HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M41/2026

BETWEEN:

DEMETRIOS CHARISIOU
Appellant

and

THE KING
Respondent

SUBMISSIONS OF THE LAW AND ADVOCACY CENTRE FOR WOMEN

Part I — Certification

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

Part II — Basis of application for leave to be heard

2. The Law and Advocacy Centre for Women (**LACW**) seeks leave to be heard as *amicus curiae* on both grounds of this appeal.

Part III — Why leave should be granted

3. LACW is a community legal centre for women who are in, or at risk of entering, the criminal justice system. On a daily basis, LACW represents women charged with criminal offences across Victoria. Many of those women are mothers of young children.[1]

4. LACW was granted leave to appear as *amicus curiae* in the Court of Appeal below.[2] Its written submissions, which were adopted by the Appellant at the hearing, raised issues central to this appeal. Those issues included approaching the question through the statutory lens of s 5(2)(g) of the ***Sentencing Act*** *1991* (Vic) and drawing the Court's attention to: the line of authorities, beginning with *R v Zerafa*,[3] expressing principled

1 Affidavit of Ellen Rose Murphy affirmed on 9 June 2026 at [1]-[8] (**Affidavit**).
2 At the outset of the hearing, the Court granted leave for LACW to be heard in reliance on its written submissions (which addressed both the common law and statutory construction) and then during the hearing granted leave for LACW to make oral submissions limited to the ***Charter*** *of Human Rights and Responsibilities Act 2006* (Vic): Affidavit at [18]-[20].
3 (2013) 235 A Crim R 265 at [107]-[149] (Beech-Jones J, as his Honour then was).

doubts about the exceptional circumstances threshold; interstate authorities indicating a divergence of common law approaches; and international materials and foreign authorities relevant to the interpretation of s 17 of the *Charter*.[4]

5. Those matters now having been addressed by the Appellant, LACW nevertheless seeks leave to be heard in this Court. It does so to provide "the benefit of a larger view" of the issues than an individual appellant is able or willing to offer.[5] That perspective is particularly important given the threshold nature of the exceptional circumstances test, which applies in all cases.[6]

10 6. LACW's proposed submissions cohere with the Appellant's submissions (**AS**), but address discrete matters, including:

6.1 the early development of the common law rule, demonstrating that it is not as clear-cut as *Markovic v The Queen*[7] suggested ([14]-[29]);

6.2 the modern application of the rule in Victoria, illustrating confusion regarding the principles to be applied ([31]-[37]);

6.3 additional reasons the *Markovic* rule should not be recognised as properly representing the common law, including that it is at odds with the wider body of common law and statute, and with international human rights ([38]-[42]);

6.4 additional statutory construction arguments about the relationship between the
20 *Sentencing Act* and the common law, and about coherence with the overarching framework of s 5(2) ([47]-[62]); and

6.5 an alternative analysis of how s 32(1) of the *Charter* might operate to resolve this appeal ([63]-[73]).

7. Given the close connection between those matters and the Appellant's submissions, a grant of leave would not materially add to the parties' preparation for the hearing or the length of the hearing itself. Any additional time required would be proportionate to the assistance provided.[8]

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4 See, Affidavit at [17].
5 See, *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 312 (French CJ).
6 See further, AS [41]-[44], with which LACW agrees.
7 (2010) 30 VR 589.
8 See, *Levy v Victoria* (1997) 189 CLR 579 at 604-605 (Brennan CJ); *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [4] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

Part IV — Argument

Overview

8. The task of a sentencing court is to impose a sentence that is just and appropriate in all the circumstances of the case.[9] For Victorian offences, the sentencing discretion is governed by the *Sentencing Act* and conditioned by the requirement in s 5(2)(g) to have regard to "the presence of any aggravating or mitigating factor concerning the offender *or of any other relevant circumstances*".[10] The question in this appeal is whether family hardship is a 'relevant circumstance'.[11]

10 9. In *Markovic v The Queen*,[12] that question was neither asked nor answered. Instead, the Court articulated and applied a common law rule whereby family hardship is a *prohibited* sentencing consideration, unless the circumstances are shown to be exceptional. Where that threshold of exceptionality is met, the court may consider the hardship through the exercise of the mercy discretion.[13]

10. In the present case, the majority below arrived at the same conclusion, by reference to ss 5(1)(a) and 5(2)(g) of the *Sentencing Act*. Under that approach, the words 'relevant circumstances' are "apt to permit and/or require the sentencing court to have regard to circumstances that would be relevant to the sentencing exercise at common law — including the relevance of mercy in the sentencing exercise".[14]

20 11. Both approaches should be rejected. On its proper construction, s 5(2)(g) of the *Sentencing Act* requires sentencing courts to have regard to family hardship. That follows from the text, context and purpose of the *Sentencing Act*, read in light of the constructional imperative in s 32(1) of the *Charter*.

12. Even if this Court accepts that the *Sentencing Act* intends to adopt the common law with respect to family hardship, however, that is not the end of the matter. Where a statute picks up as a criterion for its operation a body of the general law, in the absence of contrary indication, "the statute speaks continuously to the present, and picks up the case

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9 See, *Director of Public Prosecutions (Vic) v Dalgliesh* (2017) 262 CLR 428 at [4] (Kiefel CJ, Bell and Keane JJ), [85] (Gageler J, as his Honour then was, and Gordon J) and the cases there cited. See also, *Sentencing Act*, s 5(1)(a).

10 Emphasis added.

11 When raised on the facts known to the sentencing judge: see *R v AB (No 2)* (2008) 18 VR 391 at [45] (Warren CJ, Maxwell P and Redlich JA).

12 (2010) 30 VR 589.

13 (2010) 30 VR 589 at [3], [5], [12]-[13], [15]-[16] (the Court).

14 *Charisiou v The King* [2025] VSCA 277 (**J**) at [58] (Priest and Beach JJA).

law as it stands from time to time".[15] No contrary indication appears in the *Sentencing Act*. In fact, its subject matter tends powerfully in favour of speaking to the present to ensure that sentencing continues to reflect "the community's generally accepted standards of what is fair and just".[16] For the reasons advanced by the Appellant and those outlined below, this Court should overturn *Markovic*.

