



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: M41/2026
File Title: Charisiou v. The King
Registry: Melbourne
Document filed: Form 27D - Respondent's Submissions
Filing party: Respondent
Date filed: 23 Jun 2026

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

DEMETRIOS CHARISIOU

Appellant

and

THE KING

Respondent

RESPONDENT'S SUBMISSIONS

PART I — FORM OF SUBMISSIONS

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

PART II — STATEMENT OF ISSUES ON APPEAL

2. The respondent takes issue with the appellant's reframing of the issues after the grant of special leave at paragraph [2] of the Appellant's Submissions (AS).
3. Seen in light of the matters argued in this case, the issues should be framed as:
4. **Common law:** the challenge to the Victorian Court of Appeal's reasoning in *Markovic v The Queen* (2010) 30 VR 589, via this case,¹ should be conceptualised as whether the exercise of *mercy* requires exceptional circumstances.
5. **Statutory construction:** (if the question arises) whether the effect of a sentence on a third party, namely an offender's family, should be read into section 5(2)(g) of the *Sentencing Act 1991* (Vic) (*Sentencing Act*).
6. The answer to the first issue should be 'yes'. Mercy requires exceptional circumstances before its exercise by a sentencing judge. The answer to the second issue should be 'no'. The proper construction of the *Sentencing Act* does not give

¹ *Charisiou v The King* [2025] VSCA 277 (J) (CAB 123-166)

rise to the consideration of family hardship. Section 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) does not assist to arrive at a different conclusion.

PART III — SECTION 78B NOTICES

7. The appellant does not consider that any notice should be given under section 78B of the *Judiciary Act 1903* (Cth) because this matter raises no constitutional issues.

PART IV — STATEMENT OF FACTS

8. The respondent accepts the statement of facts set out at paragraphs [5] to [6] of the appellant's outline of submissions.

PART V — ARGUMENT

A. Mercy and the sentencing discretion

*“And earthly power doth then show likest God's – When mercy seasons justice.”*²

9. The Court in *Markovic* conceptualised the downward pressure on a sentence of an offender's family circumstances – specifically, hardship that may result from the incarceration of an offender – as an exercise of a ‘residual discretion of mercy’ which follows the ‘traditional common law approach [that] treats family hardship as itself raising a question of mercy’.³ Or, as the majority in the Court below said, a reliance on family hardship is properly understood as an appeal to mercy.⁴

A.1 Mercy in all its forms

10. The two relevant concepts of ‘mercy’ are oft-confused.
11. The **first** is the mercy inherent within the sentencing discretion. In a passage which is often cited in the authorities,⁵ the New Zealand Court of Appeal observed in *R v Radich* that:⁶

... If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the

² William Shakespeare, *The Merchant of Venice*, IV, i, 191–192 (c. 1596–1598). Though, Portia's famous plea to Shylock was for mercy in claiming a civil debt.

³ *Markovic* (2010) 30 VR 589 at 593–595 [12]–[21].

⁴ J [48] (CAB 138).

⁵ See, e.g., *R v Williscroft* [1975] VR 292 at 298 (Adam and Crockett JJ).

⁶ *R v Radich* [1954] NZLR 86 at 87 (Fair, Stanton and Hay JJ).

commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine the appropriate amount of punishment.

12. As Tadgell JA said in *Miceli*,⁷ ‘it cannot be doubted that an element of mercy has always been regarded, and properly regarded, as running hand in hand with the sentencing discretion’.⁸ For the ‘whole history of criminal justice has shewn that severity of punishment begets the need of a capacity for mercy’.⁹ These references to mercy are better conceptualised within this first type – leniency subsisting within the sentencing discretion.
13. The *second* concept is of the kind described in *Markovic*. This is of ancient origin.
14. For Blackstone, the courts of common law adjudged and punished the individual case, but the prerogative of mercy was reposed in the monarch.¹⁰ More poetically, he said that laws cannot be framed on principles of compassion to guilt, yet justice is bound to be administered in mercy.¹¹ This mercy existed as a Royal power to ‘soften the rigour of the law’¹² but *only* in cases of ‘peculiar hardship’.¹³ Separately, Hale described the Royal exercise of mercy as being only ‘upon **great and weighty** circumstances, yet such instances ought to be very rare, and upon

⁷ *R v Miceli* [1998] 4 VR 588.

⁸ *Miceli* [1998] 4 VR 588 at 592.

⁹ *Cobiac v Liddy* (1969) 119 CLR 257 at 269 (Windeyer J); See, also, *R v Osenkowski* (1982) 30 SASR 212 at 212–213 (King CJ).

¹⁰ This constitutional position was of great importance. The decision in *Prohibitions del Roy* (1607) 12 Co. Rep. 63 meant that the King could not sit in his common law courts. But for the prerogative of mercy, all other Royal powers (suspending and dispensing) were subsequently abolished by the Bill of Rights 1688: see William Blackstone, *Commentaries on the Laws of England* (5th edition, 1765–1769), Book IV, Chapter 5, 70; Book IV, Chapter 23, 310; Book IV, Chapter 33, 440.

¹¹ William Blackstone, *Commentaries on the Laws of England* (5th edition, 1765–1769), Book IV, Chapter 31, 396.

¹² William Blackstone, *Commentaries on the Laws of England* (5th edition, 1765–1769), Book IV, Chapter 31, 396–397: ‘The king himself condemns no man ... the great operation of his scepter is mercy... [he] has it in his power to extend mercy, wherever he thinks it is deserved : holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment’.

