for an offence under this section constituted by an unlawful sexual relationship that existed wholly or partly before the commencement of the relevant amendments, must take into account (but is not limited by) the maximum penalty for the unlawful sexual acts engaged in by the accused during the period in which the unlawful sexual relationship existed".

---

21 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 June 2018 at 7.

22 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 June 2018 at 8.

"[R]elevant amendments", for this purpose, means "the substitution of this section by the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018*".[23]

34 In its entire context, s 66EA(8) is an integral and logical part of the statutory scheme. The example the Crown provided to demonstrate this is s 66A, sexual intercourse with a child under 10 years of age. This was an offence before the predecessor offence commenced.[24] When the predecessor offence commenced, with its maximum sentence of 25 years' imprisonment, the s 66A offence carried a maximum sentence of 20 years' imprisonment. Over time the maximum sentence for the s 66A offence was increased until, by 2015, it carried a maximum sentence of life imprisonment.[25] The predecessor offence, however, continued to carry a maximum sentence of only 25 years' imprisonment. The potential incongruity which arose is obvious. A single offence of sexual intercourse with a child under 10 years of age carried a maximum sentence of life imprisonment if charged under s 66A, whereas three or more such offences carried a maximum sentence of only 25 years' imprisonment if charged under the provision creating the predecessor offence. This is why, in the new s 66EA, s 66EA(8) refers to "the maximum penalty for the unlawful sexual acts", and not to the maximum penalty for the predecessor offence. It is also why s 66EA(8) says that the sentence is not limited by the maximum penalty for the unlawful sexual acts engaged in by the accused during the period in which the unlawful sexual relationship existed.

35 The import of this for the present case is simply that these provisions sensibly operate together without an assumption or inference that it was intended that s 19(1) of the CSP Act should apply to the new s 66EA or that, contrary to the import of the statutory scheme, s 25AA of the CSP Act exposes such an intention. Any such assumption or inference conflates two separate questions (first, the proper construction of s 19(1) of the CSP Act and its application or non-application to the new s 66EA and, second, the interaction of the various provisions). Any such assumption or inference is also irreconcilable with the statutory scheme in which the usual position, that the maximum sentence is that available at the time the offence is committed, has no relevance to the new s 66EA offence given the clear terms of s 66EA(7) and (8).

---

23 *Crimes Act 1900* (NSW), s 66EA(15).

24 *Crimes Act 1900* (NSW), s 66A (historical version for 26 November 1998 to 14 January 1999).

25 *Crimes Act 1900* (NSW), s 66A (historical version for 29 June 2015 to 23 November 2015). The penalty was increased by *Crimes Legislation Amendment (Child Sex Offences) Act 2015* (NSW), Sch 1, item 1.

36 This is why, contrary to the appellant's arguments, references in the Royal Commission's "Criminal Justice Report", including its Recommendations, and in the Second Reading Speech for the legislative reforms commencing on 1 December 2018 to the usual position (that the maximum sentence is that available at the time the offence is committed) have nothing to do with s 66EA.[26] It is also why the Attorney-General's statement in the Second Reading Speech – that s 25AA "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"[27] – accurately explains the operation of s 25AA of the CSP Act, but it has nothing to do with the purported application of s 19 of the CSP Act to the new s 66EA offence.

A postscript to the hearing

37 After the hearing, the Court granted leave for the proceedings to be reopened to allow for the filing of supplementary submissions regarding s 431A of the Crimes Act. Section 431A was enacted in 1989 to provide certainty in respect of the terms of imprisonment then mandated for serious offending. It did so by specifying that a person is not liable to the punishment of penal servitude for life for any offence except murder or an offence carrying that punishment under the *Drug Misuse and Trafficking Act 1985* (NSW), and offence provisions carrying a maximum sentence of life imprisonment at the time were amended to substitute "25 years" and not "life" as the maximum period of imprisonment.[28] That s 431A(2) was not amended to refer to s 66EA or the new s 66EA is immaterial as s 431A, construed in its context, does not apply to offence provisions enacted after that date (the inclusion of some such provisions in s 431A(2) being a matter of abundant caution and not necessity).

Conclusion

38 These conclusions mean that the Crown's notice of contention does not arise for determination. They also mean that the appeal must be dismissed.

---

26 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017), Parts III-VI at 69, 74; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 June 2018 at 7.