13. Although the meaning of the *Sentencing Act* undoubtedly turns on its text, context and purpose, these submissions begin, chronologically not conceptually, with the common law. That mirrors the order of the Appellant's submissions, and reflects the common law context in which the *Sentencing Act* was enacted.

The common law: history, modern application and development

The early development of the common law rule

14. The statement of the common law in *Markovic*, repeated in the Court below in the present case, was emphatic: "It has long been the position at common law that, unless the circumstances are shown to be exceptional, family hardship is to be disregarded as a sentencing consideration."[17] However on closer examination, the foundations of the rule are significantly less settled. The authorities instead paint an inconsistent and ambiguous picture, and on one view tell a story of a shift from a *description* of the weight ordinarily attached to the factor (in recognition of the fact that family hardship will invariably be experienced when a person is sentenced to gaol), to a threshold *test* requiring the courts to disregard the factor unless there are exceptional circumstances.

15. The Court in *Markovic* referred to early Victorian decisions including *R v Mitchell*,[18] *R v Polterman*,[19] and *Attorney-General v Marasovic*,[20] apparently in support of the common law rule it espoused. However, none of those cases clearly established that family hardship was to be *disregarded* unless the circumstances were exceptional. [21]

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15 *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

16 *Pearce v The Queen* (1998) 194 CLR 610 at [39] (McHugh, Hayne and Callinan JJ), quoting Barry, *The Courts and Criminal Punishments* (1969) at 14-15.

17 See, (2010) 30 VR 589 at [3]; J [48]-[49], [50], [57].

18 [1974] VR 625. See *Markovic* (2010) 30 VR 589 at [77] fn 37.

19 (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Adam, Starke and Crockett JJ, 2 August 1974). See *Markovic* (2010) 30 VR 589 at [8], [12], [77] fn 37.

20 (Unreported, Supreme Court of Victoria Court of Criminal Appeal, McInerney, Kaye and Brooking JJ, 16 February 1982). See *Markovic* (2010) 30 VR 589 at [77] fn 37.

21 The Court also referred to *R v Zampaglione* (1981) 6 A Crim R 287, see *Markovic* (2010) 30 VR 589 at [77] fn 37. That decision also does not establish any clear threshold test of exceptional circumstances, though the consideration appears to relate in any event to the subjective hardship caused to the offender:

16. *Mitchell* was a Crown appeal in which the primary judge had shown the appellant leniency, including because his wife had recently suffered a miscarriage. None of the grounds of appeal concerned that consideration.[22] The Full Court allowed the appeal having regard to the seriousness of the crime and described the wife's heath as "a consideration of minimal *weight*".[23]

17. In *Polterman*, although the Court of Criminal Appeal used the language of "an appeal for mercy",[24] it did not refer to exceptional circumstances. Rather, the Court observed that its task was "not to yield to pleas based on sentiment and emotion", referring not to any threshold test, but to the standard of appellate review.[25]

18. *Marasovic* was a Crown appeal on grounds including that the sentence was manifestly inadequate.[26] In allowing the appeal, Kaye J (with whom Brooking J agreed) considered the impact of the sentence on the appellant's daughter. His Honour observed that, while no one would wish these consequences on her, "those are the consequences which are suffered by innocent members of a convicted person's family when sentenced to a gaol term". His Honour did not consider that "*any greater consideration* should be given to her."[27]

19. By 1985, there was evidently some support for what would ultimately become the *Markovic* rule. That year, the first edition of Fox and Freiberg's *Sentencing: State and Federal Law in Victoria* observed that "[h]ardship caused to others by the conviction of the offender is usually one of minimal importance in sentencing, especially where the offence of which the defendant was convicted is a serious one".[28] It went on to say: "Distress, reduced financial circumstances and deprivation of emotional support and comfort are the usual consequences of the imprisonment of spouse [sic] but, *unless the*

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see, 310, 313. Similarly, *R v Katsimalis* (Unreported, Supreme Court of Victoria Court of Criminal Appeal, 14 April 1988) (cited in the same footnote in *Markovic*) did not indicate support for a threshold test of exceptional circumstances. In *R v Hall* (Unreported, Supreme Court of Victoria Court of Criminal Appeal, 15 February 1980) (again cited in the same footnote in *Markovic*) the Court said the illness of the appellant's mother did not allow the court to intervene, but stated no exceptional circumstances test.

22 *Mitchell* [1974] VR 625 at 628-629 (the Court).

23 Ibid at 630-631 (the Court) (emphasis added).

24 (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Adam, Starke and Crockett JJ, 2 August 1974) at 2.

25 Ibid at 2-3. The Court also stated that "It is for the trial judge, having heard all the facts to make up his own mind as to what is an appropriate sentence in all the circumstances."

26 (Unreported, Supreme Court of Victoria Court of Criminal Appeal, McInerney, Kaye and Brooking JJ, 16 February 1982) at 6.

27 Ibid at 14.

28 Fox and Freiberg, *Sentencing: State and Federal Law in Victoria* (1985, Oxford University Press) at 488 [11.6023]. For that proposition, the authors cited *Mitchell* [1974] VR 625 at 631 (the Court).

circumstances are truly exceptional, sentencers are to ignore them as a sentencing factor, taking the view that the granting of preference to offenders with dependents will defeat the appearance of justice."[29]

20. The 1987 decision of *R v Power* appears to have been influential.[30] There, one of the co-appellants' sons had disabilities and was receiving cancer treatment.[31] Counsel acknowledged that family hardship "is not normally a circumstance which can lead the Court to reduce a sentence"[32] though urged the Court to do so in that case. The record shows that counsel referred the Court to passages from an English text.[33] That text recorded that family hardship "is not normally a circumstance which the sentencer may take into account"[34] but went on to state three recognised exceptions, being: where the degree of the hardship is exceptional, where the offender is a mother to young children, and where the children will be deprived of any parental care.[35] The Court in *Power* itself characterised the occasions where a sentence would be reduced as "rare" and concluded that the hardship was not "of a character which would justify the Court in interfering with the sentence which the learned Judge passed".[36] Read closely, the Court appears to be describing a conclusion, rather than stating a threshold test. In other words, the Court was not treating family hardship differently to any other sentencing factor.