¹³ William Blackstone, *Commentaries on the Laws of England* (5th edition, 1765–1769), Book IV, Chapter 2, 32.

great occasions'.¹⁴ It was a means of tempering harsh sentences, of addressing faults identified within the system and a measure to accommodate public interests.¹⁵

15. This is why justice and mercy must not be confused. Mercy exists outside of the adjudgment and punishment of criminal guilt. Importantly, mercy involves no obligation and there exists no presumption to its exercise – a distinct concept from equity.¹⁶ It requires 'great and weighty' circumstances to ensure that just punishment is *not* administered – otherwise, *iusque datum sceleri*.¹⁷ This detachment from the legal realm explains the prominent place of sovereignty in executive mercy.¹⁸ Looked at in this way, mercy is not equated with equity or 'moral' justice, but it instead tempers the application of just and proportionate punishment. It is an emotional and practical response to particulars, not to rules.¹⁹ In more modern terms, it might be said to operate as a 'pressure valve' by which to achieve a humane and compassionate outcome within the system of justice.
16. It is accepted, of course, that the Royal prerogative of mercy²⁰ is a distinct concept from the exercise of mercy by a sentencing judge to *avoid* just punishment. But it has been said that a sentencing court has an inherent prerogative of mercy within its common law (and constitutional) authority to adjudge and punish

¹⁴ Sir Matthew Hale, *The History of the Pleas of the Crown* (1847) Part I, Chapter I, 13 (emphasis added). See, also Part I, Chapter 38, 466: 'But others have thought, that this prerogative of the crown, founded in mercy and immemorially exercised, is part of the common law'.

¹⁵ See, ATH Smith, 'The Prerogative of Mercy, The Power of Pardon and Criminal Justice' (1983) *Public Law* 398, 398–399. Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750* (Stevens and Sons, 1948) vol 1, 159–61.

¹⁶ Claudia Card, 'On Mercy' (1972) 81(2) *The Philosophical Review* 182, 184. Daniel Statman, 'Doing Without Mercy' (1994) 32(3) *The Southern Journal of Philosophy* 331, 334. Whereas equity is dictated and constrained by the demands of moral justice or 'conscience': *Clough v Ratcliffe* (1853) 63 ER 1016 at 1023 (Knight-Bruce VC). See also *Bromley v Holland* (1800) 31 ER 766 at 769–770 (Eldon LC).

¹⁷ 'Crime is regarded as law' or 'wickedness deemed justice': Lucan, *Bellum Civile* or *Pharsalia* (~60CE) Book I, 1–32, as translated by AS Kline.

¹⁸ Indeed, it was said to be a characteristic of monarchs: Charles Louis de Secondat Baron de Montesquieu, *The Complete Works of M. de Montesquieu in Four Volumes*, vol 1 *The Spirit of Laws* [1748] (T Evans 1777) Book VI, Chapter XXI. See, also, Jean-Jacques Rousseau, *The Social Contract and The First and Second Discourses* (Susan Dunn ed, Yale University Press (2002) *The Social Contract*, Book II: Chapter V, 177).

¹⁹ Nigel E Simmonds, 'Judgment and Mercy' (1993) 13 *Oxford Journal of Legal Studies* 52, 52.

²⁰ *Sentencing Act 1991* (Vic), Part 9, ss 106–108.

criminal guilt.²¹ In its proper conceptual context, this second type of mercy can be seen as operating in a similar way to the Royal prerogative.

A.2 *Coherence within a retributive system of punishment*

17. While criminal actions justify proportionate punishment, mercy is the remission of this punishment as a moral response to an offender – less than his just desert.²² Put another way, mercy is deciding *not* to inflict what is agreed to be the just penalty, all things considered.²³
18. As was said in *Hoare*, ‘a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its *objective* circumstances’.²⁴ This Court has further endorsed the principle of proportionality as the primary aim of sentencing.²⁵ Mercy should not be regarded as in opposition to, or a substitute for, justice. Rather, it is the capacity for mercy to respond to particular circumstances in a particular case that is the essence of justice. An act of mercy separate to, but connected with the sentencing process (and distinct from the Royal prerogative) grants the exercise of justice legitimacy through the reduction of the severity of punishment on *compassionate* grounds.
19. Within this second concept, it has been said that mercy makes sense only in a retributive, or partially retributive, theory of punishment. That is, it has been argued that there is a coherence of mercy with a partly retributive justice in punishment. The principle of proportionality charts the upper and lower limits of the sentencing discretion,²⁶ while mercy arises from a compassionate approach based within such a system and serves as a check on the law’s propensity to be

²¹ *Evans v The Queen* [1999] WASCA 252 at [61] (Malcolm CJ, Anderson and White JJ).

²² Claudia Card, ‘On Mercy’ (1972) 81(2) *The Philosophical Review* 182, 183. Jeffrie G Murphy, ‘Mercy and Legal Justice’ in Murphy and Hampton (eds), *Mercy and Forgiveness* (Cambridge University Press 1998), 166.

²³ Alwynne Smart, ‘Mercy’ (1968) 43 *Philosophy* 345, 349.

²⁴ *Hoare v The Queen* (1989) 167 CLR 348 at 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (emphasis in original).

²⁵ *Veen v The Queen [No 1]* (1979) 143 CLR 458 at 467 (Stephen J); *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 472 (Mason CJ, Brennan, Dawson and Toohey JJ). See, *Sentencing Act 1991* (Vic) s 5(1)(a).

²⁶ *Azzopardi v The Queen* (2011) 35 VR 43 at 61 [61]–[62] (Redlich JA, with whom Coghlan and Macaulay AJJA agreed at 70 [92]–[93])

harsh and unyielding.²⁷ It supports the ‘Holy Grail’ of individualised justice,²⁸ in a society which ‘values both justice mercy’.²⁹ Plainly, this conflicts with the concept of treating like cases alike. It is at *this point* that there is a requirement to find the conditions for the ‘appropriate’ exercising of mercy – in order to permit some discrimination amongst offenders without violating the role of consistency in the application of just and proportionate punishment.³⁰