27 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 June 2018 at 7.

28 See *Crimes (Life Sentences) Amendment Act 1989* (NSW).

39 GORDON, STEWARD AND GLEESON JJ. 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 1900* (NSW). The relationship had taken place between 9 November 2016 and 14 July 2018.

40 Section 66EA was enacted by the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) ("the 2018 Amendment Act") with effect from 1 December 2018. In this appeal, there was no dispute that the offence applied with retrospective force.[29] However, it was not agreed that the prescribed sentence for the offence – a maximum penalty of life imprisonment – also applied with retrospective effect. The appellant contended that he should have been sentenced in accordance with the predecessor to s 66EA – also numbered s 66EA – which provided for a maximum penalty of 25 years imprisonment. That former s 66EA was omitted by the 2018 Amendment Act. The appellant's contention relied upon an application of s 19 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the Procedure Act") to his offending.

41 Section 19(1) relevantly 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. Here, it was not in dispute that the appellant's offending occurred prior to the commencement of current s 66EA. The principal issue for determination in this appeal is whether the replacement of s 66EA constituted an increase in the penalty for the "offence" already created by former s 66EA. If the current offence is different to the old, and is a new offence, s 19 will not apply.

42 A majority of the Court of Criminal Appeal of New South Wales decided that s 19 of the Procedure Act had no application to the offence with which the appellant had been charged because the current s 66EA had created a new and distinct offence.[30] In his appeal to this Court, the appellant challenges that holding. Relying on the dissenting reasons of Hamill J, he submits that a close analysis of the offence created by former s 66EA and that created by current s 66EA shows that the present provision is merely a reformulation of an offence that had already

---

29 By reason of s 66EA(7) of the *Crimes Act*.

30 *Xerri v The Queen* (2021) 292 A Crim R 355 at 374 [100] per Price J (with whom Bell P agreed).

existed.[31] Because that reformulation included an increase in the penalty for that offence, s 19 of the Procedure Act applied.

43 The Crown disagrees and submits that the majority below was correct. By a notice of contention, it alternatively submits that even if current s 66EA is a mere reformulation of an existing offence, because it is expressed to apply with retrospective effect s 19 must be read down, or must be seen to have been impliedly repealed.

44 For the reasons given below, the majority of the Court of Criminal Appeal was correct and it is not necessary to consider the Crown's notice of contention.

An "offence"

45 This appeal turns upon the meaning of the word "offence" as it appears in s 19 of the Procedure Act. That is because, as explained above, the issue for determination is whether the enactment of current s 66EA constitutes an increase in "the penalty for an offence" which already existed for the purposes of s 19 of the Procedure Act. In *Kingswell v The Queen*, Gibbs CJ, Wilson and Dawson JJ observed that the word "offence" has "no fixed technical meaning in the law".[32] It is, nonetheless, "the legal definition of the offence which indicates which are its factual ingredients".[33] Whilst in dissent, Brennan J similarly observed that a criminal offence can "be identified only in terms of its factual ingredients, or elements, and the criminal penalty which the combination of elements attracts".[34] In other words, an "offence" is discernible from its factual ingredients or elements, whether proscribed by the common law or by statute.

46 The decision of the Court of Appeal of the Supreme Court of Western Australia in *Cooper v Western Australia*, upon which the appellant relied, does not express any different or broader test for what is an "offence".[35] Amongst other things, that case concerned s 10 of the *Sentencing Act 1995* (WA) which applies

---

31 *Xerri v The Queen* (2021) 292 A Crim R 355 at 383-385 [156]-[164].

32 (1985) 159 CLR 264 at 276.

33 *Kingswell v The Queen* (1985) 159 CLR 264 at 276, citing *R v Courtie* [1984] AC 463 at 466-467 per Lord Diplock (with whom Lord Fraser of Tullybelton, Lord Scarman, Lord Roskill and Lord Bridge of Harwich agreed).

34 *Kingswell v The Queen* (1985) 159 CLR 264 at 292; cf *R v Ronen* (2006) 161 A Crim R 300 and *Commissioner of Taxation v Price* [2006] 2 Qd R 316.

