# HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE AND GORDON JJ

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THE DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

AND

CHARLIE DALGLIESH (A PSEUDONYM) RESPONDENT

*Director of Public Prosecutions v Dalgliesh (a pseudonym)*
[2017] HCA 41
*11 October 2017*
M1/2017

**ORDER**

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Victoria made on 18 March 2016.*

3. *Remit the matter to the Court of Appeal of the Supreme Court of Victoria for determination of the appeal against sentence.*

On appeal from the Supreme Court of Victoria

**Representation**

G J C Silbert QC with B L Sonnet for the appellant (instructed by Solicitor for Public Prosecutions (Vic))

O P Holdenson QC with P S Tiwana for the respondent (instructed by Joseph Burke Law)

## CATCHWORDS

### Director of Public Prosecutions v Dalgliesh (a pseudonym)

Criminal law – Sentencing – Current sentencing practices – Incest – Crown appeal on ground of manifest inadequacy – Where s 5(2) of *Sentencing Act* 1991 (Vic) provided that in sentencing an offender a court must have regard to current sentencing practices – Where Court of Appeal held that sentence not wholly outside permissible range reflected in current sentencing practices – Where Court of Appeal held that current sentencing so low as to reveal error in principle – Whether latter conclusion required appellate intervention to correct error reflected in sentence the subject of appeal.

Words and phrases – "comparable cases", "current sentencing practices", "manifest inadequacy", "maximum penalty", "reasonable consistency".

*Sentencing Act* 1991 (Vic), s 5(2).

1 KIEFEL CJ, BELL AND KEANE JJ. Section 5(2)(b) of the *Sentencing Act* 1991 (Vic) ("the Sentencing Act") provides that in sentencing an offender a court must have regard to current sentencing practices.

2 In the present case, the Court of Appeal of the Supreme Court of Victoria dismissed an appeal by the Director of Public Prosecutions ("the Director") against a sentence for the offence of incest. The relevant ground of appeal was that the sentence was manifestly inadequate[1]. The Court of Appeal held that the sentence was within the range indicated by current sentencing practices and, on that basis, dismissed the Director's appeal, even though the Court also concluded that this range is so low that it "reveals error in principle" in that it is not proportionate to the objective gravity of the offending or the moral culpability of the offender[2]. Given that conclusion, the Court of Appeal erred by treating the range established by current sentencing practices as decisive of the appeal before it. Accordingly, the appeal to this Court must be allowed.

The Sentencing Act

3 Section 5(2) of the Sentencing Act relevantly provides:

"In sentencing an offender a court must have regard to –

(a) the maximum penalty prescribed for the offence; and

…

(b) current sentencing practices; and

(c) the nature and gravity of the offence; and

(d) the offender's culpability and degree of responsibility for the offence; and

…

(daa) the impact of the offence on any victim of the offence; and

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**1** The Director appealed on two grounds. The second ground related to orders for cumulation, and was not the subject of appeal to this Court.

**2** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [64], [128].

(da) the personal circumstances of any victim of the offence; and

(db) any injury, loss or damage resulting directly from the offence; and

(e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so; and

(f) the offender's previous character; and

(g) the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances."

Instinctive synthesis

4 The considerations to which a sentencing judge is obliged by s 5(2) to have regard cannot be applied mechanically. Such an application is not possible given that the factors that must be taken into account are incommensurable, and indeed, in many respects, inconsistent. In *Elias v The Queen*[3], French CJ, Hayne, Kiefel, Bell and Keane JJ said:

> "As this Court has explained on more than one occasion, the factors bearing on the determination of sentence will frequently pull in different directions[4]. It is the duty of the judge to balance often incommensurable factors and to arrive at a sentence that is just in all of the circumstances."

5 The balancing of the factors listed in s 5(2) of the Sentencing Act in order to arrive at a sentence that is just in all the circumstances is a matter of instinctive synthesis, as explained in *Wong v The Queen*[5] by Gaudron, Gummow and Hayne JJ:

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**3** (2013) 248 CLR 483 at 494 [27]; [2013] HCA 31. See also s 5(1)(a) of the Sentencing Act.

**4** *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476; [1988] HCA 14; *Pearce v The Queen* (1998) 194 CLR 610 at 624 [46]; [1998] HCA 57; *AB v The Queen* (1999) 198 CLR 111 at 156 [115]; [1999] HCA 46; *Ryan v The Queen* (2001) 206 CLR 267 at 283-284 [49], 307 [136]; [2001] HCA 21.