20. The importance of a *hurdle* or *threshold* test to the exercise of mercy is accepted as a consequence of a retributivist, or partly retributivist, theory of punishment. This is because acts of mercy may discriminate unfairly between similar cases which, contrary to the lofty aims of the common law, leads to inconsistency. When analysed within this framework, and accepting that an (extra) act of mercy is *not* obligatory, this provides a rational explanation as to why a threshold test exists.³¹ It is a form of leniency motivated by compassion and subject to a consistent, and consistently applicable, exceptional circumstances test. In this way, the discretion to exercise mercy as reposed within a sentencing judge is maintained, but with an operative threshold rule that means it might be applied to a multiplicity of different persons ‘undeflected by prejudice, interest or caprice’.³²

A.3 *Coherence in the common law*

21. In Thomas’ *Principles of Sentencing*, family hardship was described only as a ground for mitigation of the sentence where the particular circumstances of the family are such that the degree of hardship is ‘exceptional’, and considerably more severe than the deprivation suffered by a family in normal circumstances as a result of the imprisonment.³³ This text involved a review of more than ten

²⁷ Claudia Card, ‘On Mercy’ (1972) 81(2) *The Philosophical Review* 182, 191.

²⁸ See, The Hon A M Gleeson, ‘Individualised Justice - The Holy Grail’ (1995) 69 *Australian Law Journal* 421, 422.

²⁹ *R v Jurisic* (1998) 45 NSWLR 209 at 221 (Spigelman CJ).

³⁰ Alwynne Smart, ‘Mercy’ (1968) 43 *Philosophy* 345, 345. Claudia Card, ‘On Mercy’ (1972) 81(2) *The Philosophical Review* 182, 184–185. Sir Carleton Kemp Allen, *Aspects of Justice* (Stevens & Sons, 1958), 62–64.

³¹ Alwynne Smart, ‘Mercy’ (1968) 43 *Philosophy* 345, 345–359. Claudia Card, ‘On Mercy’ (1972) 81(2) *The Philosophical Review* 182, 184.

³² HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012), 206. See, Markovic (2010) 30 VR 589 at 595 [19].

³³ D A Thomas, *Principles of Sentencing – The sentencing policy of the Court of Appeal Criminal Division* (Heinemann London, 1979, 2nd ed), 212.

thousand judgments over approximately fifteen years.³⁴ The importance of Thomas' study on the common law's development cannot be underestimated.³⁵

22. Accepting some inconsistency in the early years, a threshold test of 'exceptional circumstances' prior to the exercise of mercy has been applied consistently by the Court of Appeal of England and Wales since the 1970s.
23. The headnote to *R v Tullett*³⁶ refers to 'special circumstances' relating to the Court's determination to release the offender on probation because of her caring responsibilities to her three children. The headnote in *R v Wring*³⁷ refers to 'exceptional circumstances' relating to placing an offender on probation as an act of mercy due to family hardship involving the death of a child since conviction. In *R v Saunders*,³⁸ mercy was extended to the female offender who had 'special considerations' relating to her parental responsibilities, with the headnote referring to 'exceptional circumstances'. The sentence in *R v Harrison*³⁹ was reduced due to the male offender's 'unusual family circumstances', including his wife's illness, an expected fourth child, and impending family homelessness.
24. In *R v Sumners*,⁴⁰ the sentence of imprisonment was reduced 'as an act of mercy' because of 'special' family circumstances. Likewise, in *R v Vaughan*,⁴¹ the Court determined that there were extra circumstances 'which in mercy and compassion' the Court found 'compelling' – relating to physical and mental disabilities in the offender's children. In *R v Haleth*,⁴² the Court also showed mercy with the headnote referring to 'exceptional hardship'. In *R v Smith-Bryant*,⁴³ there were 'wholly exceptional circumstances' relating to the impact of the offending and sentence on the offender's children.

³⁴ 1962–1970 for the first edition, then for second edition 1962–1977.

³⁵ See, Austin Lovegrove, *The Framework of Judicial Sentencing: A Study in Legal Decision Making* (Cambridge University Press, 1997) 37. Cyrus Tata, 'Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process' (2007) 16(3) *Social & Legal Studies* 425, 434.

³⁶ [1971] Crim LR 719 at 719–720 (Megaw LJ, Cusack and Croom-Johnson JJ).

³⁷ [1972] Crim LR 387 at 387–388 (Lawton LJ, Geoffrey Lane and Mars-Jones JJ).

³⁸ [1972] Crim LR 194 at 194–195 (Megaw LJ, Thesiger and Swanwick JJ).

³⁹ [1973] Crim LR 64 (Lawton LJ, Swanwick and Phillips JJ).

⁴⁰ (1979) 1 Cr App R (S) 13 at 13–14 (Lawton LJ, Cantley and Willis JJ).

⁴¹ (1982) 4 Cr App R (S) 83 at 83–84 (Lane LCJ, Brown and Taylor JJ).

⁴² (1982) 4 Cr App R (S) 178 at 178–179 (Watkins LJ and Drake J).

⁴³ (1989) 11 Cr App R (S) 49 at 49–54 (Lane LCJ, Rose and Pill JJ).

25. In *R v Bernard*,⁴⁴ the Court of Appeal described principles relating to sentencing offenders with severe, terminal or physical illnesses, quoting from *R v Wynne* (unreported, C.A. April 18, 1994).⁴⁵ The Court articulated four principles from its analysis of the authorities.⁴⁶ The fourth principle was that ‘an offender’s serious medical condition may enable a court, as an act of mercy in the exceptional circumstances of a particular case, rather than by virtue of any general principle, to impose a lesser sentence than would otherwise be appropriate’.⁴⁷ The so-called *Bernard* principles were recently reviewed in *R v S*; *R v M*,⁴⁸ which emphasised that sufficient allowance might be made for mitigating factors but that ‘exceptional leniency’ or the ‘act of mercy’ required exceptional circumstances.
26. In Australia, the Victorian Court of Appeal has recognised again,⁴⁹ and again,⁵⁰ and again,⁵¹ that mercy is *not* antithetical to justice but still requires exceptional circumstances. Winneke P cited five cases supporting the need for exceptional circumstances before mercy might be extended on family hardship grounds.⁵²
27. The exceptional circumstances test is accepted and applied by the Court of Appeal of the Supreme Court of Western Australia.⁵³ It is referred to and accepted by one member of the High Court.⁵⁴ It is the current law in Tasmania,⁵⁵ and the Northern

⁴⁴ (1997) 1 Cr App R (S) 135 at 135–139 (Rose LJ, Mantell and Thomas JJ).