35 (2020) 286 A Crim R 28.

when changes are made to the penalty for an "offence" after the offending has taken place but before the time the offender is sentenced. If that occurs, whatever is the lesser penalty is applicable. In *Cooper*, the repealed offence of rape had been replaced with the offence of "sexual penetration without consent" after the offending had taken place.[36] The penalty under the new law was less than under the old law. The Court of Appeal undertook a comparison of the elements of each offence. Relevantly, the offences were both found to proscribe "the same acts and circumstances and are constituted by the same legal elements".[37] Section 10 thus applied. The reasoning of the Court of Appeal in *Cooper* therefore accords with that in *Kingswell v The Queen*.

The appellant's sentence

47 In February 2020, the appellant was sentenced to a term of imprisonment of eight years, with a non-parole period of four years and nine months. In her Honour's reasons, the sentencing judge noted that the maximum penalty for s 66EA(1) was life imprisonment and that it had served as a "valuable guidepost" in the overall sentencing process.

Former s 66EA

48 Former s 66EA was introduced with effect from 15 January 1999 until it was replaced with the current s 66EA, which took effect from 1 December 2018.[38] Former s 66EA bore the heading "Persistent sexual abuse of a child". Pursuant to former s 66EA(1), a person who had on three or more separate occasions, occurring on separate days, engaged in conduct that constituted a "sexual offence" in relation to a "particular child" was liable to imprisonment for 25 years. The term "sexual offence" was defined in s 66EA(12) by reference to a list of specific offending relating, amongst other things, to the abuse of children, including various offences relating to sexual intercourse with children, sexual assault, indecent assault, and other offences of a sexual nature. For example, it listed s 66B which makes it an offence to attempt to have sexual intercourse with a child under the age of ten. The "child" against whom the offending conduct occurred was defined by s 66EA(12) to mean a person under the age of 18 years.

49 Pursuant to former s 66EA(2), it was immaterial whether or not the conduct was of the same nature, or constituted the same offence, on each occasion. Nor,

---

36 *Criminal Code* (WA), s 325.

37 (2020) 286 A Crim R 28 at 56 [134] per Buss P, Mazza and Vaughan JJA.

38 2018 Amendment Act, Sch 1, item 20.

pursuant to s 66EA(4), was it necessary to specify or to prove the dates or exact circumstances of the alleged occasions on which the conduct constituting the offence occurred. However, any charge had to specify with "reasonable particularity" the period during which the offence occurred and had to describe the nature of the separate offences during that period.[39]

50 In order to convict:[40]

(a) the jury had to be satisfied beyond reasonable doubt that the evidence had established that during the period concerned the accused had engaged in at least three sexual offences on separate days in relation to a particular child;[41]

(b) the jury did not need to be satisfied about the dates or the order of the offending, but did need to be satisfied about the material facts of the three occasions;

(c) if more than three occasions were relied upon as evidence of the commission of an offence, all the members of the jury had to be satisfied about the same three occasions; and

(d) the jury had to be satisfied that the three occasions occurred after 15 January 1999. In other words, former s 66EA had only prospective operation.

Royal Commission into Institutional Responses to Child Sexual Abuse

51 In the Second Reading Speech for the *Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018* (NSW), the Attorney-General for New South Wales said that former s 66EA had been enacted to "assist the prosecution of the most terrible cases of abuse where many largely indistinguishable incidents of abuse made it difficult for victims to recall specific occasions with sufficient particularity for individual charges".[42] In practice, it was said that former s 66EA

---

39 *Crimes Act*, s 66EA(5).

40 *Crimes Act*, s 66EA(6).

41 See generally *KBT v The Queen* (1997) 191 CLR 417 at 422 per Brennan CJ, Toohey, Gaudron and Gummow JJ.

42 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 June 2018 at 5.

had "not fulfilled this objective".[43] The Attorney-General said that the Royal Commission into Institutional Reponses to Child Sexual Abuse had suggested the introduction of a new law based upon an existing Queensland offence.[44] Current s 66EA was intended to be the enactment of this "model".[45]

52 In 2017, the Royal Commission published the "Criminal Justice Report". It noted that following the decision of this Court in *S v The Queen*,[46] all States and Territories had, between 1989 and 1999, enacted persistent child sexual abuse offences.[47] One of these was identified to be former s 66EA. Notwithstanding these new laws, the Royal Commission received evidence that the prosecution of persistent child sexual abuse offences had been difficult where the memory of the complainant comprised "composite memories" or where the complainant was unable to describe or distinguish a particular occasion of abuse.[48] The Royal Commission made the following recommendation:[49]

> "We are satisfied that, without undermining a fair trial for the accused, there must be offences in each jurisdiction that allow for prosecutions – and convictions where the evidence warrants convictions – that:
>
> • do not require particularisation in a manner inconsistent with the ways in which complainants remember the child sexual abuse they suffered

---

43 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 June 2018 at 5.

