HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **THE KING**

Appellant

and

FAYEZ HATAHET

Respondent

REPLY SUBMISSIONS

PART I FORM OF SUBMISSIONS

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

PART II REPLY

Part IB of the Crimes Act

2. There is no dispute between the parties that, in sentencing federal offenders, attention must focus upon Part IB of the Crimes Act: see **RS [15]**. The respondent's criticism that the Crown did not pay attention to Part IB in its submissions in chief is misplaced: see **AS [13]-[16], [30]-[31], [46]-[50]**.

3. Notably, the respondent does not dispute the Crown's survey of the case law across common law jurisdictions in Australia and elsewhere. Nor does he dispute the conclusion the Crown draws from them: that they stand contrary to the Court of Criminal Appeal's approach in this case. The respondent seeks to deflect these authorities by contending that they are not germane in the Part IB context: **RS [18]-[19]**.

4. It is well established that:[1]

> except to the extent stated in ss 16A and 16B of the [Crimes] Act, general common law and not peculiarly local or state statutory principles of sentencing are applicable. That common law principles may apply follows from the use of the words "of a severity appropriate in all the circumstances of the offence ..." in s 16A(1) and the introductory words "In addition to any other matters ..." to s 16A(2) of the Act.

[1] *Johnson v The Queen* (2004) 78 ALJR 616 at [15] (Gummow, Callinan and Heydon JJ; Gleeson CJ agreeing).

5. As explained in *Hili v The Queen*:[2]

> Section 16A accommodates the application of that and some other judicially developed general sentencing principles because those principles give relevant content to the statutory expression "of a severity appropriate in all the circumstances of the offence" used in s 16A(1), as well as some of the expressions used in s 16A(2), such as "the need to ensure that the person is adequately punished for the offence".

6. The survey of the common law demonstrates that the prospects of obtaining parole is not a matter which informs an assessment of the appropriate severity of the sentence (s 16A(1)) or the need to ensure adequate punishment (s 16A(2)(k)). Nor does it fall within the reference to "any other matters" in s 16A(2) — or anywhere else within s 16A.

7. If this issue had any bearing on general deterrence (**cf RS [21]**), specific deterrence (**cf RS [22]**) or the age or physical or mental condition of the person (**cf RS [22]**), then the case law would have recognised it. The common law never has.

8. Section 16A(2)(p) and the probable effect of the sentence on the person's family or dependents is in a different category: this consideration is different from the common law.[3] But there is no real connection between prospects of parole and the probable impact of the sentence upon the offender's family or dependents and that is not how the Court of Criminal Appeal reasoned. There was no evidence to link prospects of parole to a probable impact on the respondent's family. The argument is unrealistic, and, in any event, fails on the facts.

9. So far as s 16A is concerned, the parties are fundamentally at odds about whether prospects of parole tell the sentencing judge anything about the nature of the offence and the nature of the offender. On the premise that it does (see **RS [21]-[22], [30]**), the respondent evidently levels the charge against the Crown that it has ignored Part IB.

10. The prospects of parole could only inform the sentencing judge something meaningful about the offence or the offender if the stipulation of a non-parole period gives rise to a meaningful entitlement or right to expect that parole will be granted. It does not: see **AS [17]-[19]**. The respondent has not provided an answer to those submissions.

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2 (2010) 242 CLR 520 at [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Bui v DPP (Cth)* (2012) 244 CLR 638 at [18] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

3 See *Totaan v The Queen* (2022) 108 NSWLR 17.

Speculation and statutory context

11. The respondent's arguments about the speculative nature of the grant of parole do not assist.

12. *First*, relying on s 19ALB to mitigate sentence (as the respondent seeks to do: see **RS [24]**) would subvert the legislative regime, the intention of which is to make it more difficult for certain people to be released into the community – a purpose which the respondent accepts (**RS [27]**). The respondent has no good answer to this issue of overall statutory coherence.

13. *Second*, the respondent notes that other sentencing factors are speculative and forward-looking: see **RS [26]**. That is not to the point. Take prospects of rehabilitation for example. Findings about rehabilitation can be speculative. However, a sentencing court is *required* to make findings about rehabilitation. Those findings are typically made on the basis of psychological evidence and character references, and any evidence about employment prospects, the support provided by family, prior convictions and rehabilitation actually achieved if there be a delay between offending and the imposition of sentence. Further, findings about prospects of rehabilitation invite prediction about what or how **the offender** will do (for example, on their journey of rehabilitation). Here, the sentencing judge would be speculating about what the relevant executive would do (noting also that the identity of the executive decision-maker at the time of sentence may well be different from the time of parole), which is too far removed from the offence and the offender to inform sentencing.

14. *Third*, the respondent essentially contends that this concern is no reason to deny the relevance of prospects of parole to sentence. The solution for the respondent is to recognise that a sentencing judge could choose to put this factor aside in any case where prospects are too speculative to assess: see **RS [25]**. This is no answer because, as the Crown contends, it will always be too speculative to assess the prospects of being granted parole, having regard to the inherent nature of parole and its susceptibility to change and executive discretion, except in special cases where the Parliament has tipped the scales in favour of or against parole. In the latter case, the intractable problem of statutory coherence that is referred to in paragraph [12] above arises if such legislation is relied upon to mitigate sentence.

Dated: 29 April 2024

Raelene Sharp
Director of Public Prosecutions (Cth)
(03) 9605 4441
raelene.sharp@cdpp.gov.au

Paul Holdenson
Aickin Chambers
(03) 9225 7231
ophqc@vicbar.com.au

Christopher Tran
Banco Chambers
(02) 9376 0686
christopher.tran@banco.net.au

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ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, the Appellant sets out below a list of the particular statutes and Conventions referred to in these submissions.

No	Description	Version	Provision(s)
1	*Crimes Act 1914* (Cth)	As at 2 December 2022	Part IB