⁴⁵ The circumstances of that case were described as ‘unusual, exceptional and extraordinary’.

⁴⁶ Sentencing judges in Victoria have also extended mercy in cases of terminal illness. See, reference to the co-accused in *DPP (Cth) v Vestic* [2008] VSCA 12 at [9] (Coghlan AJA).

⁴⁷ *Bernard* (1997) 1 Cr App R (S) 135 at 139.

⁴⁸ [2018] 1 WLR 5344 at 5348 [10], 5355 [41]–[43] (Holroyde LJ, Laing J and Judge Aubrey).

⁴⁹ *Barbaro v The Queen* (2012) 226 A Crim R 354 at 365 [39] (Maxwell P, Harper JA and T Forrest AJA).

⁵⁰ *Guode v The Queen* [2020] VSCA 257 at [46] (Ferguson CJ, Priest and Beach JJA).

⁵¹ *DPP v Hill (a pseudonym)* (2023) 307 A Crim R 273 at 280 [19]–[20] (Priest and T Forrest JJA, with whom Hargrave JA agreed with additional reasons).

⁵² *R v Panuccio* (Unreported, Supreme Court of Victoria Court of Appeal, 4 May 1998) at 7 (Winneke P, Brooking and Charles JJA). These were *R v Matthews* (1996) 130 FLR 230; *R v Lynch and Ratcliffe* (unreported, Court of Appeal, 18 April 1996); *R v Yaldiz* (unreported, Court of Appeal, 4 December 1996); *R v Yates* (unreported, Court of Appeal, 17 February 1998); *R v Kim* (unreported, Court of Appeal, 18 March 1998).

⁵³ See, recently, *The State of Western Australia v Rayapen* [2023] WASCA 55 at [202]–[207] (Quinlan CJ, Mazza and Hall JJA).

⁵⁴ *Dinsdale v The Queen* (2000) 202 CLR 321 at 343 [68] (Kirby J) citing *Anderson v The Queen* (1996) 18 WAR 244.

⁵⁵ *R v Boyle* (1987) 34 A Crim R 202 at 205–206 (Burt CJ, Kennedy and Franklin JJ).

Territory.⁵⁶ Prior to legislative change, it applied in Queensland.⁵⁷ As noted by the majority in the Court below, the New South Wales Court of Criminal Appeal referred to *Markovic* as having ‘explained’ the position at common law.⁵⁸

28. As Doyle JA explained in *Adams*,⁵⁹ the position in South Australia has been complicated by legislative prescription, and then change, over time. Doyle JA further explained that while it may be accepted that authorities in South Australia represent something of a retreat from the articulation of the common law principles in *R v Wirth*, it nevertheless tended to treat the concept of exceptionality as a descriptive function of when such circumstances may have a ‘significant influence’ on a sentencing outcome.⁶⁰ But, as emphasised by the majority of the Court below, the issue for determination in *Adams* was the proper construction of section 16A(2)(p) of the *Crimes Act 1914* (Cth)⁶¹ – not section 11(2) of the *Sentencing Act 2017* (SA) nor the common law.⁶²

29. A coherence in the common law as to the exercise of mercy is readily apparent. If mercy is to be exercised, beyond the limit of justice, it requires exceptional circumstances before anything *other than* a just desert might be imposed.

A.4 *Other justifications for restraint*

30. Before proceeding to consider other justifications for restraint in the exercise of mercy, an analysis of relevant authorities reveals that:

a. matters of family hardship *or* grave ill-health are not only relevant to the quantum – or length – of sentence but also relevant to the *type* of sentence imposed.⁶³ These categories are not closed, noting that the traditional

⁵⁶ *R v Nagas* (1995) 5 NTLR 45 at 54 (Gallop, Angel and Thomas JJ).

⁵⁷ *R v Stewart* (1994) 72 A Crim R 17 at 21 (Franklyn, Wallwork and Owen JJ); *R v Chong; ex parte Attorney-General (Qld)* (2008) 181 A Crim R 200 at 206–207 [29]–[35] (Keane and Fraser JJA and Atkinson J).

⁵⁸ J [109] (CAB 153) citing, *inter alia*, *Totaan v The Queen* (2022) 108 NSWLR 17 at 28–9 [56], 32 [67] (Bell CJ, with whom Gleeson JA, Harrison, Adamson and Dhanji JJ agreed at 48 [148]–[151]).

⁵⁹ *Adams v The Queen* (2022) 141 SASR 204 at 227 [96] (Doyle JA) (citations omitted).

⁶⁰ *Adams* (2022) 141 SASR 204 at 228 [97] (Doyle JA) (citations omitted).

⁶¹ *Crimes Act 1914* (Cth) (*Commonwealth Crimes Act*).

⁶² J [56(1)] (CAB 140-141).

⁶³ *R v Nagul* [2007] VSCA 8 at [45] (Chernov JA, with whom Maxwell P and Habersberger AJA agreed).

bestowal of the Royal prerogative of mercy extended to pregnancy and insanity, amongst other reasons.⁶⁴

- b. to even attract such an application, the exercise of mercy must be capable of ameliorating the circumstances of the hardship claimed.⁶⁵
 - c. mercy must be exercised upon considerations ‘supported by the evidence’ and ‘appeal not only to sympathy but also to well-balanced judgment’.⁶⁶
31. The base complexity with the exercise of mercy was explained by Winneke P in *Panuccio*: ‘the court’s primary function is to impose a sentence which meets the gravity of the crime committed by the person who is being sentenced’.⁶⁷ There will ‘rarely be a case where a sentence of imprisonment imposed does not have consequential effects upon the spouse, children or other close family members who are dependent in one form or another upon the person imprisoned’.⁶⁸ Or, as Gleeson CJ said in *Edwards*,⁶⁹ the real difficulty was that ‘causing hardship to third parties by the imprisonment of an offender is only too common’.⁷⁰
32. Drawing from *Markovic*, the majority of the Court below explained four reasons for the necessity of restraint on the exercise of mercy:⁷¹
- a. First, it is almost inevitable that imprisoning a person will have an adverse effect on the person’s dependants.
 - b. Secondly, the primary function of a sentencing court is to impose a sentence commensurate with the gravity of the crime.

