



HIGH COURT OF AUSTRALIA

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Form 27C—Intervener’s submissions

M41/2026

Note: See rule 44.04.4.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

DEMETRIOS CHARISIOU
Appellant

and

THE KING
Respondent

**SUBMISSIONS OF THE ATTORNEY-GENERAL FOR VICTORIA
SEEKING LEAVE TO INTERVENE**

Part I: Certification

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

Part II: Basis of intervention

2. The Attorney-General for Victoria seeks leave to intervene in support of the Respondent.

Part III: Why leave to intervene should be granted

3. The Attorney-General seeks leave to intervene to make submissions on the proper approach to applying s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) in construing s 5(2)(g) of the *Sentencing Act 1991* (Vic).
4. By s 34(1) of the *Charter*, Parliament has conferred on the Attorney-General a right to intervene in proceedings in Victorian courts that give rise to questions of law relating to the application of the *Charter* or the interpretation of a statutory provision in accordance with it.¹ As the State’s First Law Officer and the Minister of the Crown responsible for the administration of the *Charter* and the *Sentencing Act* (together with other Ministers in respect of some parts of the *Sentencing Act*),² the Attorney-General has a direct legal

¹ Section 34(1) does not, on its terms, purport to confer a right to intervene in this Court (“court” being defined in s 3(1) to mean a Victorian court), but it is arguable that s 34(1) is capable of being “picked up”, with “court” being “translated” so as to include federal courts, in proceedings in federal jurisdiction: *The King v McGregor* (2026) 100 ALJR 287, [18] (Gageler CJ, Gleeson and Beech-Jones JJ).

² Affidavit of Alison Patricia Kate O’Brien sworn on 7 July 2026, [4].

interest in the construction and application of the *Charter*, both generally and in the context of sentencing.³

5. The Attorney-General’s proposed submissions focus on the proper approach to the application of s 32(1) of the *Charter* to the question of statutory construction that is raised by Ground 1 of the Notice of Appeal, and will not materially impact the parties’ preparation for the hearing or the length of the hearing itself.⁴

Part IV: Issues and argument

6. As already noted, these submissions are focused on the issues raised by Ground 1 of the Notice of Appeal (if it arises) as to whether s 5(2)(g) of the *Sentencing Act*, construed in accordance with s 32(1) of the *Charter*, required the sentencing judge to consider family hardship in the absence of exceptional circumstances.

A Context and overview of submissions

7. In *Markovic v The Queen*, a five-member Court of Appeal held that family hardship — that is, hardship likely to be suffered by members of an offender’s immediate family or other dependants by reason of the offender’s imprisonment — is to be disregarded as a sentencing consideration unless the circumstances are shown to be exceptional (**Markovic rule**).⁵ The Court below accepted that *Markovic* “states”, “correctly set[s] out” or “explains” the position at common law.⁶
8. In this Court, the parties have approached the issues on appeal by first considering whether the common law should be developed so that family hardship can be taken into account in sentencing absent exceptional circumstances (ie, Ground 2 of the Notice of Appeal). The Attorney-General respectfully submits that the parties are correct to do so.
9. In *Markovic*, family hardship was considered, not as a mitigating factor, but as an appeal for mercy requiring exceptional circumstances.⁷ The construction of s 5 of the

³ See *Roadshow Films Pty Ltd v iiNet Ltd [No 1]* (2011) 248 CLR 37, [2]–[3] (the Court).

⁴ Cf *Roadshow Films* (2011) 248 CLR 37, [4] (the Court).

⁵ (2010) 30 VR 589, [2]–[3] (Maxwell P, Nettle, Neave, Redlich and Weinberg JJA).

⁶ *Charisiou v The King* [2025] VSCA 277 (CA), [56(3)], [57] (Priest and Beach JJA), [109] (Walker JA), referring in particular to *Totaan v The Queen* (2022) 108 NSWLR 17, [47], [67], [83] (Bell CJ, Gleeson JA, Harrison, Adamson and Dhanji JJ agreeing).

⁷ *Markovic* (2010) 30 VR 589, [3], [5]–[7], [14] (Maxwell P, Nettle, Neave, Redlich and Weinberg JJA). See also CA, [48] (Priest and Beach JJA).