21. The 1991 *Victorian Sentencing Manual*, however, referred to *Power* (among other authorities) when stating that: "Whilst hardship to the family of the offender is a matter which is frequently raised in the course of the sentencing process, it is relevant only where the degree of hardship is clearly exceptional."[37] However the manual classified a

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29 Fox and Freiberg, *Sentencing: State and Federal Law in Victoria* (1985, Oxford University Press) at 488 [11.602] (emphasis added). For that proposition, the authors cite "*Posvek* 2/9/83". LACW has been unable to locate a digital or hard copy version of this decision.

30 See *Markovic* (2010) 30 VR 589 at [9] (the Court) and Victorian Government, *Victorian Sentencing Manual*, compiled by and for the Judges of the County Court of Victoria under the direction of His Honour Judge Paul R Mullaly QC, 25 October 1991 ("1991 Victorian Sentencing Manual") at 225 [17.536].

31 (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Young CJ, Kaye and Gray JJ, 2 June 1987) at 7 (Young CJ).

32 Ibid at 14.

33 Thomas, *Principles of Sentencing* (1979, 2nd ed, Heinemann London).

34 Ibid at 211.

35 Ibid at 212-213.

36 *Power* (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Young CJ, Kaye and Gray JJ, 2 June 1987) at 14-15 (Young CJ, Kaye and Gray JJ agreeing).

37 1991 Victorian Sentencing Manual at 225 [17.535].

woman having a dependent child in a different category; that was a "personal factor concerning the offender" to be taken into account.[38]

22. Throughout the 1990s and early 2000s, it seems the principles were applied inconsistently, and often ambiguously.

23. In *R v Yaldiz*,[39] for example, the Court of Appeal referred to the "exceptional category" of case which would lead *an appellate court to reduce a sentence*. In upholding the sentence imposed, the Court of Appeal remarked that the sentencing judge "took into account all of the matters urged on her behalf" (which included family hardship).[40]

10 24. In *R v Panuccio*, in a passage later quoted by the Court in *Markovic*,[41] the Court of Appeal observed: "[I]t has often been stated that it is a general principle of sentencing that the court should usually disregard the impact which the sentence will have upon the members of a prisoner's family unless exceptional circumstances have been demonstrated."[42] However, read in context, it seems clear that the Court in *Panuccio* was not espousing an exceptional circumstances threshold. Earlier in its reasons, the Court observed that although the court is not "impervious" to family hardship, it "will need to be 'exceptional' or 'extreme' *before the court will tailor its sentence in order to relieve the plight of those other family members*."[43] Later in its reasons, the Court held that that the sentencing judge had not "failed to give *sufficient weight*" to family hardship, and
20 observed that "the parents' circumstances … in all probability led his Honour to fix a shorter than normal non-parole period".[44]

25. Thus, behind the statement of the common law rule in *Markovic* lies significant uncertainty.

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38 Ibid at 222 [17.522]-[17.525].
39 (Unreported, Supreme Court of Victoria Court of Appeal, Winneke P, Hayne JA and Nathan AJA, 10 December 1996).
40 Ibid at 12 (Hayne JA, with whom Winneke P and Nathan AJA agreed).
41 (2010) 30 VR 589 at [10] (the Court).
42 *R v Panuccio* (Unreported, Court of Appeal Victoria, 4 May 1998) at 7 (Winneke P, Brooking and Charles JJA agreeing). See also *R v Yates* (1998) 99 A Crim R 483 at 486 (Charles JA, Phillips CJ and Batt JA agreeing); *R v Wall* (1999) 105 A Crim R 426 at [10]-[11] (Callaway JA, Phillips CJ and Buchanan JA agreeing).
43 Ibid at 6 (emphasis added).
44 Ibid at 7-8 (emphasis added).

26. The suggestion by the Court in *Markovic* that "the exceptional circumstances test has been adopted throughout Australia as governing the position at common law"[45] was also, on closer examination, overstated.

27. In relation to South Australia, *Markovic* cited the 1976 decision of *R v Wirth*.[46] Justice Wells observed that courts "would do less than their clear duty … if they allowed themselves to be *much influenced* by [family hardship]".[47] His Honour went on to observe that family hardship "ought to be taken into account where the circumstances are highly exceptional, where it would be, in effect, inhuman to refuse to do so."[48] To do what, exactly, was not made explicit — though his Honour did go on to say that in such a case, "it would be a steely-hearted judge who did not, however illogically, at least try to meet the situation *by suitably framed orders as to penalty*."[49] But whatever the position in South Australia at the time of *Wirth*, from at least 1997— as observed in *Adams v The Queen*[50] — "exceptional circumstances" had not been used in South Australia to prohibit a sentencing court from considering family hardship. Rather, family hardship is understood not to materially affect a sentence unless the hardship is shown to be "out of the ordinary", "special or uncommon" or "relatively serious or extreme." See also, **AS [23(b)]**.

28. Similarly, *Markovic* relied on *R v Edwards* for the proposition that the exceptional circumstances rule was adopted in New South Wales.[51] But since *Edwards*, the New South Wales Court of Criminal Appeal had refined its approach: unless exceptional circumstances were shown, family hardship could only be taken into account as "one subjective circumstance in assessing the appropriate penalty", rather than as a "specific and particular matter resulting in a substantial reduction or elimination of sentence of imprisonment".[52]

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45 (2010) 30 VR 589 [11] (the Court), citing *R v Wirth* (1976) 14 SASR 291 at 295-296, *R v Boyle* (1987) 34 A Crim R 202 at 205-206 and *R v Edwards* (1996) 90 A Crim R 510 at 516-517.