⁶⁴ William Blackstone, *Commentaries on the Laws of England* (5th edition, 1765–1769), Book IV, Chapter 31, 396.

⁶⁵ See, *R v Davidson*; *R v Konestabo* [2008] VSCA 188 at [35]–[48] and [44]–[45] (Nettle JA, with whom Weinberg JA agreed at [47] and Mandie AJA agreed at [48]).

⁶⁶ *R v Kane* [1974] VR 759 at 766 (Gowans, Nelson and Anderson JJ).

⁶⁷ *Panuccio* (unreported, Court of Appeal, 4 May 1998) at 7 (Winneke P, with whom Brooking and Charles JJA agreed at 8).

⁶⁸ *Panuccio* (unreported, Court of Appeal, 4 May 1998) at 7 (Winneke P, with whom Brooking and Charles JJA agreed at 8).

⁶⁹ *R v Edwards* (1996) 90 A Crim R 510 at 515 (with whom James and Ireland JJ agreed at 518).

⁷⁰ *Edwards* (1996) 90 A Crim R 510 at 516 (with whom James and Ireland JJ agreed).

⁷¹ J [49] (citations omitted) (CAB 139).

- c. Thirdly, to treat family hardship as the basis for the exercise of leniency ‘produces the paradoxical result that a guilty person benefits in order that innocent persons suffer less’.
 - d. Fourthly, to treat an offender who has needy dependants more leniently than one equally culpable co-offender who has none would ‘defeat the appearance of justice’ and be ‘patently unjust’.
33. These must be accepted as correct. While the appellant has argued that these four reasons has been the subject of ‘sustained criticism’, a closer inspection of the authorities cited does not make good that contention: cf **AS [9]**.
34. In *Zerafa*, the issue that fell to be resolved was a question of statutory construction regarding section 16A(2)(p) of the *Commonwealth Crimes Act*.⁷² It was the interpretation of this provision which was resolved in *Totaan*.⁷³ The issue in those cases concerned neither the exercise of mercy by a sentencing judge, nor whether a basis for the exercise of mercy required the satisfaction of a threshold test.
35. Though it is accepted that there was a ‘review’ of relevant common law authorities in *Zerafa*,⁷⁴ as applicable via the *chaussette* to section 21A(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), it was not necessary to decide the point. Importantly, there was no argument on the issue of mercy, nor analysis of the necessity of a threshold test before mercy might be exercised.
36. *Carter* does also not assist this analysis: cf **AS [20]**. This is because McCallum J (as her Honour then was) endorsed only the analysis of Beech-Jones J in *Zerafa* as concerning the ability of sentencing courts to weigh the assessment of probable hardship to family members. There is no doubt that this must be correct – sentencing judges are more than capable of synthesising such matters for sentence – but, again, neither case considered this issue in the context of mercy and the nature of the restraint imposed by common law on that prerogative.
37. As to the ‘**frame of reference problem**’, this remains genuinely unanswered by the appellant. While it is easy to point to matters concerning female prisoners, the

⁷² *R v Zerafa* (2013) 235 A Crim R 265 at 299 [144] (Beech-Jones J).

⁷³ *Totaan v The Queen* (2022) 108 NSWLR 17 at 39–40 [93] (Bell CJ, with whom Gleeson JA, Harrison, Adamson and Dhanji JJ agreed at 50 [148]–[151]).

⁷⁴ *Zerafa* (2013) 235 A Crim R 265 at 291–293 [113]–[118] (Beech-Jones J).

trite answer is that the common law often provides that such instances *may* be exceptional, as an exercise of individual prerogative by a sentencing judge.

38. The question, however, remains unanswered when that ‘frame’ is extended to encompass different categories of offenders:
 - a. What of the appellant in *Guode*?⁷⁵ She drove four of her children into a lake in Wyndham Vale killing all but the eldest child.⁷⁶ Should the effect of her imprisonment on her surviving child have mitigated the sentence she received for killing her other three children?
 - b. What of the offender in *Paulino*?⁷⁷ He was found guilty by a jury of murdering his wife in despicable family violence circumstances.⁷⁸ Should his sentence of 30 years’ imprisonment have been mitigated because his children will consequentially lose their relationship with their father?
 - c. What of the appellant in *Thorn*?⁷⁹ He was found guilty of an execution-style murder in the Lakes Entrance area – the deceased was alleged to have sexually abused one or more of the deceased’s own step-children.⁸⁰ The appellant had moved to the family farm just prior to the offending to take care of his mother and two daughters (who were aged 13 and 12 years at the time of sentencing) – the children’s mother died of cancer just prior to the offending.⁸¹ Should his sentence of life imprisonment have been mitigated because of the family hardship that undoubtedly resulted?
39. These three examples are not raised lightly. At the heart of the appellant’s submission, it would seem,⁸² is the contention that the basis for reduction in sentence due to the effect of a sentence on an offender’s family should not be constrained by an arbitrary threshold. Yet the requirement of an exceptionality threshold ensures that no unfairness is worked within the system *by* an arbitrary

⁷⁵ *Guode v The Queen* [2018] VSCA 205 (Ferguson CJ, Priest and Beach JJA).

⁷⁶ *Guode* [2018] VSCA 205 at [1]–[3].