Sentencing Act was not in issue, nor the application of the *Charter*. That approach is consistent with the relationship between the *Sentencing Act* and common law principles, described by the High Court in *Elias v The Queen*.⁸

The sentencing of offenders in Victoria is subject to the governing principles contained in the *Sentencing Act*. As earlier noted, the statutory statement of the matters that the court must have regard to in determining the sentence is not exhaustive. It may be accepted that, subject to any contrary statutory intention, common law principles such as proportionality, totality and parity apply in the sentencing of offenders under Victorian law.

10. Notwithstanding the statutory basis and the statutory regulation of the exercise of the power to sentence an offender,⁹ the common law informs the exercise of the discretion to impose a sentence that is “just in all of the circumstances”.¹⁰ Common law principles operate alongside the *Sentencing Act*.¹¹ Similarly, common law sentencing principles may give content to statutory words or phrases.¹²
11. Terms such as “deter”, “aggravating” or “mitigating” factors, or “any other relevant circumstance”, are concepts contained in s 5 of the *Sentencing Act* that draw their content from the common law. By way of example, common law provides that delay between the time an offender is interviewed by police and charges laid, and delay between the laying of charges and trial, can be a powerful mitigating factor,¹³ such as where an offender has had the matter “hanging over [their] head” and it has caused anxiety.¹⁴
12. It is uncontroversial that s 5(2) is not an exhaustive statement of factors that may be relevant in sentencing, or those a sentencing court must have regard to.¹⁵ The

⁸ (2013) 248 CLR 483, [25] (the Court) (citations omitted).

⁹ *Sentencing Act*, ss 5, 7(1).

¹⁰ *Sentencing Act*, s 5(1)(a). See also *Elias* (2013) 248 CLR 483, [27] (the Court); *Director of Public Prosecutions (Vic) v Dalgliesh (a pseudonym)* (2017) 262 CLR 428, [4] (Kiefel CJ, Bell and Keane JJ).

¹¹ *Elias* (2013) 248 CLR 483, [25], [28] (the Court); CA, [58] (Priest and Beach JJA), [128] (Walker JA).

¹² See analogous discussion in *Bui v Director of Public Prosecutions (Cth)* (2012) 244 CLR 638, [18], [28] (the Court) as to s 16A of the *Crimes Act 1914* (Cth) accommodating common law principles, rather than the common law being ‘picked up’ by s 80 of the *Judiciary Act 1903* (Cth). See also *Johnson v The Queen* (2004) 78 ALJR 616, [15] (Gummow, Callinan and Heydon JJ).

¹³ *Tones v The Queen* [2017] VSCA 118, [36] (Maxwell P, Redlich and Kyrrou JJA); *Thomas v The Queen* [2019] VSCA 223, [66] (Ashley and Weinberg JJA).

¹⁴ *Dragojlovic v The Queen* (2013) 40 VR 71, [294] (Redlich and Weinberg JJA, Bell AJA).

¹⁵ *Elias* (2013) 248 CLR 483, [25] (the Court).

Sentencing Act makes no express mention of family hardship; its relevance to the sentencing exercise is governed by the *Markovic* rule. Accordingly, even if, as the majority of the Court below held,¹⁶ the words “any other relevant circumstances” in s 5(2)(g) are given content by the common law, the threshold question in this appeal is whether the common law rule as stated in *Markovic* should be developed.¹⁷ Being a question of common law, the *Charter* cannot influence its resolution,¹⁸ and the Attorney-General makes no submissions in relation to it.

13. Ground 2 is sufficient to dispose of the appeal. Ground 1 only arises if, on the contrary, the Court considers that the question of whether the words “any other relevant circumstances” in s 5(2)(g) of the *Sentencing Act* require consideration of family hardship is a question of statutory construction that is at least capable of being informed by the *Charter*.

B Ground 1 — construction of s 5(2)(g) of the *Sentencing Act* in light of s 32(1) of the *Charter*

B.1 Construction of s 5(2)(g) of the *Sentencing Act* in the Court below

14. In the Court below, as noted above, the majority held that the words “any other relevant circumstances” in s 5(2)(g) “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”,¹⁹ and that nothing in ss 17 or 32 of the *Charter* alters the common law position stated in *Markovic*.²⁰
15. In dissent, Walker JA preferred a construction where relevance is informed by the *Charter*, and “relevant circumstances” encompasses any *Charter* rights that are engaged.²¹ This is the construction now urged upon the Court by the Appellant (at AS [42], [44]) and the LACW (at LACW [68]). The Attorney-General submits (in

¹⁶ CA, [58], [63] (Priest and Beach JJA).