**5** (2001) 207 CLR 584 at 611 [75]; [2001] HCA 64 (emphasis in original, footnote omitted).

> "[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 that the task is to arrive at an 'instinctive synthesis'. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features."

6 This statement was referred to, with evident approval, by Gleeson CJ, Gummow, Hayne and Callinan JJ in *Markarian v The Queen*[6].

7 While the instinctive synthesis must be informed by each of the factors listed in s 5(2), the extent to which each factor bears upon the case is inevitably a matter for judgment. The process of instinctive synthesis thus allows a measure of discretion to the sentencing judge. The discretionary nature of the judgment required means that there is no single sentence that is just in all the circumstances. Nevertheless, it is well understood that a sentence may be so clearly unjust, because it is either manifestly inadequate or manifestly excessive, that it may be inferred that the sentencing discretion has miscarried. The question raised for determination by the Court of Appeal in the present case was whether the sentence imposed on the respondent was manifestly inadequate.

8 The appeal to this Court is concerned with the significance accorded by the Court of Appeal to the consideration referred to in s 5(2)(b) of the Sentencing Act in determining the question before it.

9 In this regard, it may be said at the outset that the terms of s 5(2) are clear such that, while s 5(2)(b) states a factor that must be taken into account in sentencing an offender, that factor is only one factor, and it is not said to be the controlling factor.

10 It is also important to note the consideration referred to in s 5(2)(a) – the "maximum penalty prescribed for the offence". In this regard, in *Markarian*[7], the plurality said:

> "[C]areful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case

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**6** (2005) 228 CLR 357 at 373-375 [37]; [2005] HCA 25.

**7** (2005) 228 CLR 357 at 372 [31].

> before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick."

11 As will be seen, the range of sentences applied by the sentencing judge in the present case pays scant, if any, regard to the maximum penalty prescribed for the offence of incest. In particular, it is to be noted that the maximum penalty for incest from 1949 until 1997 was 20 years' imprisonment. From 1 September 1997, the maximum sentence for incest was increased to 25 years' imprisonment[8]. In the second reading speech for the Bill which implemented the increase, the then Attorney-General said[9]:

> "The government believes that sexual crimes against children are extremely serious and when they occur have the potential to ruin young lives. This view has been repeatedly expressed by members of the public, victims' groups and other specialist bodies, and is now being acted upon."

The proceedings

12 The respondent was convicted on his plea of guilty of one act of incest ("charge 1") and one act of sexual penetration of a child under 16 ("charge 4") upon complainant A. He also pleaded guilty to, and was convicted of, one act of incest ("charge 2") and one act of indecent assault ("charge 3") upon complainant B. A and B are sisters. At the time of the offending, A was aged between nine and 13 years and B was aged between 15 and 16 years. B has been diagnosed with a mild intellectual disability and attention deficit hyperactivity disorder.

13 This appeal is concerned with the sentence imposed in respect of charge 1, which alleged that the respondent, contrary to s 44(2) of the *Crimes Act* 1958 (Vic), between 16 January 2013 and 13 March 2013, took part in an act of sexual penetration with A – whom he knew to be under the age of 18 years and whom he knew to be the child of his then de facto spouse.

14 The respondent had commenced a relationship with A's mother in 2009. After some time, he moved in with the mother and the complainants, and their younger brother.

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**8** *Sentencing and Other Acts (Amendment) Act* 1997 (Vic), ss 2(2), 60(1), Sched 1 item 21(a).

**9** Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 April 1997 at 872.

15 Prior to the offence the subject of charge 1, and while not yet in a de facto relationship with A's mother, the respondent committed the offence of sexual penetration of a child under 16 on A (charge 4). The circumstances of that offence were that, when A was between the ages of nine and 13, she entered the bedroom that the respondent shared with her mother. The respondent was in the bedroom having recently had a shower. A climbed into the bed. The respondent approached her, took his towel off, inserted his penis into her mouth, grabbed her head, and moved it back and forth[10].

16 Subsequently, in early 2013, the offence the subject of charge 1 was committed. By this time, the respondent was in a de facto relationship with A's mother. The circumstances of this offence were that A got into the bed that the respondent shared with her mother, while the mother was in the shower. The respondent moved himself towards A and inserted his penis into her vagina. A was aged 13 at the time. The respondent ejaculated inside her. As a result, A fell pregnant.