⁷⁷ *DPP v Paulino* [2017] VSC 794 (Bell J).

⁷⁸ *Paulino* [2017] VSC 794 at [2]–[8].

⁷⁹ *Thorn v The King* [2026] VSCA 99 (Emerton P, Lyons and Kidd JJA).

⁸⁰ *Thorn* [2026] VSCA 99 at [1]–[7].

⁸¹ *Thorn* [2026] VSCA 99 at [481].

⁸² Noting that the appellant has engaged only with a category for which mercy might be granted – family hardship – rather than the justification for mercy itself.

frame of reference. Instead, there is *no* restriction to *whom* mercy may be granted – the existence of a threshold test does not discriminate against an individual, but requires that the whole of the circumstances relied on be exceptional.

40. As to the ‘**nature of exceptionality**’ problem, this is more apparent than real. The court requires the circumstances warranting the extension of mercy to be exceptional, not the individual case itself. It accords with the common law.
41. As to the ‘**equal justice**’ objection, it is accepted that this paradox exists – but it is properly explained and justified in the preceding analysis (above) concerning the history of the exercise of mercy and its place within a retributive, or partly retributive system of justice. For if the appellant’s contentions were to be accepted that, where relevant, family hardship should not be limited by exceptionality (however described), then ‘mercy does no more than assist what weight might be given to particular accepted mitigating factors’.⁸³ To accept this contention would be to strip sentencing judges of the prerogative of mercy, which operates independent to any leniency that might be afforded as part of a weighting process.
42. The appellant’s reliance on authorities questioning the basis of the exceptional circumstances test cannot be divorced from the relevant authorising legislative environment, in particular, section 16A(2)(p) of the *Commonwealth Crimes Act*: cf, AS [23(a)]. Like the *Commonwealth Sentencing Act*, it is open to any Parliament to incorporate ‘family hardship’ as an explicit sentencing factor.
43. In Victoria, Parliament has not done so despite recommendation to the contrary. In 1988, when the Victorian Attorney-General’s Department published the Report of the Victorian Sentencing Committee, a recommendation was made not only to include a statutory list of mitigating factors, but to include ‘family hardship’.⁸⁴ This was a position not taken up by the Victorian Government.
44. However, the Victorian Legislature *has* specifically acknowledged and accepted the existence of the exceptional circumstances test with respect to the exercise of mercy by a sentencing court.

⁸³ Richard G Fox, “When Justice Sheds a Tear: The Place of Mercy in Sentencing” (1999) 25(1) *Monash University Law Review* 1, 23.

⁸⁴ Victorian Sentencing Committee, *Sentencing* (Report, Victorian Attorney-General Department, April 1988) Vol 12, Sum-12.

45. Division 1 of Part 3BA of the *Sentencing Act* relates to ‘Dismissals, discharges and adjournments’. Section 70(1)(e)⁸⁵ states in plain and explicit language:

(1) An order may be made under this Division—

...

- (e) to allow for the existence of other extenuating or exceptional circumstances that justify the court showing mercy to an offender.

...

46. This provision tends to indicate that the Victorian Parliament has specifically acknowledged the existence of ‘exceptional circumstances’ that ‘justify’ the court showing mercy to an offender and, in so doing, has given its imprimatur.

B. The statutory construction of the *Sentencing Act 1991* (Vic)

47. The appellant’s argument that section 5(2)(g) of the *Sentencing Act* must be construed, via section 32 of the *Charter*, as admitting the right contained in section 17 of the *Charter* (and, when relevant, all other rights) must be rejected.

B.1 *Purposes, aggravating and mitigating factors*

48. The relevant sentencing purposes provided in the *Sentencing Act* seek to promote consistency in sentencing, which is a hallmark of the rule of law⁸⁶:
- a. section 1(a) of the *Sentencing Act* provides that one of its purposes is to promote consistency of approach in the sentencing of offenders.
 - b. section 1(b) provides that ‘all general provisions dealing with the powers of courts to sentence offenders’ is to be contained within the one Act.
 - c. section 1(c) provides for fair procedures in imposing sentence or dealing with contraventions.
 - d. section 1(d) relevantly provides for principles relating to (i) general and specific deterrence, (ii) rehabilitation, (iii) denunciation, (iv) proportionality, and (v) promoting public understanding.

⁸⁵ This has been accepted as being distinct from the exercise of mercy by the Executive: see, *Re MJR* (2000) 1 VR 119 at 130–132 [22]–[25] (Winneke P, Batt JA and Hampel AJA).

⁸⁶ See, for example, *R v MacNeil-Brown* (2008) 20 VR 677 at 690 [37] (Maxwell P, Buchanan, Vincent, Redlich and Kellam JJA) citing *Lowe v R* (1984) 154 CLR 606 at 610–611 (Mason J); *Wong v R* (2001) 207 CLR 584 at 591 [6] (Gleeson CJ).

49. The complexity of these purposes is further reflected in the governing principles stated in Part 2, ‘Governing Principles’, of the *Sentencing Act*. As the Court below said in *Boulton*, the discretionary decision to impose sentence must give effect to the purposes stated in section 5(1) of the Act, and take account of the factors listed in section 5(2) of the *Sentencing Act*. A sentencing judge is further guided by the principles of parsimony, proportionality and totality.⁸⁷
50. As this Court held in *Elias*, the statutory statement of these matters is not exhaustive and, subject to any contrary intention, common law principles apply in the sentencing of offenders under Victorian law.⁸⁸ The mandatory considerations in section 5(2) are diverse and no particular consideration is required to be assessed in a particular manner or accorded particular weight.⁸⁹
51. When construing the matters in section 5(2)(a)–(f), it is useful to consider the categories or types of matters to which a sentencing court must have regard:
- a. *statutory matters* – (a): maximum penalty; (ab): the standard sentence;
 - b. *consistency* – (b): current sentencing practices;
 - c. *the offence* – (c): seriousness; (d) culpability; (daaa): hatred or prejudice motivations; (db): injury or loss;
 - d. *the victim* – (daa): impact on the victim; (da): victim’s personal circumstances; and
 - e. *the offender* – (e): guilty plea; (f): offender’s previous character.
52. It is only subsections (daa) and (da) which include reference to a third party, namely a victim of an offence. No other factor contemplates any *other* third party to be considered in the sentencing process.
53. It cannot be ignored that the purpose as set out in section 1(d)(iv)(C) is mirrored in section 5(2)(g), which provides that, in sentencing an offender, a court ‘must have regard to ... the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances’. The *Sentencing Act* does not,