¹⁷ Compare, eg, the question which arose in *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333, [1], [16] (Kiefel CJ, Bell, Keane and Gordon JJ), as to whether a court’s *statutory* power to award costs in litigation should be informed by common law rules as to the recovery of costs by self-represented litigants, as discussed in Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (2023), 113.

¹⁸ *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, [22]–[25] (Gleeson CJ, Gaudron and Gummow JJ).

¹⁹ CA, [58] (Priest and Beach JJA).

²⁰ CA, [63] (Priest and Beach JJA).

²¹ CA, [134(b)], [138] (Walker JA).

section B.3 below) that s 32(1) of the *Charter* does not require those words to be construed to require a sentencing court to have regard to any human rights that may be engaged by the imposition of a sentence on a particular offender. Such a construction is contrary to the text, context and purpose of s 5(2)(g) and beyond the scope of the interpretative exercise required by s 32(1).

16. In addition, the LACW appears to advance a further, narrower, construction — that the term “relevant circumstances” is to be construed to encompass the fact of the underlying hardship of the family members of the offender, distinct from any common law exceptionality requirement, and, it seems, putting to one side whether s 5(2)(g) engages rights under s 17 of the Charter: LACW [70]. This submission is addressed in section B.4 below.

B.2 Section 32(1) of the Charter

17. Section 32(1) of the *Charter* forms part of the ordinary process of statutory interpretation, which focuses on the text of the statute itself, construed in its context, which includes the general purpose and policy of the provision and the mischief it is seeking to remedy.²² Within that process, s 32(1) imposes a mandatory rule of statutory construction,²³ that requires all Victorian statutory provisions to be interpreted “in a way that is compatible with human rights”, “[s]o far as it is possible to do so consistently with their purpose”.
18. Section 32(1) operates on constructional choices which the language of the statute permits.²⁴ This has been said to mean that “[w]here more than one interpretation of a provision is available on a plain reading of the statute, then that which is compatible with rights protected under the Charter is to be preferred”.²⁵ Section 32(1) therefore requires “close attention to the particular rights said to be engaged by the statutory provision that

²² *AB (a pseudonym) v Independent Broad-based Anti-Corruption Commission* (2024) 278 CLR 300, [21] (the Court), citing *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, [47] (Hayne, Heydon, Crennan and Kiefel JJ).

²³ *Momcilovic v The Queen* (2011) 235 CLR 1, [50] (French CJ), [170] (Gummow J), [280] (Hayne J), [565] (Crennan and Kiefel JJ), [684] (Bell J).

²⁴ *Momcilovic* (2011) 245 CLR 1, [50] (French CJ).

²⁵ *Director of Public Prosecutions (Vic) v Smith* (2024) 98 ALJR 1163, [57] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), quoting *R v DA* (2016) 263 A Crim R 249, [44] (Ashley, Redlich and McLeish JJA).

falls for interpretation”,²⁶ as well as the purpose of the statutory provision being interpreted.²⁷

19. The nature of s 32(1) as a principle of statutory construction, and its invocation of statutory purpose to mark out the limits of that principle, makes clear that it does not confer a legislative function on courts.²⁸ Like the principle of legality,²⁹ it permits consideration of the effect of a statutory provision on human rights to be taken into account to inform the *meaning* of words and phrases used in the provision, as occurred in *Hogan v Hinch*.³⁰ It may also permit the reading down of the statutory text,³¹ but only so far as that involves the *interpretation* of the text or, in other words, the ascertainment of the *meaning* of the statutory text. As will be developed below, it does not permit the wholesale importation of any and all relevant *Charter* rights into the statutory text.

B.3 Section 5(2)(g) does not require consideration of all Charter rights

20. Section 5(2)(g) of the *Sentencing Act* 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”.
21. Although the words “any other relevant circumstances” are, of themselves, open-textured, they do not stand alone. They must be construed in the context of s 5(2)(g) itself and in light of the context and purpose of s 5 and the *Sentencing Act* more broadly. That is, the question of whether those words give rise to a constructional choice — or, more specifically, whether they give rise to a constructional choice broad enough to embrace

²⁶ *Smith* (2024) 98 ALJR 1163, [58] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), quoting *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, [195] (Tate JA).

²⁷ *Slaveski v Smith* (2012) 34 VR 206, [20], [24] (Warren CJ, Nettle and Redlich JJA).

²⁸ *Momcilovic* (2011) 245 CLR 1, [171] (Gummow J).