46 (1987) 14 SASR 291.

47 Ibid at 296 (emphasis added).

48 Ibid.

49 Ibid.

50 See *Adams v The Queen* (2022) 141 SASR 204 at [50], see more generally at [31]-[50] (Livesy P), [96]-[98] (Doyle JA).

51 (1996) 90 A Crim R 510 at 516-517.

52 *R v Girard* [2004] NSWCCA 170 at [15], [18]-[23] (Hodgson JA, Levine and Howie JJ agreeing). See also *R v X* [2004] NSWCCA 93 at [24]-[25] (Sully J, Grove and Bell JJ agreeing); *Dipangkear v The Queen* [2010] NSWCCA 156 at [30]-[36], [40]-[41] (Whealy J; Hodgson and Buddin J agreeing); *Totaan v The Queen* (2022) 108 NSWLR 17 at [56] (Bell CJ).

29. Case law from other jurisdictions also paints a less than cohesive picture. In 2008, for example, the Queensland Court of Appeal held that "hardship caused to an offender's children by imprisonment may be taken account of in the exercise of the sentencing discretion but only in certain circumstances",[53] endorsing an earlier decision of the Western Australian Court of Criminal Appeal that hardship may be taken into account "when the degree of hardship … is exceptional *or* when the offender is the mother of young children, *or* where imprisonment will result in the children being deprived of parental care."[54]

30. Thus, while it may be accepted that the test articulated in *Markovic* has cemented into an apparently clear common law rule in Victoria, its foundations are far from certain. The conceptual slipperiness evident in its development persists in the modern case law.

Modern application of the common law rule

31. In Victoria, *Cross v The Queen*[55] is frequently cited as a reiteration of the *Markovic* rule.[56] There, the appellant was a mother of five children aged between nine months and eleven years. Expert evidence indicated that the two youngest children were at a critical stage of their development and that disrupting their secure attachment bond with their mother would have potential lifelong consequences for their mental health.[57]

32. Citing *Markovic*, the Court confirmed that reliance on family hardship is an appeal for mercy, and that the purpose and effect of the exceptional circumstances test is to limit the availability of the mercy discretion.[58] The Court held that the circumstances of the case before it were not exceptional: it is "almost inevitable that children of an imprisoned mother will suffer some hardship … without more, however, the mere hardship to be expected from such separation cannot amount to exceptional circumstances."[59] While the Court accepted the expert evidence about early attachment, it remarked that "[w]hether

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53 *R v Chong; ex parte A-G (Qld)* (2008) 181 A Crim R 200 at [29] (Atkinson J, Keane and Fraser JJA agreeing). See also, earlier, *Tho Le and Diem Mac Le* (1995) 83 A Crim R 428 at 431 (Pincus JA).

54 *Stewart v The Queen* (1994) 72 A Crim R 17 at 21 (emphasis added). See also *Boyle* (1987) 34 A Crim R 202 at 205-206 (Burt CJ, Kennedy and Franklyn JJ agreeing) and *R v Nagas* (1995) 5 NTLR 45 at 53-54 (the Court), both referring to Thomas, *Principles of Sentencing* (1979, 2nd ed, Heinemann London) at 212.

55 [2019] VSCA 310.

56 See, eg, *Borg v The Queen* [2020] VSCA 191 at [48] (the Court); *Curtis v The Queen* [2022] VSCA 5 at [20] (Priest and Niall JJA); *Director of Public Prosecutions v Hill (a pseudonym)* (2023) 307 A Crim R 273 at [16] (Priest and T Forrest JJA).

57 *Cross v The Queen* [2019] VSCA 310 at [47] (Priest and Weinberg JJA).

58 Ibid at [51] (Priest and Weinberg JJA). See, also reiteration of the rationales at [52].

59 Ibid at [53] (Priest and Weinberg JJA).

any adverse consequence will eventuate, however, remains to a large extent in the realms of speculation."[60]

33. The Court's reasoning made plain that the exceptionality threshold applies to the degree of the hardship itself. More recent authority, however, appears to suggest otherwise.

34. In *Carabott v The King*, the Court of Appeal relied on the following passage from *Markovic*: [61]

> [T]he graver the crime for which the prisoner is being sentenced the more difficult it will be to find exceptional circumstances, because the relief usually sought and generally necessary to alleviate the plight of the relevant family members affected will require absolution from incarceration.

35. The passage quoted in *Carabott* tends to suggest that the test is concerned not with the exceptionality of the hardship, but with the circumstances of the case taken as a whole.[62]

36. Problems arising from the confusion are not merely conceptual. If the test concerns the exceptionality of the hardship itself, it disproportionately impacts those facing less serious crimes: where the hardship cannot pass the threshold, it is unable to be considered in the instinctive synthesis, in the very cases where it would be most likely to result in a different sentence. For example, a Magistrate sentencing a woman for theft is unable to take into account the impact on her children before sentencing her to a short term of imprisonment.

37. Thus, without accepting that the phrase 'exceptional circumstances' accurately describes when family hardship will result in a different sentence,[63] the *descriptive function* of 'exceptional circumstances' is certainly a better fit than the *threshold test*: see, **AS [17]-[20]**. The history of the rule and the uncertainty attending its application reinforce the Appellant's submissions on this point, and underscore the case for developing the common law.

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60 Ibid.
61 [2025] VSCA 118 at [38], see also [54] (Niall CJ and T Forrest JA).
62 See further, *Carabott* [2025] VSCA 118 at [54] (Niall CJ and T Forrest JAA).
63 See AS [18].

Coherence with common law, statute and international human rights

38. Two additional matters tend strongly in favour of recognising family hardship as a sentencing factor at common law.

39. *First,* considered in the context of the wider body of law, recognition of family hardship as a sentencing factor would better cohere with the body of accepted legal rules, principles and values.[64] Justice Beech-Jones recognised as much in *R v Zerafa*, when his Honour remarked that in other contexts the courts are bound to consider the impact of their orders on innocent third parties.[65] The body of accepted legal rules and principles in Australia also recognises the rights and interests inherent in the parent-child relationship and places significant weight on the protection and welfare of children.