⁸⁷ *Boulton v The Queen* (2014) 46 VR 308 at 318 [34] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

⁸⁸ *Elias v The Queen* (2013) 248 CLR 483 at 493 [25] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁸⁹ *DPP (Vic) v Dalglish* (2017) 262 CLR 428 at 434 [9] (Kiefel CJ, Bell and Keane JJ), 452 [79] (Gageler and Gordon JJ).

however, attempt to define ‘aggravating factor’ (or, for that matter, ‘aggravating circumstances’), or in terms spell out those factors which a sentencing judge must regard as ‘aggravating’ or ‘mitigating’.

54. The Court below has considered that these statutory descriptions of aggravating and mitigating circumstances are ‘no more than shorthand expressions’,⁹⁰ and that factors ‘cannot be characterised as always aggravating or always mitigating’.⁹¹
55. The Court below has been accepted that the aggravating circumstances of an offence are those that increase its seriousness – these factors point towards greater severity of sentence.⁹² Of course, the circumstances of *an offence* are not neatly marked out by two lines, one at its technical beginning and the other at its technical end.⁹³ Common sense and moral sense extend the circumstances of an offence which may be considered when assessing the objective seriousness of a offence, to events which precede and follow its technical limits.⁹⁴
56. Nevertheless, for many years now, the question of a ‘mitigating factor’ or ‘mitigating circumstances’, has been considered by the Court below as being one of two sides of the same coin – aggravating or mitigating circumstances relate to *the offence or the offender*.⁹⁵ Indeed, this concept is also found in Edward Cox’s historic treatise of sentencing whereby the court was to consider only the circumstances of the crime and the character of the criminal, which might be either aggravating or mitigating.⁹⁶ This Court recently reached a similar conclusion in relation to NSW sentencing legislation.⁹⁷

⁹⁰ *R v Storey* [1998] 1 VR 359 at 371 (Winneke P, Brooking and Hayne JJA, and Southwell AJA, with whom Callaway JA agreed with additional reasons).

⁹¹ *R v Storey* [1998] 1 VR 359 at 371. See, recently, *Rickerby v The King* [2025] VSCA 252 at [43]–[45] (Priest, Osborn and Kaye JJA).

⁹² *DPP v England* [1999] 2 VR 258 at 263 [17] (Brooking JA, with whom Batt JA agreed at 268–269 [41], and Charles JA agreed at 269 [42]).

⁹³ *DPP v England* [1999] 2 VR 258 at 263–264 [18].

⁹⁴ *DPP v England* [1999] 2 VR 258 at 263–264 [18].

⁹⁵ *R v Storey* [1998] 1 VR 359 at 368–369. See, also, *DPP (Vic) v Dalgliesh* (2017) 262 CLR 428 at 452 [78]–[79] (Gageler and Gordon JJ).

⁹⁶ Edward W Cox, *Principles of Punishment as applied in the Administration of the Criminal Law by Judges and Magistrates* (Law Times Office, 1877) ix, 18–19, 157–59.

⁹⁷ *The King v McGregor* [2026] HCA 3 at [31] (Gageler CJ, Gleeson and Beech-Jones JJ).

57. This adheres to the means by which punishment, which would normally be imposed as commensurate to the gravity of the crime and offender's moral responsibility, might be alleviated by reference to mitigating factors.
58. Within section 5(2)(g), the words 'aggravating' or 'mitigating' are juxtaposed against 'the offender' by use of the word 'concerning'. The word 'concerning' is one of wide import, and has been defined as 'regarding', 'touching', 'in reference or relation to', and 'about'.⁹⁸ This Court has held 'concerning' has the same meaning as 'in 'relation to'.⁹⁹ Plainly, this is the type of word which gathers meaning from its context.
59. By itself, it cannot be doubted that the phrase 'any other relevant circumstances' has the widest possible meaning. However, a word or phrase of wide possible meaning will be limited by the context in which it appears, and general matters are coloured by reference to specific matters.¹⁰⁰ Here, the common characteristic which describes the genus must be considered as *the offender*, not some other person. The broad reference to 'any other relevant circumstances' is thus confined as one relating to the offender, and not some other person.
60. The words of section 5(2)(g) read as one thus become clear. This is because the words 'aggravating' or 'mitigating' factor colour the words which follow, namely 'any other relevant circumstances'. This latter phrase must not be considered as floating at large; that is, the function of the word 'or' cannot be such as to operate wholly disjunctively and separate 'any other relevant circumstances' from the preceding words of 'aggravating or mitigating factor concerning the offender'. Tutored by authority and the long-held manner of application of the common law, the majority were thus correct to find that reference to 'any other relevant circumstance' in section 5(2)(g) is a reference to the relevant circumstances of the offending *and* of the offender.¹⁰¹ For it is the offender who has committed the offence. Importantly, these words also leave room to incorporate reference to the

⁹⁸ *O'Connor v Leaw Pty Ltd* (1994) 42 NSWLR 285 at 303 (Rolfe J). Similar definitions are apparent in the Macquarie Dictionary.

⁹⁹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 289 (Mason CJ and Deane J), 302 (Toohey J).

¹⁰⁰ *R v Regos* (1947) 74 CLR 613 at 623 (Latham CJ).