²⁹ *Momcilovic* (2011) 245 CLR 1, [51] (French CJ); *Nigro v Secretary, Department of Justice* (2013) 41 VR 359, [85] (Redlich, Osborn and Priest JJA); *Taha* (2013) 49 VR 1, [27] (Nettle JA); *DA* (2016) 263 A Crim R 429, [44] (Ashley, Redlich and McLeish JJA).

³⁰ (2011) 243 CLR 506, [66]–[84] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ), construing the offence, and in particular the meaning of the word “contravention”, in s 42(3) of the *Serious Sex Offenders Monitoring Act 2005* (Vic).

³¹ As s 32(1) is *part* of the process of construction, “reading down” is used here to describe “the ordinary technique of interpretation which recognises that sentences have only one meaning but which gives particular weight to important considerations in identifying that meaning”: *Smith* (2024) 98 ALJR 1163, [133] (Edelman J).

the construction for which the Appellant contends — must be determined in light of the context and purpose of the section and the *Sentencing Act* as a whole.

22. In this respect, the Respondent submits at RS [48]–[60] that the meaning of those words in s 5(2)(g), having regard to their statutory context, must be confined to circumstances concerned with, or connected to the offender and the offending (which presumably embraces the impact of the offending on the victim). But even if, contrary to the Respondent’s submission, the words “any other relevant circumstances” in s 5(2)(g) are capable of embracing circumstances other than those relating to the offender and the offending, s 32(1) of the *Charter* does not require them to be construed to require a sentencing court to have regard to any and all *Charter* rights engaged by the imposition of a sentence on a particular offender.
23. *First*, as a matter of ordinary language, the word “circumstances” should be taken to refer to facts that, where relevant, are capable of being accorded some weight in the discretionary exercise of fixing a sentence that best achieves the purposes in s 5(1) of the *Sentencing Act*.³² A right protected by the *Charter* is not itself a “relevant circumstance”. That a person enjoys certain rights protected by the *Charter* does not tell one anything about how those rights might or might not be affected by the imposition of a sentence. By contrast, the fact that a person has a family with, for example, dependant children, is a “circumstance”. The constructional question is whether, and if so how, s 32(1) of the *Charter*, read with the right in s 17, informs the determination of whether or not that circumstance is “relevant” to the determination of the appropriate sentence to be imposed.
24. *Secondly*, the *Sentencing Act* makes detailed provision for the principles, guidelines and factors to be applied in the sentencing exercise. Although the list of factors in s 5(2) is not itself exhaustive, it is detailed and is supplemented by other provisions of the *Sentencing Act* designed to elucidate those factors. For example, the provision made for victim impact statements in Pt 3 Div 1C of the *Sentencing Act* facilitates the ascertainment of circumstances relevant to the factors described in s 5(2)(daa) (the impact of the offence on any victim) and s 5(2)(da) (the personal circumstances of the victim). It would undermine the carefully calibrated scheme of the *Sentencing Act* to read into the words “any other relevant circumstances” in s 5(2)(g) the whole of Pt 2 of the *Charter* as

³² Cf, albeit in a different statutory context, *Shrestha v Minister for Immigration and Border Protection* (2018) 264 CLR 151, [32] (Nettle and Edelman JJ); see also [3] (Kiefel CJ, Gageler and Keane JJ).

a separate legislative repository of sentencing considerations.³³ That is especially so where an express purpose of the *Sentencing Act*, in s 1(b), is to have all general provisions relating to the power to sentence “in one Act”. To import all relevant *Charter* rights would go well beyond *interpreting* the words of s 5(2)(g); it would amount to re-writing them.

25. Moreover, it would lead to uncertainty and complexity in the sentencing process because it would require the consideration of potentially conflicting rights (such as a victim’s right to life or property) and of the interaction — and potential inconsistency — between relevant *Charter* rights and other principles and factors in s 5(1)–(2).³⁴ Neither the Appellant nor the LACW deal with the full range of purposes and guiding principles in the *Sentencing Act* as part of the interpretative exercise: see AS [45(c)]; LACW [68], [70]. In the Court below, Walker JA found the preferred construction was consistent with ss 1(d)(iv)(C) and 5(1)(a) and otherwise did not refer to other purposes including ss 1(a) and 1(b).³⁵ It is not possible to reconcile those purposes with a construction of s 5(2)(g) that reads in all relevant *Charter* rights.
26. *Thirdly*, the approach adopted by Walker JA, and advanced by the Appellant and the LACW in this Court, conflates the interpretive task required by s 32(1) with the obligation on public authorities to act compatibly with, and to give proper consideration to, relevant *Charter* rights imposed by s 38(1). The way the issue was described by Walker JA in the Court below exposes the point. Her Honour said:³⁶