17 A later told her mother that the pregnancy was due to the fact that she had had sex with a male friend from school. The pregnancy was terminated. As a result of the mother's belief that A had been impregnated by a friend from school, the family moved to a new town in rural Victoria. The respondent knew of the pregnancy and A's lie to her mother as to its cause. The respondent knowingly acquiesced in the lie, thereby permitting himself to continue to live with the family at their new residence.

18 The offences the subject of charges 2 and 3 were committed between 1 January 2014 and 28 November 2014 and 28 November 2014 and 30 November 2014 respectively. These were acts that involved the respondent placing his penis inside (charge 2) and near (charge 3) B's vagina.

19 On 11 September 2015, the respondent pleaded guilty to each charge before the County Court of Victoria. He was sentenced on that day.

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**10** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [12]-[13].

The sentence

20 In relation to charge 1, the sentencing judge said that the fact that the complainant fell pregnant as a result of the offending was an aggravating factor[11]. His Honour went on to say[12]:

> "Clearly your offending is serious, and the sentence that I impose must be calculated to deter you and others from offending in this manner. You must also be punished for what you have done".

21 His Honour described the offending as having had a "profoundly traumatic effect" upon the complainants and their mother[13].

22 The sentencing judge noted that, according to a psychologist's report tendered by the defence, the respondent suffered from post-traumatic stress disorder and depression. He was also said to be on the lower end of the autism spectrum, which impaired his impulse control and judgment[14]. The sentencing judge took into account the respondent's early guilty plea[15], and the fact that he had no prior convictions[16]. It was also noted that when being interviewed by investigating police, the respondent made a number of admissions against interest, and that he had demonstrated genuine remorse for his actions[17]. The

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**11** *Director of Public Prosecutions v Dalgliesh* unreported, County Court of Victoria, 11 September 2015 at [8].

**12** *Director of Public Prosecutions v Dalgliesh* unreported, County Court of Victoria, 11 September 2015 at [11].

**13** *Director of Public Prosecutions v Dalgliesh* unreported, County Court of Victoria, 11 September 2015 at [12].

**14** *Director of Public Prosecutions v Dalgliesh* unreported, County Court of Victoria, 11 September 2015 at [15].

**15** *Director of Public Prosecutions v Dalgliesh* unreported, County Court of Victoria, 11 September 2015 at [4].

**16** *Director of Public Prosecutions v Dalgliesh* unreported, County Court of Victoria, 11 September 2015 at [5].

**17** *Director of Public Prosecutions v Dalgliesh* unreported, County Court of Victoria, 11 September 2015 at [16].

sentencing judge considered that the respondent's prospects of rehabilitation were good. In this regard, it was noted that he had the support of his family[18].

23 The respondent was sentenced to three years and six months' imprisonment on charge 1, to three years' imprisonment on charge 2, to 18 months' imprisonment on charge 3, and to three years' imprisonment on charge 4. Nine months of the sentence on charge 2, six months of the sentence on charge 3 and nine months of the sentence on charge 4 were ordered to be served cumulatively upon the sentence on charge 1 and upon each other. In respect of the total term of imprisonment of five years and six months, a non-parole period of three years was imposed[19]. The respondent was declared to be a serious sex offender and placed on the Sex Offenders Register for life[20].

The Director's appeal to the Court of Appeal

24 The Director lodged a notice of appeal on two grounds: that the sentence imposed on charge 1 was manifestly inadequate ("ground 1"); and that the orders for cumulation resulted in a total effective sentence which was manifestly inadequate ("ground 2")[21].

25 Subsequently, the Deputy Registrar of the Court of Appeal, at the request of the Court, wrote to the parties. That email, dated 21 January 2016, stated that "[t]he issue on the appeal is whether the sentences were within range. That issue is to be determined by reference to current sentencing practices." The email went on to state that the Court considered the present case to be an appropriate vehicle for consideration to be given to the adequacy of "current sentencing practices" for the offence of incest. The Court advised the parties that its "decision on the general question will not, of course, affect the outcome of the appeal."

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**18** *Director of Public Prosecutions v Dalgliesh* unreported, County Court of Victoria, 11 September 2015 at [16].

**19** *Director of Public Prosecutions v Dalgliesh* unreported, County Court of Victoria, 11 September 2015 at [18]-[24].