¹⁰¹ J [62] (CAB 142).

common law as relevant to aggravating or mitigating factors. Construed in this way, the general words are not rendered otiose,¹⁰² and advance the purposes for which a sentence might be imposed under section 5(1) of the *Sentencing Act*. This leaves no room by which the effect or consequences of a sentence on a third party, like an offender's family, might be considered as part of the sentencing process.

61. Importantly, this construction supports the purposes under section 5(1) read in context of the *categories* of matters referred to under section 5(2)(a)–(f). Otherwise, Parliament's election to define specific, and limited, categories of matters to which a court must have regard would have no work to do, if the words 'any other relevant circumstances' in section 5(2)(g) are read as opening the door to distinct other matters of a type or in a category *not* defined by Parliament.

B.2 *The Charter does not assist*

62. The terms of section 1(d)(iv)(C), as mirrored in section 5(2)(g), are clear and unequivocal. Section 32(1) of the *Charter* does not authorise departure from this clear meaning. This is supported by the words of section 1(b) detailing Parliament's intention to have within *one* Act all general provisions dealing with the powers of courts to sentence offenders. It is further supported by Parliament's acknowledgement of the exercise of mercy as subject to the exceptional circumstances test in section 70(1)(e) of the *Sentencing Act*.
63. To the extent that it is necessary, the following submissions are advanced.
64. **First**, the justifications and policy reasons advanced for the common law exceptionality test are sufficient to justify limiting the right in section 17 so that the rule can be considered compatible with the right.
65. **Secondly**, if this Court deploys the *Charter* in construing section 5(2)(g) then the *relevance* of a circumstance to sentencing, as both a matter of logic and statutory construction, must be considered by reference relevantly to section 1(a)–(e) and to meet one or more of the purposes as defined under section 5(1) of the *Sentencing Act*. That is, a *Charter* right can therefore only have a bearing on the construction of section 5(2)(g) insofar as that right conforms with this threshold

¹⁰² cf J [136] (Walker JA) (CAB 160).

of relevance, which is to be judged by reference to the sentencing guidelines as set by Parliament in section 5(1) of the *Sentencing Act*.

66. This construction does not exclude the *Charter* from having any *meaningful* bearing on the construction of section 5, because it might be accepted that the various *Charter* rights could be considered as bearing on the construction of the sentencing purposes under section 5(1), to the extent that there is any ambiguity in *those* purposes. For example, to give content to the general term of ‘community’ within section 5(1)(e); to elucidate the types of conduct requiring denunciation in section 5(1)(d); to consider what conditions may actually be rehabilitative for the purposes of section 5(1)(c), etc.
67. Thus, the *Charter* might be said to have a mediate relationship with section 5(2)(g) by way of section 5(1), and so remains meaningful in the interpretive exercise, but it does not have an immediate relationship with section 5(2)(g) of the *Sentencing Act*.
68. **Thirdly**, to adopt the appellant’s invitation (AS [43]) and import *every* right as ‘any relevant circumstances’ in the sentencing process:
 - a. is inconsistent with the repeated, careful amendment of the sentencing principles and purposes, and other aspects of the *Sentencing Act* and the accepted relationship to common law sentencing principles.
 - b. would not promote consistency in sentencing, but instead give a different meaning to the sentencing principles and purposes depending on the individual offender.
 - c. would require determination of how those rights interact, including conflict, with particular statutory and common law sentencing principles.
69. **Fourthly**, the appellant elides the meaning of the section 17 with the concept of family hardship. The terms of section 17(1) focus on protection of ‘families’ by ‘society’ and the ‘State’ – as a court is neither of those two things, section 17(1) cannot have application in the sentencing process. As to section 17(2), this right is not at large. It refers to ‘a child’, as defined under section 3 to mean a person under 18 years of age, and the protection of *that* child’s best interests. Accepting for the moment that section 17(2) is informed by the United Nations *Convention on the Rights of the Child* (the **CROC**), article 9(4) of the CROC provides that

where separation results from detention, obligations arise on a State party. On one view, the general nature of this right (and its seemingly purposive expression) seems inapt to find purchase in a sentencing process, or to imply into this right some meaning of *family* hardship. It does *not* entail that this separation is a matter to be considered *before* imposing punishment. Nor does it entail a concurrent obligation on a sentencing judge to prioritise a child's best interests when imposing a just and proportionate sentence on a family member.

70. Regardless, this case remains a poor vehicle for consideration of the relevance of section 17, including any resolution of the relationship between *Charter* rights with the sentencing process. This is because the definition of 'child' is defined under section 3 of the *Charter* to mean a person under 18 years of age. Where it is accepted that the appellant's daughters are both *over* the age of 18 years, it is difficult to see what work this right has to do here.
71. *Fifthly*, and *finally*, if this Court accedes to the appellant's prayers, then 'family hardship', shoehorned into the sentencing process via section 17(2) and section 32 of the *Charter*, would only ever be a matter of 'weight' and cannot justify the imposition of *less* than an offender's just desert. The end result may be that family hardship has *less* impact in the sentencing process in truly deserving cases. This is a far cry from the powerful exercise of mercy which, for centuries, has existed to mitigate the harshness of the criminal law.

PART VI — CROSS-APPEAL

72. There is no cross-appeal.

PART VII — ESTIMATE OF TIME FOR ORAL ARGUMENT

73. The respondent estimates that two hours is required to present oral argument.

Dated: 23 June 2026



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ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1	<i>Sentencing Act 1991</i> (Vic)	Compilation No. 226	ss 1, 5(1), 5(2), 70	Version in force on sentence date (provision unchanged since)	24 May 2024
2	<i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)	Compilation No 15	ss 3, 17, 32	Version in force on sentence date (provision unchanged since)	24 May 2024
3	<i>Crimes Act 1914</i> (Cth)	Compilation No 166	s 16A(2)(p)	Current version	All relevant times
4	<i>Sentencing Act 2017</i> (SA)	Compilation No 15	s 11(2)	Current version	All relevant times