[G]iven the imperative in s 32(1) of the *Charter*, I consider that the second construction is to be preferred. That is, the general words in s 5(2)(g) are to be construed in light of the *Charter* and have the effect that, *if a Charter right is engaged by the imposition of a sentence*, then that right is to be regarded as a ‘relevant circumstance’. This does not involve a large alteration to the text that might go beyond what is permissible as a matter of statutory construction. It does not involve the reading in of words or a reading down that changes the meaning of the provision.

³³ Cf *Ngata v The Queen* [2020] ACTCA 18, [40] (Burns and Loukas-Karlsson JJ, Walker AJ): “The [*Human Rights Act 2004* (ACT)] does not determine sentencing criteria but establishes underlying rights and principles”.

³⁴ See also RS [68].

³⁵ CA, [139] (Walker JA). Section 1(a) of the *Sentencing Act* provides that one of the purposes of the Act is “to promote *consistency* of approach in the sentencing of offenders” (emphasis added).

³⁶ CA, [138] (Walker JA) (emphasis added) (citations omitted).

27. The Appellant (at AS [44]) submits that “[s]ection 5(2)(g), construed in light of *Charter* rights in the round, picks up the engagement of any *Charter* right as a ‘relevant circumstance’”. The LACW similarly submits that s 32(1) will have work to do “[w]herever a statutory provision is apt to affect or limit a right, whether directly or *by the exercise of power under it*” (at LACW [69], emphasis added).
28. While s 32(1) is capable of informing the *meaning* of a statutory provision, including provisions that confer statutory powers and discretions, it does not operate — at least where the power or discretion is conferred on a court — to regulate the manner in which it is to be *exercised*.³⁷ The manner of the exercise of a statutory power is, instead, regulated by s 38(1), where a “public authority” has a substantive obligation to act in a way that is compatible with human rights and, in making a decision, to give proper consideration to relevant human rights. Relevantly, a court or tribunal is only a “public authority” when it is acting in an administrative capacity.³⁸ Unlike the position in the United Kingdom,³⁹ to which Walker JA referred,⁴⁰ in introducing the *Charter* Parliament deliberately excluded the courts (when acting in their judicial capacity) from the scope of s 38.⁴¹
29. Given that the *Charter* expressly excludes courts from the obligation under s 38(1) to give proper consideration to relevant human rights when exercising judicial power, s 32(1) ought not be construed to have that effect indirectly through the construction of an otherwise open-textured provision. To do so would, in effect, amount to impermissible judicial legislation,⁴² by inserting into the *Sentencing Act* words to the effect that a court, when exercising the judicial power to sentence an offender, must give

³⁷ Cf *Nigro* (2013) 41 VR 359, [179]–[187] (Redlich, Osborn and Priest JJA). See also *Johnston v Carroll* (2024) 19 QR 1, [197]–[199] (Martin SJA), discussing the relationship between the equivalent provisions in ss 48 and 58 of the *Human Rights Act 2019* (Qld).

³⁸ *Charter*, s 4(1)(j). See also *Cemino v Cannan* (2018) 56 VR 480, [99] (Ginnane J); *Attorney-General (Qld) v Grant (No 2)* (2022) 12 QR 357, [65], [139]–[140] (Applegarth J), holding that s 58 of the *Human Rights Act 2019* (Qld) does not bind the Court acting in a judicial capacity.

³⁹ *Human Rights Act 1998* (UK), s 6(3)(a).

⁴⁰ *R v Petherick* [2012] EWCA Crim 2214, cited in CA, [147] (Walker JA).

⁴¹ See Victoria, Department of Justice, *Rights, Responsibilities and Respect – The Report of the Human Rights Consultation Committee* (2005) (**Consultation Committee Report**), 59. This was to avoid any suggestion that Victorian courts should be bound by the *Charter* in the application of the single Australian common law.

⁴² See *Johnston* (2024) 19 QR 1, [199] (Martin SJA).

proper consideration to relevant human rights. This goes beyond the scope of s 32(1) and trespasses into the domain of s 38(1) of the *Charter*.