44 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 June 2018 at 5.

45 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 June 2018 at 5.

46 (1989) 168 CLR 266.

47 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017), Parts III-VI at 18 [11.4.1].

48 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017), Parts III-VI at 66 [11.8].

49 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017), Parts III-VI at 66 [11.8].

- allow for the effective charging and successful prosecution of repeated but largely indistinguishable occasions of child sexual abuse."

53 In that respect, the Royal Commission favoured the then Queensland model because it made the actus reus of the offence a particular type of relationship, rather than individual occasions of abuse.[50] The Royal Commission then recommended that the Queensland offence could be "improved upon by giving it retrospective operation".[51] It noted a concern that retrospectivity "may have the effect of exposing the offender to a much higher maximum penalty than applied to the individual acts of abuse at the time they were committed".[52] To address this concern the Royal Commission made the following recommendation:[53]

> "[W]e are satisfied that [this concern] can be addressed by requiring the sentencing court to have regard to the maximum penalties that applied to the individual acts of abuse at the time they were committed if the offence is being used retrospectively."

54 The Royal Commission proposed a draft of an offence of persistent child sexual abuse whereby, relevantly, and in general terms: the actus reus of the offence would be maintenance of an "unlawful sexual relationship" in which an adult had engaged in two or more unlawful sexual acts; there would be no obligation to give the usual particulars of any given unlawful sexual acts; the trier of fact would only need to be satisfied about the general nature or character of the unlawful sexual acts; the offence would apply retrospectively; and when it did so apply, on sentencing, the court would need to take into account the maximum penalties applicable for both any predecessor offence of persistent child sexual

---

50 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017), Parts III-VI at 68 [11.8].

51 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017), Parts III-VI at 68 [11.8].

52 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017), Parts III-VI at 69 [11.8].

53 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017), Parts III-VI at 69 [11.8].

abuse and for the individual unlawful sexual acts that the unlawful sexual relationship is alleged to have involved.[54]

Current s 66EA

55 The current s 66EA, which retains the heading "Persistent sexual abuse of a child", implements many of the essential features of the draft offence recommended by the Royal Commission. The actus reus of the offence is thus the maintenance of an "unlawful sexual relationship with a child".[55] Section 66EA(2) defines this term to be a "relationship in which an adult engages in 2 or more unlawful sexual acts with or towards a child over any period". The term "unlawful sexual act" is defined by s 66EA(15) by reference to a series of individual sexual offences. The "child" subjected to the unlawful sexual relationship is now defined in s 66EA(15) to mean a person under the age of 16 years. The perpetrator of the offence is now required to be an "adult", defined in s 66EA(15) as a person who is of or above the age of 18 years. This contrasts with the former s 66EA which applied to a "person".

56 In contrast to former s 66EA, under the current s 66EA(4), the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence, but is required to give particulars of the period of time over which the unlawful sexual relationship existed.

57 In order now to convict:[56]

(a) the jury must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship existed;

(b) the jury is not required to be satisfied of the particulars of any unlawful sexual act that it would otherwise have to be satisfied of if the act were charged as a separate offence; and

(c) the members of the jury are not required to agree on which unlawful sexual acts constitute the unlawful sexual relationship.

---

54 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017), Parts VII-X and Appendices at 551-552.

55 *Crimes Act*, s 66EA(1).

56 *Crimes Act*, s 66EA(5).

58 Pursuant to s 66EA(7), this section applies retrospectively. It applies to a relationship that existed wholly or partly before 1 December 2018, as well as before the commencement of former s 66EA, so long as "the acts engaged in by the accused were unlawful sexual acts during the period in which the relationship existed". The maximum penalty, as already mentioned, is now imprisonment for life.[57]

59 Section 66EA(8), which assumed some importance in this appeal, provides as follows:

> "A court, when imposing a sentence for an offence under this section constituted by an unlawful sexual relationship that existed wholly or partly before the commencement of the relevant amendments, must take into account (but is not limited by) the maximum penalty for the unlawful sexual acts engaged in by the accused during the period in which the unlawful sexual relationship existed."