**20** *Director of Public Prosecutions v Dalgliesh* unreported, County Court of Victoria, 11 September 2015 at [27].

**21** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [3]. Ground 2 is not the subject of appeal to this Court.

The Court of Appeal

26 The Director argued that the sentence of three years and six months' imprisonment on charge 1 was manifestly inadequate, given that the respondent had engaged in unprotected penile-vaginal sexual intercourse with a 13-year-old complainant, and that this had caused her to fall pregnant[22]. In addition, the respondent had breached the trust he owed to his young and vulnerable stepdaughter. It was also said that the respondent's silence had lent support to her explanation that another person was responsible for her pregnancy, which increased his moral culpability[23]. The Director submitted that the offending fell within the mid-range category of seriousness, with pregnancy being an obvious aggravating factor[24].

27 The respondent argued that, while the sentence on charge 1 "could be characterised as lenient"[25], it was nevertheless within the permissible range open to the sentencing judge, as demonstrated by current sentencing practices. The respondent submitted that comparable cases showed that the sentence was reasonably open to the sentencing judge, especially as there were significant matters in mitigation[26].

28 The Court of Appeal (Maxwell ACJ, Redlich and Beach JJA) dismissed the appeal on the ground that the Director was "unable to establish that the sentences imposed were outside the range of sentences reasonably open to the sentencing judge based upon existing sentencing standards."[27]

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**22** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [20].

**23** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [21], [22].

**24** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [24].

**25** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [23].

**26** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [24].

**27** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [5].

29 As had been foreshadowed in its email of 21 January 2016, the Court of Appeal dealt separately with the determination of the Director's appeal and the general question of the adequacy of current sentencing practices for the offence of incest. The Court set out its reasons for dismissing the appeal in Pt A of its reasons. In Pt B of its reasons, the Court went on to determine that current sentencing practices for the offence of incest were inadequate.

*Part A of the reasons*

30 The Court of Appeal noted that s 5(2)(b) of the Sentencing Act requires judges to have regard to current sentencing practices, and observed that comparable cases within the same category of seriousness as the case at hand will generally "provide an important, though limited, guide to the range of sentences reasonably open to the sentencing judge."[28]

31 The Court considered 12 cases of incest involving pregnancy, in which the range of sentences extended from four to seven years' imprisonment[29]. The Court made particular reference to *Director of Public Prosecutions (Vic) v BGJ*[30] and *RSJ v The Queen*[31], both said to be examples of the "worst category" of this kind of offending[32]. In *BGJ*, the offender pleaded guilty to one charge of incest against his daughter, and one of indecent assault. The offences were committed while he was on parole for previous incest offences against all three of his daughters. As a result of the later offending, his daughter fell pregnant. She gave birth to a severely disabled daughter who, 20 years later, became the victim of the offender's indecent assault. The Court in that case allowed the Director's appeal and resentenced the offender to six years' imprisonment on the incest charge.

32 In *RSJ*, the appellant had sexually abused his daughter over 28 years. Over the period of the abuse the complainant had borne four children to her

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**28** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [49], citing *Hasan v The Queen* (2010) 31 VR 28 at 41 [55].

**29** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [25]-[39].

**30** (2007) 171 A Crim R 74.

**31** [2012] VSCA 148.

**32** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [36]-[37].

father, one of whom died and two of whom were born with intellectual difficulties. He pleaded guilty to 10 charges of incest. On count 5, an offence of incest resulting in pregnancy, he received a sentence of four years. His appeal against the total effective sentence was dismissed. It may be noted, however, that individual sentences were not the subject of any separate consideration by the Court of Appeal and the total effective sentence of 22 years and five months' imprisonment was upheld.

33 The decisions in *BGJ* and *RSJ*, in particular, persuaded the Court of Appeal that the sentence on charge 1, "though extremely lenient, was not wholly outside the permissible range."[33] The Court went on to say[34]:

> "But for the constraints of current sentencing practice, the objective seriousness of the conduct constituting charge 1 demanded a considerably longer sentence than three years and six months, even allowing for the factors in mitigation. [The respondent's] conduct was opportunistic and abhorrent. His morally repugnant conduct has had lasting consequences for the victim and her family."

*Part B of the reasons*

34 In the second part of its reasons, the Court of Appeal, having reviewed the sentencing information provided to it, concluded that "current sentencing does not reflect the objective gravity of such offending or the moral culpability of the offender."[35] Their Honours noted that the offence of incest carries with it a maximum penalty of 25 years' imprisonment, the "highest in the criminal calendar, short of life imprisonment", and observed that the fixing of such a high penalty reflects the community's abhorrence of sexual crimes against children[36].

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**33** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [52].