30. For these reasons, s 5(2)(g) of the *Sentencing Act* ought not be construed to require a sentencing court to take into consideration any *Charter* rights engaged by the imposition of a sentence on a particular offender.

B.4 *Whether s 32(1) requires s 5(2)(g) to be construed to permit consideration of family hardship in all cases*

31. It remains to consider the narrower construction proffered by the LACW — that s 5(2)(g) of the *Sentencing Act* must be construed to require a sentencing court to take into account the fact of any family hardship resulting from the imposition of sentence as a relevant circumstance, irrespective of whether the hardship can be regarded as exceptional.
32. If this submission is made, as stated in LACW [70], “quite apart from the engagement of the right” in s 17(1), the Attorney-General makes no submissions in relation to it. However, if the submission is that this construction follows from the application of ss 17 and 32(1) of the *Charter*, the Attorney-General makes the following submissions as to the approach to be adopted to its determination.
33. *First*, the LACW’s submission must be, in essence, that the words “any other relevant circumstances” in s 5(2)(g) are capable of more than one construction — one which precludes consideration of family hardship other than in exceptional cases because of the *Markovic* rule and is therefore incompatible with the rights of the offender’s family under s 17 of the *Charter*, and the other which permits consideration of the fact of family hardship in all cases and is therefore compatible with s 17 — and that, in accordance with s 32(1), the latter construction is to be preferred.⁴³ The submission focuses appropriately, with respect, on the *meaning* given to the words “any other relevant circumstances” as a result of the majority judgment below and whether s 32(1) of the *Charter*, read with s 17(1), requires that they be given a different meaning.⁴⁴

⁴³ Cf *DA* (2016) 263 A Crim R 249, [44] (Ashley, Redlich and McLeish JJA); *Smith* (2024) 98 ALJR 1163, [57] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

⁴⁴ Cf *RJE v Secretary, Department of Justice* (2008) 21 VR 526, [105]–[106] (Nettle JA), in relation to whether the *Charter* required a departure from existing authority as to the meaning of the word “likely” in s 11(1) of the *Serious Sex Offenders Monitoring Act 2005* (Vic) and cognate legislation in another jurisdiction.

34. *Secondly*, whether the alternative construction proffered by the LACW is available on a plain reading of s 5(2)(g) requires consideration not of the words “any other relevant circumstances” in isolation, but of those words in their context in s 5(2)(g) and in the broader context of s 5 and the *Sentencing Act* generally. The alternative construction must also be consistent with the purpose of s 5(2)(g) and more generally s 5 as a whole. The Respondent’s submissions address these matters at RS [47]–[61]. Accordingly, it is not correct to say, as the LACW says at [69], that “[w]herever a statutory provision is apt to affect or limit a right ... s 32(1) has work to do”. It may or may not have work to do, depending on the text, context and purpose of the provision.
35. *Thirdly*, whether s 32(1) has any role to play in the construction of s 5(2)(g) requires close attention to the particular right said to be engaged by the statutory provision that falls for interpretation.⁴⁵ Here, that is s 17(1) of the *Charter*, which provides that “[f]amilies are the fundamental group unit of society and are entitled to be protected by society and the State”. Section 17(2) is limited in its application to children under 18 years of age,⁴⁶ and has no relevance to the present case.⁴⁷ As to the scope of the right in s 17(1):
- (a) Section 17(1) is framed differently from all other *Charter* rights. It states a proposition (that “families are the fundamental group unit of society”) and then confers an “entitlement” on “families” “to be protected by society and the State”. “Families”, rather than “a person” or “every person”, are the beneficiaries of the right. It is nonetheless “a human right in the hands of the individual”.⁴⁸
 - (b) The concept of “families” is not defined in the *Charter*, but is to be interpreted broadly. The use of the word “families” (rather than “family” as in Article 23(1) of the ICCPR, on which s 17(1) of the *Charter* is based) is intended to recognise

⁴⁵ *Smith* (2024) 98 ALJR 1163, [58] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), quoting *Taha* (2013) 49 VR 1, [195] (Tate JA).

⁴⁶ *Charter*, s 3 (definition of “child”).

⁴⁷ See CA, [104] (Walker JA).