40. In *J v Lieschke*, for example, in holding that a parent was owed procedural fairness in a decision affecting the custody of their child, Brennan J observed: "[t]here is a natural reciprocity between the duty and authority of parents with respect to the nurturing, control and protection of their child and the child's rights and its interests in being nurtured, controlled and protected. The natural reciprocity between the interests of parents and child means that both the parents and the child have an interest in proceedings leading to the exercise of a power which is apt to affect the relationship between them."[66] In the same case, Deane J observed: "whether the rationale of the prima facie rights and authority of the parents is expressed in terms of a trust for the benefit of the child, in terms of the right of both parent and child to the integrity of family life or in terms of the natural instincts and functions of an adult human being, those rights and authority have been properly recognised as fundamental [and] have deep roots in the common law".[67]

41. Taken as a whole, the law presumes that it is in the interests of children to be under the nurture and care of a parent.[68] It recognises that children have a "special vulnerability"[69] that is not only physical but also psychological; "[t]hey depend on love, and on the

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64 See, *Breen v Williams* (1996) 186 CLR 71 at 115 (Gaudron and McHugh JJ). See also, *Dietrich v The Queen* (1992) 177 CLR 292 at 320-322 (Brennan J); *Momcilovic v The Queen* (2011) 245 CLR 1 at [392] (Heydon J), quoting Dixon, "Concerning Judicial Method", *Australian Law Journal*, vol 29 (1956) 468 at 475 and *Jesting Pilate* (1965) 152 at 164.

65 (2013) 235 A Crim R at [140] (Beech-Jones J, as his Honour then was).

66 (1987) 162 CLR 447 at 458 (Brennan J), see also 450 (Mason J and Wilson J agreeing), 462 (Deane J agreeing), 464 (Dawson J agreeing).

67 *Lieschke* (1987) 162 CLR 447 at 463 (Deane J).

68 See, *Leischke* (1987) 162 CLR 447 at 463 (Deane J); *Secretary, Department of Health and Community Services v JWB (Marion's Case)* (1992) 175 CLR 218 at 277-278 (Brennan J).

69 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 304 (Gaudron J); *Cattanach v Melchior* (2003) 215 CLR 1 at [324] (Heydon J).

perception that they are loved, in order to build up confidence and stability."[70] The various ways in which common law and statute protect the child,[71] by imposing and reinforcing parental obligations, reflect international norms.[72] Further, "[i]t is a fundamental assumption underlying many rules of the common law and many statutory provisions that, in general, where the interests of children collide with other interests, the interests of the children prevail."[73]

42. *Second*, the common law rule is in tension with international human rights. It requires courts, in the vast majority of cases, to disregard the impacts of its orders on children and on family integrity. International human rights are a legitimate and important influence on the common law;[74] the common law should develop to reflect and protect those rights that are universal and fundamental. Those rights reflect community values and are, in many ways, already woven into the fabric of the common law.[75] The fundamental status of the rights of the child and family are not open to serious doubt.[76] In particular, children have the right to have their best interests considered in actions taken by public institutions that directly or indirectly affect them.[77]

43. *The Queen v Esposito*,[78] decided the year before *Markovic*, illustrates the practical impact of the exceptional circumstances threshold, and its tension with the wider body of law

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70 *Cattanach* (2003) 215 CLR 1 at [324] (Heydon J).

71 See also, for example, the *Parens Patriae* jurisdiction.

72 *Cattanach* (2003) 215 CLR 1 at 22 (Gleeson CJ), referring to the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (**ICCPR**), Arts 23 and 24, *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 99S UNTS 3 (entered into force 3 January 1976) (**ICESCR**), Art 10, and *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (**CRC**), Art 18.

73 *Cattanach* (2003) 215 CLR 1 at [323] (Heydon J). See, eg, *Marion's Case* (1992) 175 CLR 218 at 293 (Deane J); *Children Youth and Families Act 2005* (Vic), s 10; *Marriage Act 1958* (Vic), s 133; *Adoption of Children Act 1984* (Vic), s 9; *Child Wellbeing and Safety Act 2005* (Vic), s 16B(1)(a); *Status of Children Act 1974* (Vic), ss 22(1) and 29E; *Worker Screening Act 2020* (Vic), s 11; *Family Law Act 1975* (Cth), ss 60B and 60CA; *National Disability Insurance Scheme Act 2013* (Cth), s 5(f).

74 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at [35] (Brennan J); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 499 (Mason CJ and Toohey J).

75 See French, "The Common Law and the Protection of Human Rights" (Speech delivered at the Anglo Australasian Lawyers Society, 4 September 2009).

76 See, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), arts 16(3), 25(2). See also ICCPR, Arts 23(1) and 24(1) (ratified by Australia on 13 August 1980); ICESCR, Art 10(1) (ratified by Australia on 10 December 1975); CRC, Art 3(1), 18(1) (ratified by Australia on 17 December 1990).

77 See, CRC, Arts 3 and 12; Committee on the Rights of the Child, *General Comment No 14: on the right of the child to have his or her best interests taken as a primary consideration*, 62nd sess, Un Doc CRC/C/GC/14 (29 May 2013) at [13]-[15], [17]-[20], [69]; Rights of the Child, GA Res 68/147, UN Doc A/RES/68/147 (adopted 18 December 2013) at [56]-[57]; Rights of the Child, HRC Res, Un Doc A/HRC/RES/19/37 (adopted 19 April 2012) at [5], [68]-[69].