This sub-section did not fully adopt the recommendations of the Royal Commission, in that it does not require the court to take into account the maximum penalty applicable to the former s 66EA. The court is required to take into account the maximum penalty for the unlawful sexual acts.

60 The primary differences between the current and former s 66EA may be seen as follows:

(a) the actus reus of former s 66EA was the committing of three or more sexual offences during any period; the actus reus of the current offence is the maintenance of an unlawful sexual relationship in which an adult engages in two or more unlawful sexual acts;

(b) the maximum penalty has changed from 25 years imprisonment to life imprisonment;

(c) the content of the particulars of the offending which the Crown must provide is different. The Crown no longer needs to describe the nature of the separate offences alleged to have been committed;

(d) what the jury needs to be satisfied about in order to convict is also different. Whereas under former s 66EA the jury needed to be satisfied that a sexual offence had occurred on at least three different occasions on separate days (and to be satisfied about the material

---

57 *Crimes Act*, s 66EA(1).

facts of those occasions, but not the specific dates of when they occurred), now the jury must be satisfied that an unlawful sexual relationship existed in which an adult has engaged in two or more unlawful sexual acts (without the need to be satisfied about the particulars of each act at the standard required if each act had been charged separately);

(e) under former s 66EA, if more than three occasions were relied upon by the Crown as evidence of the commission of an offence, all members of the jury needed to be satisfied about the same three occasions. Now the jury is not required to agree on which unlawful sexual acts constitute the unlawful sexual relationship;

(f) the age of the child, the subject of the offending conduct, changed from a person under 18 years to a person under 16 years;

(g) the age of the offender must now be 18 years or older;

(h) the current provision applies retrospectively. It thus would apply – for the first time – to offending which had taken place prior to 15 January 1999, when the former s 66EA commenced. It also applies to offending that took place during the period when the former s 66EA was in force.

The 2018 amendments to the Procedure Act

61 Given the contents of the dissenting reasons in the Court of Criminal Appeal (described below), mention should also be made of Sch 3 to the 2018 Amendment Act which made amendments to the Procedure Act. Relevantly, this included the insertion of s 25AA.[58] Amongst other things, this required 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.[59] Section 25AA(5) defined the term "child sexual offence". It referred to a number of offences which included s 66EA. Importantly for the appellant, pursuant to s 25AA(4), this "section" did not "affect" s 19. The appellant also relied upon s 25AA(4) in answer to the Crown's notice of contention; it was

---

58 Relevant parts of s 25AA have since been repealed and replaced by the insertion of s 21B of the Procedure Act: see *Crimes (Sentencing Procedure) Amendment Act 2022* (NSW), Sch 1, items 1 and 2.

59 Procedure Act, s 25AA(1).

said to be an indicator of Parliament's intention that s 19 should apply to the current s 66EA.

The decision of the Court of Criminal Appeal

62 By majority, the Court of Criminal Appeal dismissed the appellant's appeal against sentence. Price J, with whom Bell P agreed, held that the sentencing judge did not err in sentencing the appellant on the basis that the maximum penalty was life imprisonment. His Honour identified two "hurdles" to that conclusion: first, the general assumption that legislation is not intended to operate retrospectively; and, secondly, s 19 of the Procedure Act.[60] As to the first, the retrospective intent of Parliament was clear from the text of s 66EA, namely s 66EA(7).[61] As to the second, Price J set out the differences between the current s 66EA and the former s 66EA, referred to the relevant extrinsic materials, and concluded that the current s 66EA is a new offence. Accordingly, s 19 did not apply and the maximum penalty for the offence was life imprisonment.[62]

63 In dissent, Hamill J characterised the enactment of current s 66EA as the making of changes that "were largely facilitative and responsive to the difficulties of proof and decisions of the courts which created obstacles to the prosecution and conviction of people, like the [appellant]".[63] The change made to the provision of particulars was identified as an example of this.[64] Whilst accepting that some changes had been more substantive, such as changing the definition of who is a child, his Honour did not consider that the alterations were such as to characterise current s 66EA as a new "offence" for the purpose of s 19 of the Procedure Act.[65]

64 The enactment of s 25AA of the Procedure Act at the same time as the current s 66EA, and its express preservation of the application of s 19 of the Procedure Act, assumed some importance in Hamill J's reasons. A conclusion contradicting the operation of s 19 was seen by his Honour to be an "outlier" in the context of the other amendments made by the 2018 Amendment Act and one which contradicted a "cohesive legislative scheme" in which s 19 was to be given

---

60 *Xerri v The Queen* (2021) 292 A Crim R 355 at 368 [77]-[78].

