



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: M41/2026
File Title: Charisiou v. The King
Registry: Melbourne
Document filed: Form 27F - Respondent's Outline of Oral Submissions
Filing party: Respondent
Date filed: 12 Aug 2026

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

DEMETRIOS CHARISIOU

Appellant

and

THE KING

Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I — FORM OF SUBMISSIONS

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

Part II — OUTLINE OF PROPOSITIONS FOR ORAL ARGUMENT

2. **Statutory text:** section 1 of the *Sentencing Act 1991* (Vic) promotes consistency in sentencing. There is an explicit purpose to have within this statute all general provisions dealing with a court's powers to sentence offenders. A sentencing court must give effect to these principles, the purposes in s 5(1) of the Act, and the factors listed in s 5(2) of the *Sentencing Act*.
3. **Section 5(2)(g) in context:** section 5(1)(a) broadly reflects the principle of proportionality, which limits the weight that can be given to the impact of a sentence on third parties. Section 5(2) defines five categories to which a court must have regard: statutory matters; consistency; the offence; the victim; and the offender. Aggravating or mitigating factors are only "shorthand expressions" and circumstances cannot always be characterised one way or the other: *R v Storey* [1998] 1 VR 359, 371 (**JBA 1000**). Read with ss 1(d)(iv)(A)–(C), s 5(2)(g) should be construed as relevant to the offender and offence, but not at large: **RS [47]–[53]**; **J [62]–[63]**, **CAB 142**. This construction incorporates the common law, relevant to the offender and the offence.
4. **First**, common law factors that *are* aggravating or mitigating are picked up. This includes the "subjective" aspect, but *not* the "objective" aspect of the effects of a sentence on a third party: **RS [56]–[61]**. It also includes delay, assistance to authorities, and voluntary

compensation to a victim (such matters finding no genesis in the statutory text, apart from procedural provisions). **Secondly**, this construction embraces circumstances that are *neither* aggravating nor mitigating. For example, the prevalence of an offence, or the (subjective) impact of impending deportation on an offender.

5. **Common law background:** section 5(1) of the *Sentencing Act* is exhaustive, but not s 5(2); and, subject to any contrary intention, common law principles apply in the sentencing of offenders under Victorian law. This includes proportionality, parity, and totality: *Elias v The Queen* (2013) 248 CLR 483, [20] and [25] (**JBA 398, 401**).
6. **Third party hardship:** Parliament accepted that the common law would continue regulating the exceptional circumstances in which mercy might be extended to an offender: *Victorian Sentencing Committee Report, Chapter 3* (**JBA 1790–2**). Further, Parliament determined *not* to accept the Committee’s recommendation as to a list of mitigating factors (*Chapter 5, JBA 1883, 1889, 1893*), nor to discriminate based on gender (*Chapter 8, 1902, 1904*). Parliament was aware of the common law approach to mercy, as seen in s 70(1)(e), because of the abolition of common law bonds (which, historically, were a principal means by which a court exercised mercy): **RS [43]–[46]**.
7. **A coherent history:** the history of mercy crystallised 55 years ago in Thomas’ *Principles of Sentencing*, which described family hardship only as a ground for mitigation of the sentence where the particular circumstances are such that the degree of hardship is exceptional (**JBA 1631–3**). This is the law in England and Wales, and in Australia: **RS [21]–[29]**. By contrast, in *Totaan* (2022) 108 NSWLR 17 (**JBA 1130**), the meaning of s 16A(2)(p) of the *Commonwealth Crimes Act* was resolved as a matter of statutory interpretation (and its terms find no mirror within the *Sentencing Act*).
8. **Justifications for restraint:** The common law accepts the necessity of restraint on the exercise of mercy for at least four reasons: **J [49], CAB 139**; *Markovic v The Queen* (2010) 30 VR 589, [6]–[20] (**JBA 753–7**). Restraint is needed because there is nothing unusual about a situation in which the sentencing of an offender to a term of imprisonment would impose hardship upon some other person: Alwynne Smart, *Mercy* (**JBA 1578**). (Though, it cannot be forgotten that the categories to which mercy might apply are not closed – e.g., ill-health.) The objective aspect of hardship has a much greater role to play in cases on the “cusp”. Otherwise, sentences would not be proportionate and there would be inconsistency in sentencing.

9. **Section 17 is not relevant:** given its wording, s 17(1) has no relevance to the sentencing process. Section 17(1) is concerned with a structural or systemic effect on families, rather than the decision of a sentencing judge. The near-inevitable disruption to family life from a sentence does *not* equate to the ‘group unit’ being undermined. As to s 17(2), this is limited in its application to children under 18 years of age. It has no relevance to the present case because the appellant’s daughters are both *over* the age of 18 years.
10. **There is no relevant constructional choice:** there is only one interpretation available on a plain reading of s 5(2)(g), in light of its statutory context and purpose: the ‘relevant circumstances’ therein must be that of the *offender and the offence*: **RS [47]–[61]**. To the extent that there is a single available interpretation, which does *not* engage s 17 in the manner contended for by the appellant, s 32 has no work to do in this case: **RS [69]–[70]**. Section 32 is not to be used as a means of choosing between two alternatives without reference to a particular right: *cf J [135]–[139]* (Walker JA), **CAB 160**.
11. **In the alternative, there is no interference with s 17(1):** if s 32 has some work to do because there is a range of relevant constructional choices, this proposed construction does *not* interfere with s 17(1). This is because the proposed construction promotes the protection of families as a “group unit of society”, structurally, by furthering the sentencing purposes in s 5(1), including the protection of the community: **RS [65]–[67]**.
12. **In the further alternative, any limitation on s 17(1) is demonstrably justified:** if the above construction necessarily entails a limitation on s 17(1), any such limitation is demonstrably justified under s 7(2) of the *Charter*, insofar as this construction continues to permit the consideration of objective family hardship where there are exceptional circumstances, through the exercise of mercy: **RS [62]–[64]**. As to the justifications for the continued maintenance of this threshold for the exercise of mercy, the matters set out in *Markovic*, [6]–[7] are apposite (**JBA 753–4**).
13. **Section 7 of the *Sentencing Act* does not assist:** the power to adjudge and punish criminal guilt is the exclusive province of judicial power. This discretion does not arise from s 7 of the *Sentencing Act* and so this provision does not fall to be considered.
14. **A poor vehicle:** if family hardship is treated as an ordinary factor, in the circumstances of this case, it could not possibly have an impact on the sentence imposed here.

Dated: 12 August 2026



BRENDAN F KISSANE