78 [2009] VSCA 277.

and international human rights. There, the appellant's two-year-old daughter had passed away from a neurodegenerative genetic condition. Following the imposition of sentence, the appellant's infant son was diagnosed with the same condition, requiring intensive physical treatment. He was expected to die around the age of two, before the appellant would be eligible for parole.[79]

44. The Court of Appeal considered whether a different sentence should be imposed in light of the fresh evidence. The Court ultimately reduced the sentence to a limited extent by reference to the subjective burden of imprisonment on the appellant. In relation to family hardship, however, the Court reasoned that the hardship must be "considerably more severe than normal for a family where the father is imprisoned, and the situation must be so highly exceptional that 'it would be, in effect, inhuman to refuse to do so'."[80]

45. The Court held that the circumstances were not exceptional:[81]

> [T]he birth of the appellant's second child with the same affliction as killed the first no doubt causes the appellant and his wife profound sadness and emotional distress. But the age and condition of their child is such that the child could hardly if at all be aware of the appellant's position or concerned by his absence from home. Further, although the appellant's wife no doubt misses the appellant and his support in dealing with their child, and is saddened that the appellant cannot spend more time with the child during his short life, in this context I do not think that to be so highly exceptional that 'it would be, in effect inhuman to refuse to do so.'

46. Having found that the circumstances were not exceptional, the Court considered itself bound to ignore the impact upon the child and the child's mother of the incarceration of the father.

Statutory construction

The approach of the majority in the Court of Appeal

47. Below, Priest and Beach JJA construed the words "just in all the circumstances" and "the presence … of any other relevant circumstances" in ss 5(1)(a) and 5(2)(g) respectively to "permit and/or require" the court to consider circumstances that would be relevant at common law, including the relevance of mercy in the sentencing discretion.[82] Their

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79 Ibid at [7]-[8] (Nettle JA, Buchanan JA agreeing).

80 The requirement in *Esposito* for "cogent evidence" of exceptional hardship is not infrequently cited in the County Court of Victoria, see, eg, *Director of Public Prosecutions v Carabott* [2024] VCC 1619 at [62] (Chambers J); *Director of Public Prosecution v Dunn* [2024] VCC 877 at [52] (Rozen J); *Director of Public Prosecutions v Liberatore* [2024] VCC 231 at [118] (Trapnell J).

81 *Esposito* [2009] VSCA 277 at [14] (Nettle JA, Buchanan JA agreeing).

82 J [58].

Honours further reasoned that the references to "other relevant circumstances" concern the circumstances *of the offending* or *the offender*.[83]

48. With respect, that approach faces several difficulties.

49. *First*, s 5(2)(g) in its terms *requires* a court to have regard to relevant circumstances. How the majority's approach squares with the mercy *discretion* is unclear. Under the logic of s 5(2), relevance is binary. If a factor is relevant and raised on the facts known to the sentencing judge, the court must have regard to it.[84]

50. *Second,* the law in any event recognises sentencing factors that do not directly concern the offending or the offender. The prevalence of an offence, for example,[85] is no more directly related to the offending than family hardship is to the offender; it is about the circumstances of *other offending*. The utility of a plea, while contingent on the conduct of the offender, is about the impact on the justice system. That explains why changing social circumstances — nothing to do with the offender themselves— can alter the utility of a plea.[86]

The Sentencing Act

51. The *Sentencing Act* is to be construed according to its text, context and purpose and in light of accepted principles of statutory interpretation. In Victoria, those accepted principles include the constructional imperative in s 32(1) of the *Charter*. Before considering the operation of s 32(1), it is convenient to address several features of the *Sentencing Act* itself.

Relationship between the *Sentencing Act* and the common law

52. It may be accepted that the *Sentencing Act* and the common law exist in a "symbiotic relationship."[87] Not only is the common law an important part of the context in which the *Sentencing Act* was enacted, but the framing of the Act plainly leaves room for common law principles to inform the meaning and content of the statutory language.

53. In *Elias v The Queen*, this Court observed that "subject to any contrary intention, common law principles such as proportionality, totality and parity apply in the sentencing

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83 J [62].
84 *R v AB (No 2)* (2008) 18 VR 391 at [45] (Warren CJ, Maxwell P and Redlich JA).
85 See eg, *Haddara v The Queen* (2016) 260 A Crim R 306 at [62] (Redlich, Priest and Beach JJA).
86 *Worboyes v The Queen* [2021] VSCA 169 at [35] (Priest, Kaye and T Forrest JJA).
87 See *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [31] (Gleeson CJ).

of offenders under Victorian law."[88] That may be accepted; there is no suggestion that the general provisions of the Act should be read "as if they were written on a *tabula rasa*."[89] It does not follow, however, that the Act necessarily intended to pick up the entire body of the common law. Where a statute might "appear to have adopted general law principles and institutions as elements in a new regime, in truth the legislature has done so only on particular terms."[90] Ascertaining the scope of accommodated common law principle is a question of statutory construction.[91]

54. One of the purposes of the *Sentencing Act* was "generally to reform sentencing in Victoria."[92] When introducing the *Sentencing Bill 1991* (Vic) to Parliament, the then Attorney-General's first words were: "[t]his Bill completely overhauls sentencing law in this State."[93] In those circumstances, the weight to be afforded to the common law context must be viewed with at least some circumspection.

55. In particular, there is a large difference between the fundamental principles of sentencing identified by this Court in *Elias* and the specific rule of constraint identified in *Markovic*. An orthodox approach to statutory construction would presume the Act did not, absent clear words, intend to override fundamental common law principles.[94] The same cannot be said for the entire body of common law.

56. Still, it may be accepted that, by the language of "the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances", Parliament likely intended to refer to aggravating and mitigating factors, and other relevant circumstances, recognised by the common law. The secondary materials provide support for that construction, though not overwhelmingly or unambiguously so.[95]

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88 (2013) 248 CLR 483 at [25] (the Court).

89 See, *Vallance v The Queen* (1961) 108 CLR 56 at 76 (Windeyer J).

90 See *Wik Peoples v Queensland* (1996) 187 CLR 1 at 197 (Gummow J).

91 See further, *Director of Public Prosecutions (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194 at [31] (Basten JA).

92 *Sentencing Act*, s 1(l).

93 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 March 1991 at 336 (Jim Kennan, Attorney-General).