61 *Xerri v The Queen* (2021) 292 A Crim R 355 at 374 [98]-[103].

62 *Xerri v The Queen* (2021) 292 A Crim R 355 at 376 [111].

63 *Xerri v The Queen* (2021) 292 A Crim R 355 at 380 [144].

64 *Xerri v The Queen* (2021) 292 A Crim R 355 at 380 [144].

65 *Xerri v The Queen* (2021) 292 A Crim R 355 at 380-381 [145]-[146].

overarching application.[66] In that respect, the better view, it was said, is that the current s 66EA did not create a new offence but merely "reformulated, refined and 'improved' an existing offence".[67]

Current s 66EA is a new offence

65 Current s 66EA is a new offence. The 2018 Amendment Act did not merely amend former s 66EA. Item 20 of Sch 1 to that Act provides that former s 66EA was to be wholly omitted and a new s 66EA was to be inserted "instead". The factual ingredients or elements of former s 66EA differ significantly from current s 66EA such that they are not the same offence. The differences are set out above and need not be repeated. In particular, both the actus reus of each offence and the elements about which the jury must be satisfied are different, and the current s 66EA is intended to, and does, have retrospective effect.[68] This reflects the work and recommendations of the Royal Commission. That Royal Commission did not suggest a mere reformulation of existing State and Territory offences but a major reform whereby all States and Territories would follow the Queensland model and the focus would not be on the proof of a particular number of individual sexual offences, but on proving a particular kind of relationship.[69] It follows that the current s 66EA is not the same "offence" as the former s 66EA.

66 With respect, nothing in s 25AA of the Procedure Act can alter that conclusion. That is because, whilst s 25AA(4) expressly preserved the continuing application of s 19, that reservation did not touch upon the ambit of the application of s 19. Section 25AA(4) therefore cannot influence the correct characterisation of current s 66EA as being a new offence.

67 It is true that, expressed at a higher level of generality, both offences address conduct comprising persistent child sexual abuse. Both offences are directed in general terms to addressing the same problem. However, the offences specify different factual ingredients or elements to identify such abuse; they largely overlap but do not cover identical conduct and the current s 66EA covers conduct over a longer period than the former s 66EA. The current s 66EA is also designed to address more effectively the problem of persistent child sexual abuse. Moreover,

---

66 *Xerri v The Queen* (2021) 292 A Crim R 355 at 381-382 [149], 384-385 [163]-[164].

67 *Xerri v The Queen* (2021) 292 A Crim R 355 at 383 [156].

68 cf *Stephens v The Queen* (2022) 273 CLR 635 at 651-654 [29]-[36]; 658 [49].

69 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017), Parts III-VI at 66, 68 [11.8].

and in any event, as the Crown pointed out, it is possible for different and distinct criminal offences to apply to the same, or at least part of the same, underlying conduct. For New South Wales, an example proffered was common assault and intimidation.[70] As McHugh, Hayne and Callinan JJ observed in *Pearce v The Queen*:[71]

> "[A]s the range of crimes and punishments for crime has expanded, it has become apparent that a single series of events can give rise to several different criminal offences to which different penalties attach."

Leave to reopen

68 After the hearing of this appeal the Crown sought leave to reopen to draw to the attention of the Court s 431A of the *Crimes Act*. Leave was granted. Section 431A was enacted in 1989. Since 2015, s 431A has provided that a person is not liable to the punishment of imprisonment for life save for certain specified crimes. Section 66EA is not one of the crimes identified. It was appropriate for the Crown to bring to the Court's attention this provision. Ultimately, both parties submitted that, properly construed, s 431A could not apply to offence provisions enacted after 1989, such as s 66EA.

Conclusion

69 For the foregoing reasons, the appeal should be dismissed. It is otherwise unnecessary to consider the merits of the Crown's notice of contention.

---

70 *Crimes Act*, s 61; *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 13.

71 (1998) 194 CLR 610 at 614-615 [11].