

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A20 of 2019

BETWEEN:



KMC
Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS (SA)
Respondent

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OUTLINE OF ORAL ARGUMENT OF THE ATTORNEY-GENERAL FOR THE
STATE OF VICTORIA (INTERVENING)

PART I:

This outline of oral argument is in a form suitable for publication on the internet.

PART II:

1. Section 9(1) of the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) effects a retrospective change in the substantive law of sentencing. Vic [26]-[27]

This is evident from the text, context and purpose of s 9(1). Vic [16]-[25]

Ground 1

2. So understood, s 9(1) does not direct any court as to the manner or outcome of the judicial process. It is open for the Parliament to alter the substantive law to be applied by a court, even in relation to pending proceedings. Vic [31]-[44]

- *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at 98 [26]

Ground 2

3. Nor does s 9(1) purport to exclude the power of the Supreme Court to review a sentence to which it applies for jurisdictional error, contrary to *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531. The decision in *Kirk* did not deny the competence of State legislatures to alter the substantive law that governs the scope of a court's jurisdiction. Vic [45]-[47]

- *Duncan* (2015) 256 CLR 83 at 99 [29]

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Ground 3

4. The alteration of the substantive law of sentencing effected by s 9(1) does not undermine the institutional integrity of any of the courts of South Australia so as to contravene the principle identified in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
- a. A State Parliament may choose to dispense with trial by jury altogether for State offences, including for indictable offences, and confer jurisdiction to both convict and sentence on a judge.
 - b. Similarly, it is open to a State Parliament to adopt an intermediate approach to conviction and sentence and:
 - confer the power to determine guilt of the single offence of persistent exploitation of a child on the jury by determining what two or more acts constituted the offence;
 - but, for the purposes of determining the appropriate sentence, and where the jury’s findings of the actus reus are unknown, confer on the sentencing judge the power to find, beyond a reasonable doubt, what two or more acts constituted the offending;
 - so long as the judge’s finding is consistent with the jury’s verdict as to the single offence.
 - c. A scheme that permits that course does not undermine the institutional integrity of the sentencing court. The sentencing court remains independent of the legislative and executive branches; it exercises its fact finding powers in accordance with the judicial process; and it must find facts adverse to the accused beyond a reasonable doubt.
 - d. Nor does a scheme of that kind undermine the institutional integrity of an appellate court reviewing the sentence for error. That court too remains independent of the legislative and executive branches and determines any appeal in accordance with the appellate process.

Vic [48]-[59]
& SA [34]

Dated: 6 February 2020

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