⁴⁸ Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (2020) (*A Commentary on the ICCPR*), 631, in relation to Article 23(1) of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (**ICCPR**).

that “families can take many and varied forms, all of which are worthy of protection”.⁴⁹

- (c) As Walker JA noted in the Court below, the concept of “protection” of the family in s 17(1) is somewhat uncertain.⁵⁰ And as the Respondent notes (at RS [69]), the protection to which families are entitled under s 17(1) is limited to protection “by society and the State”. The extrinsic materials do not elucidate these aspects of the right.⁵¹
- (d) The scope of s 17(1) should be informed by the fact that s 13(a) of the *Charter* also protects a person’s “family” from unlawful or arbitrary interference. Although there may be some overlap, s 17(1) should not be construed in a manner that overlaps completely with or subsumes the right in s 13(a) in so far as it applies to a person’s “family”. To do so would run counter to the principle of construction which seeks to give some operative effect to all words in a statute and to avoid redundancy.⁵²
- (e) Therefore, s 17(1) is not centrally concerned with laws, acts or decisions which “interfere with” a person’s family, which is the core of the s 13(a) right. Rather, the core of s 17(1) concerns laws, acts or decisions which have some *structural* or *systemic* effect on “families” as the fundamental group unit in society.⁵³ Taylor observes that Article 23(1) of the ICCPR “functions to shield the family as the cornerstone of the entire social order from trends toward disintegration. It is directed against extremely collectivist social forms in which the traditional

⁴⁹ Victoria, *Consultation Committee Report*, 45; see also Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, 14.

⁵⁰ CA, [143] (Walker JA).

⁵¹ To similar effect in relation to Article 23(1), see Taylor, *A Commentary on the ICCPR*, 635: “The drafting background still leaves much unexplained about the expectations of Article 23(1), and how it is to be implemented, especially in relation to protection by ‘society’”.

⁵² *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [71] (McHugh, Gummow, Kirby and Hayne JJ), quoting *The Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ); cf *Palmanova Pty Ltd v Commonwealth* (2025) 99 ALJR 1362, [71]–[75] (Edelman J).

⁵³ Eg, laws relating to the custody and care of children: *Buckle v New Zealand* (United Nations Human Rights Committee, Communication No 858/1999, 25 October 2000), [5.2], [9.2].

functions of the family, such as raising children, are shifted in whole, or to a large extent, to State institutions”.⁵⁴

- (f) So understood, s 17(1) may have little or no application to the sentencing context. The imprisonment of a particular offender inevitably results in some disruption to an offender’s family life, but it does not undermine the family as the “fundamental group unit of society”. A sentence of imprisonment might therefore “interfere with” an offender’s family life for the purposes of the s 13(a) right, but it would do so lawfully and not arbitrarily — which may explain why the Appellant places no reliance on that right.
36. If these submissions, or the Respondent’s submissions at RS [69]–[70], are accepted, the right in s 17 would not be engaged by consideration of family hardship in the context of the sentencing and s 32(1) would have no work to do.
37. *Fourthly*, even if it is accepted, at its highest, that the imprisonment of an offender (being *one* of the options available to a sentencing court) can have the practical effect of limiting the offender’s connection with their family, and that the s 17(1) right is therefore engaged in any case where a custodial sentence is a potential outcome, it does not automatically follow that the sentencing court must therefore consider the impact on an offender’s family in every case. For reasons explained above at [28]–[29], s 32(1) does not operate on the open-textured words of s 5(2)(g) to impose an obligation on courts to give proper consideration to all *Charter* rights in the exercise of the sentencing discretion.
38. Rather, to apply s 32(1), it is necessary to consider whether a construction of s 5 of the *Sentencing Act* which precludes consideration of family hardship unless the circumstances are exceptional is or is not compatible with the right in s 17. That will ultimately depend on whether the limitation on the right is justified by the policy reasons underpinning the common law position as stated in *Markovic*. The Attorney-General does not seek to make submissions on that issue. That is a matter for the Appellant and the Respondent.
39. It may be noted, however, that the question of compatibility may require consideration of the role of s 7(2) of the Charter. The question of whether s 7(2) is relevant in the

⁵⁴ Taylor, *A Commentary on the ICCPR*, 632, citing Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary* (2005, 2nd ed), 516.

interpretive exercise under s 32(1) remains unsettled. In *Momcilovic*, four members of the Court held that it was,⁵⁵ and three members held that it was not.⁵⁶ As Heydon J was in dissent in *Momcilovic*, there was no majority view on the question. Victorian courts have since left the question open.⁵⁷