94 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [58] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

95 See Victorian Attorney-General's Department, *Report of the Victorian Sentencing Committee*, April 1988 at 240-241 [5.1.5]-[5.1.6], 265-266 [5.4.22]-[5.4.23], 269-270 [5.6.4] and Draft Penalties and Sentences Bill (annexed to Report); *Penalties and Sentences Bill 1989* (Vic), cll 5(a)(i)(D) and 5(a)(ii)(F); Victoria, *Parliamentary Debates,* Legislative Council, 1 November 1989, 1144-1146 (E H Walker, Minister for the Arts); *Sentencing Bill 1991* (Vic); Victoria, Parliamentary Debates, Legislative Assembly, 19 March 1991, 336-339 (Jim Kennan, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Assembly, 8 May 1991, 1934-1942.

Purpose and framework

57. Nothing in the text or purpose of the *Sentencing Act* indicates that family hardship was intended to be excluded as a sentencing consideration. Indeed, recognition of family hardship as a factor to be weighed in the instinctive synthesis better coheres with the purpose of the *Sentencing Act*, and the overarching framework of sentencing principles.

58. There is also a significant friction between the prevailing approach and the overarching framework of s 5. As this Court explained in *Wong v The Queen*: "[T]he task of the sentencer is to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying the task is to arrive at an 'instinctive synthesis'."[96]

59. In *Director of Public Prosecutions (Vic) v Dalgliesh*, this Court made clear that while all of the factors in s 5(2) are mandatory considerations, the extent to which each factor bears on the sentence is "inevitably a matter for judgment".[97] As Justices Gageler and Gordon observed: "No particular consideration is required to be assessed in a particular manner, or accorded particular weight. That is consistent with the proposition that the sentencing exercise requires the sentencing judge to identify and balance all relevant factors — factors that may point in different, conflicting and contradictory directions — and to make a judgment as to the appropriate sentence in the circumstances of the case."[98]

60. Not only does recognition of family hardship as a relevant circumstance fit comfortably within that framework, the *Markovic* rule makes for an awkward fit. The position is not that family hardship is *never* relevant, but rather that it is only relevant if the threshold of exceptionality is met. According to at least some approaches,[99] that depends on the assessment of other sentencing factors, such as the seriousness of the offending. That distorts the approach to sentencing whereby all considerations are taken into account and weighed in the instinctive synthesis, without any pre-assigned degrees of weight.

61. Thus, while there is some attraction to the suggestion that Parliament intended s 5(2)(g)

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96 (2001) 207 CLR 584 at [75] (Gaudron, Gummow and Hayne JJ). Cited with approval in *Markarian v The Queen* (2005) 228 CLR 357 at [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ) and *Dalgliesh* (2017) 262 CLR 428 at [5] (Kiefel CJ, Bell and Keane JJ), [79] (Gageler J, as his Honour then was, and Gordon J).

97 (2017) 262 CLR 428 at [7] (Kiefel CJ, Bell and Keane JJ), [79] (Gageler J, and his Honour then was, and Gordon J).

98 Ibid at [79] (Gageler J, as his Honour then was, and Gordon J).

99 See discussion of *Carabott* [2025] VSCA 118 above at [34]-[35].

to reflect the common law, that is far from the only available construction.

62. Recognition of family hardship as a 'relevant circumstance' would involve no departure from the text or purpose of the Act, and in fact better coheres with it. The application of s 32(1) of the *Charter* should be understood in that light.

The Charter's constructional imperative

63. Statutory interpretation is "an expression of the constitutional relationship between the arms of government."[100] The preferred construction of a statute is chosen by the courts, applying principles of interpretation accepted by all arms of government in the system of representative democracy.[101]

64. Within that constitutional relationship, s 32(1) creates a new constructional imperative: "[s]o far as it is possible consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights." Importantly, s 32(1) applies to all statutory provisions, whenever enacted.[102]

65. 'Human rights' are defined in the *Charter* to mean the civil and political rights set out in Part 2.[103] The main purpose of the *Charter* is to protect and promote those rights,[104] including by "ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with [them]."[105]

66. 'Compatible' is not defined in the *Charter*, though the concepts of compatibility and incompatibility are woven throughout it.[106] Under the *Charter*, provisions can be more or less compatible with rights. So too, provisions can be more or less incompatible with rights. So much reflects the practical operation of statutes, and is supported by the text of s 28(3)(b), which requires a statement of compatibility to state "the nature and extent of the incompatibility."

67. The constructional imperative in s 32(1) is to interpret provisions *so far as is possible* in a manner that is compatible with human rights. The purpose of the *Charter* and the text of s 1(2)(b) confirm that the words 'so far as is possible' have an imperative as well as

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100 *Zheng v Cai* (2009) 239 CLR 446 at [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).
101 Ibid, referring to *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298 at 410-412 (French J).
102 *Charter*, s 1(2)(b).
103 Ibid, s 3(1) (definition of "human rights").
104 Ibid, s 1(2).
105 Ibid, s 1(2)(b).
106 Ibid, ss 28, 30, 31, 32, 38.

qualifying function. The task is to adopt the construction that best protects and promotes human rights,[107] without undermining the purpose of the provision.

68. Here, the constructional question is the meaning of 'relevant circumstances'. Justice Walker reasoned that s 32(1) favours a construction whereby the engagement of a right is understood as a 'relevant circumstance'.[108] That approach should be embraced. Sentencing has long been concerned with "the community's generally accepted standards of what is fair and just."[109] The human rights chosen for protection and promotion by the democratically elected Parliament are a significantly better guide to those matters than the "excited sympathies of the judge".[110] The sentencing process is not fundamentally altered in any way. The courts are simply governed by the *Sentencing Act*, construed in light of the *Charter*.

69. For completeness, however, it is noted that a slightly different approach leads to a similar conclusion. Section 32(1) exists to protect and promote human rights by requiring statutory provisions to be construed, so far as is possible to do so consistently with their purpose, compatibly with human rights. Wherever a statutory provision is apt to affect or limit a right, whether directly or by the exercise of a power under it, s 32(1) has work to do. The task of the court is to construe the provision according to accepted principles of statutory construction, and in light of the specific legislative direction in s 32(1).

70. Here, the statutory language is open-textured. Recognition of family hardship as a sentencing factor — without any threshold requirement that the hardship be exceptional — is perfectly consistent with the purpose of the provision and the overarching framework of the Act. Indeed, it better accords with it. In those circumstances, the underlying hardship, quite apart from the engagement of the right, could too be regarded as a 'relevant circumstance'. In other words, in the process of statutory construction, the pull of the common law yields to the constructional imperative.

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107 This has sometimes been described by the Victorian Court of Appeal as the approach that "least interferes" with the rights: eg, *HJ (a pseudonym) v Independent Broad-based Anti-Corruption Commission* (2021) 64 VR 270 at [153] (the Court), or "better accommodates" or "best accords with" the rights: see, *Slaveski v Smith* (2012) 34 VR 206 at [24] (the Court); *Carolan v The Queen* (2015) 48 VR 87 at [47] (the Court); *Nguyen v Director of Public Prosecutions* (2019) 59 VR 27 at [104]-[105] (Tate JA, Maxwell P and Niall JA agreeing); *Gebrehiwot v State of Victoria* (2020) 287 A Crim R 226 at [138] (the Court).

108 J [134]-[138].

109 *Pearce* (1998) 194 CLR 610 at [39] (McHugh, Hayne and Callinan JJ), quoting Barry, *The Courts and Criminal Punishments* (1969) at 14-15.

110 See, *Markovic* (2010) 30 VR 589 at [1] (the Court), citing *R v Osenkowski* (1982) 30 SASR 212 at 212-213 (King CJ).

71. For completeness, LACW agrees with the Appellant that this case does not require determination of some key questions about s 32(1) left unresolved following *Momcilovic v The Queen*.[111]

72. However, one question that might plausibly arise is whether the operation of s 32(1) is contingent on the identification of a construction that unjustifiably limits rights under s 7(2). For the avoidance of doubt, LACW's answer to that question is no. If the operation of s 32(1) were so contingent, it would be less protective of rights.[112] That approach also conflicts with the statutory language of s 32(1): the mandate is to construe all provisions *so far as it is possible to do so* compatibly with human rights; not only to avoid incompatible interpretations (though it certainly also requires that).[113]

73. For similar reasons, the operation of s 32(1) is also not contingent on the provision itself *directly* affecting or limiting the rights; it is sufficient if an exercise of power under the provision is apt to affect rights. If the contrary view were taken, however, s 32(1) would still have work to do in this appeal. Section 5(2)(g) applies in all cases, including those involving children. The rights of children under s 17(2) of the *Charter* include the right to have their best interests *considered* in decisions that affect them.[114]

Conclusion

74. Properly construed, s 5(2)(g) of the *Sentencing Act* requires sentencing courts to take family hardship into account. The weight attributed to the factor is ultimately a matter of judgment, depending on all the circumstances of the case, and assessed in light of any relevant *Charter* rights. Alternatively, if s 5(2)(g) on its proper construction reflects the common law, the appeal should be allowed on the basis that the common law now

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111 AS [35].

112 See, Pound and Evans, *Annotated Victorian Charter of Rights* (2nd ed, 2019) at 270 [32.100].

113 LACW's answer is consistent with the current approach of the Victorian Court of Appeal, see, eg: *HJ* (2021) 64 VR 270 at [153] (the Court). This interpretation of s 32(1) does not mean that a limit being unjustifiable under s 7(2) can *never* have relevance to the task of statutory construction. In some circumstances, for example, it may necessitate techniques such as partial disapplication, though such questions do not arise on this case. See generally *Director of Public Prosecutions (Vic) v Smith* (2024) 98 ALJR 1163 at [131]-[143] (Edelman J).

114 See, *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221 at [11]-[15] (Bell J); *Certain Children v Minister for Families and Children* (2016) 51 VR 473 at [144]-[148] (Garde J); *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441 at [259]-[262] (John Dixon J). See also, CRC, Arts 3 and 12; Committee on the Rights of the Child, *General Comment No 14: on the right of the child to have his or her best interests taken as a primary consideration*, 62nd sess, Un Doc CRC/C/GC/14 (29 May 2013) at [13]-[15], [17]-[20] and [69]; Rights of the Child, GA Res 68/147, UN Doc A/RES/68/147 (adopted 18 December 2013) at [56]-[57]; Rights of the Child, HRC Res, Un Doc A/HRC/RES/19/37 (adopted 19 April 2012) at [5], [68]-[69].

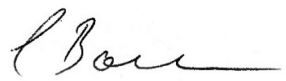
recognises family hardship as a sentencing consideration, without any threshold requirement for exceptionality.

75. In many cases, family hardship may not ultimately make a difference to the sentence imposed. For the avoidance of doubt, it does not follow that the recognition has no utility in those cases. Sentencing remarks explain the reasons for sentence to the offender, victim, and wider community, including those indirectly affected by the sentence. The matters taken into account by the sentencing court have value. The bare fact of acknowledging and considering the hardship dignifies the human experience,[115] and reflects the significance of the rights affected.

Part V — Estimated time

76. If leave is granted to make oral submissions, LACW would seek up to 20 minutes to present oral argument.

Dated: 9 June 2026



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[115] In that regard, see the founding principles of the *Charter* outlined in the preamble: "human rights are essential in a democratic and inclusive society that respects the rule of law, *human dignity*, equality and freedom" (emphasis added).

ANNEXURE TO INTERVENER'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1	*Sentencing Act 1991* (Vic)	Compilation No. 226 (10 April 2024 to 17 October 2024)	ss 1, 5	Act in force at date of sentencing (provisions unchanged since)	24 May 2024
2	*Charter of Human Rights and Responsibilities Act 2006* (Vic)	Compilation No. 015 (from June 2022)	Preamble and ss 1, 3(1) (definition of 'human rights'), 7, 17, 28, 30, 31, 32, 38	Act in force at date of sentencing (also Act as currently in force)	24 May 2024