40. If it is necessary for the Court to consider this issue, it is submitted that s 7(2) does form part of the interpretative exercise required by s 32(1).⁵⁸ The statutory command in s 32(1) is to construe all statutory provisions “in a way that is compatible with human rights”. Each of those words must be given work to do. The concept of “compatibility” is used throughout the *Charter*,⁵⁹ particularly in s 28, which also concerns statutory interpretation, and in s 38(1), where it has been held to involve consideration of s 7(2).⁶⁰ It should be given a consistent meaning.
41. Further, the concept of “human rights” is defined in s 3 to mean “the civil and political rights set out in Part 2”, which Part includes s 7(2). Section 7(2) reflects Parliament’s intention to enact a general limitations provision, rather than following the model of the ICCPR of incorporating limits within the rights themselves.⁶¹ This construction of s 32(1), as embracing consideration of s 7(2) when necessary, is therefore consistent with the undoubted proposition that *Charter* rights are, in general terms, not absolute but may be subject to reasonable limits that are able to be demonstrably justified. Where a law’s limitation of a right is so justified, the law would remain compatible with the right.

⁵⁵ *Momcilovic* (2011) 245 CLR 1, [168] (Gummow J), [280] (Hayne J), [683]–[684] (Bell J); see also [415]–[427] (Heydon J dissenting).

⁵⁶ *Momcilovic* (2011) 245 CLR 1, [24]–[35] (French CJ), [572]–[576] (Crennan and Kiefel JJ).

⁵⁷ See, eg, the following cases in the Court of Appeal: *Slaveski* (2012) 34 VR 206, [21]–[22] (Warren CJ, Nettle and Redlich JJA); *Noone (Director of Consumer Affairs Victoria) v Operation Smile (Aust) Inc* (2012) 38 VR 569, [26]–[31] (Warren CJ and Cavanough AJA), [142] (Nettle JA); *WBM v Chief Commissioner of Police* (2012) 43 VR 446, [80] (Warren CJ), [201] (Bell AJA); *Taha* (2013) 49 VR 1, [214] (Tate JA); *Nigro* (2013) 41 VR 359, [87]–[88] (Redlich, Osborn and Priest JJA); *Cotterill v Romanes* (2023) 413 ALR 360, [110]–[111] (Emerton P, McLeish and Kennedy JJA). See also *Minogue v Victoria* (2018) 264 CLR 252, [55]–[56] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ); *Davidson v Director-General, Justice and Community Safety Directorate* (2022) 18 ACTLR 1, [191] (Loukas-Karlsson J).

⁵⁸ Cf AS [35]; LACW [72].

⁵⁹ *Charter*, ss 1(2)(b)–(d), 28, 30, 31(1) (“incompatible”), 32(1), 32(3) (“incompatible”), 38(1).

⁶⁰ See, eg, *Thompson v Minogue* (2021) 67 VR 301, [96]–[97] (Kyrou, McLeish and Niall JJA). See also *Mallard v Homes Victoria* [2025] VSCA 339, [180] (Niall CJ, Kennedy JA and J Forrest AJA) (special leave granted on other grounds).

⁶¹ Victoria, *Consultation Committee Report*, 46–48; Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, 8–9. Sections 13(a) and 15(3) are also internally qualified.

Part V: Estimated time

42. The Attorney-General estimates that she will require 20 minutes to present oral argument.

Dated: 7 July 2026



Alistair Pound SC
Solicitor-General for Victoria
03 9225 8249
alistair.pound@vicbar.com.au



Sarah Keating KC
Crown Counsel for Victoria
03 9225 8597
sarahkeating@vicbar.com.au

ANNEXURE TO THE ATTORNEY-GENERAL'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1.	<i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)	Compilation No 15	ss 1, 4(j), 7(2), 17(1), 28, 30–32, 34(1), 38	Current, and in force on sentencing date	24 May 2024
2.	<i>Sentencing Act 1991</i> (Vic)	Compilation No 226	ss 5(2)(g), 7(1)	In force on sentencing date	24 May 2024
3.	<i>Crimes Act 1914</i> (Cth)	Compilation No 166	s 16A	Illustrative purposes	All relevant times
4.	<i>Human Rights Act 2004</i> (ACT)	Republication No 17	ss 28, 30	Illustrative purposes	All relevant times
5.	<i>Human Rights Act 2019</i> (Qld)	Reprint as at 20 September 2023	ss 48, 58	Illustrative purposes	All relevant times
6.	<i>Human Rights Act 1998</i> (UK)	Reprint as at 26 June 2026	s 6(3)(a)	Illustrative purposes	All relevant times