**34** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [53].

**35** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [64].

**36** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [78].

35 The Court held that current sentencing practices for incest are "demonstrably inadequate"[37]. In so holding, their Honours observed that "[t]he sentences imposed devalue the objective gravity of the offence, as informed by the egregious breach of trust and the appalling consequences for victims."[38] The Court went on to say[39]:

> "[C]urrent sentencing for incest reveals error in principle. The sentencing practice which has developed is not a proportionate response to the objective gravity of the offence, nor does it sufficiently reflect the moral culpability of the offender. Sentences for incest offences of mid-range seriousness must be adjusted upwards. That is a task for sentencing judges and, on appeal, for this Court. The criminal justice system can be – and should be – self-correcting."

36 Their Honours said that "[b]ut for the constraints of current sentencing which … reflect the requirements of consistency", they would have had "no hesitation" in concluding that the sentence imposed on the respondent was manifestly inadequate[40]. Their Honours concluded[41]:

> "On the basis of the principles we have set out, a sentence of the order of seven years' imprisonment was warranted for charge 2, with the aggravating circumstance of pregnancy requiring a significantly higher sentence again on charge 1."

The appeal to this Court

37 On appeal to this Court, pursuant to a grant of special leave in relation to the sentence imposed on charge 1 only, the Director argued that the Court of

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**37** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [123].

**38** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [123].

**39** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [128] (footnote omitted).

**40** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [132].

**41** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [132].

Appeal erred by failing to conclude that the sentencing judge had erred by imposing a sentence for the offence of incest on charge 1 that was manifestly inadequate. In particular, it was said that the Court of Appeal erred in elevating the significance of current sentencing practices so that they were determinative of the issue.

*The Director's submissions*

38 The Director submitted that the issue raised by his appeal to the Court of Appeal was whether the sentence was "unreasonable or plainly unjust"[42].

39 It was submitted that nothing in s 5(2) of the Sentencing Act suggests that a sentencing judge should give greater emphasis to "current sentencing practices" than to any other of the factors in s 5(2) so as to fetter the exercise of the instinctive synthesis.

40 The Director submitted that past sentences are not determinative of the upper and lower limits of the proper range of the sentencing discretion in respect of a particular offence[43]. In particular, the Director argued that the Court of Appeal erred in regarding *BGJ* and *RSJ* as fixing the range of sentences appropriate to the worst category of incest. In addition, it was said to be apparent from Pt B of the reasons of the Court of Appeal that the Court recognised that current sentencing practices were endemically inadequate for the offence of incest.

*The respondent's submissions*

41 The respondent submitted that the Court of Appeal was rightly mindful of the purpose of the statutory requirement to have regard to "current sentencing practices", that is, to promote a consistency of approach in the sentencing of offenders because like cases should be treated in a like manner[44]. The respondent submitted that the Court of Appeal, in dismissing the Director's appeal, did not support an approach to sentencing which was inconsistent with the instinctive synthesis.

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**42** *House v The King* (1936) 55 CLR 499 at 505; [1936] HCA 40.

**43** *R v Pham* (2015) 256 CLR 550 at 558 [27]; [2015] HCA 39.

**44** See *Wong v The Queen* (2001) 207 CLR 584 at 591 [6], 608 [65]; *Hili v The Queen* (2010) 242 CLR 520 at 535-536 [49]; [2010] HCA 45; *R v Pham* (2015) 256 CLR 550 at 559 [28].

42 The respondent also invoked the residual discretion of a court of appeal to dismiss a Crown appeal against sentence, arguing that the Court of Appeal determined ground 1 in conformity with the argument advanced by the Director on his appeal to that Court. It was submitted that the Director had invited the Court to determine the appeal as to the adequacy of the sentence imposed on charge 1 on the basis of a comparison between the individual sentence imposed and the sentences imposed by sentencing courts in "comparable cases". Having proceeded in this way, so it was said, the Director ought not now be heard to complain to this Court of the course adopted by the Court of Appeal.

43 In addition, the respondent submitted that the Director should not now be allowed to resile from his acceptance in the Court of Appeal that the general uplift of sentences for the offence of incest should have no bearing on the disposition of the Crown appeal against sentence in this case[45].

*BGJ* and *RSJ*

44 The Court of Appeal calibrated the range of sentences available in this case by using the decisions in *BGJ* and *RSJ* as sentences appropriate to the worst category of incest involving pregnancy, and proceeding to a conclusion that the range of sentences available in this case – a case of mid-level seriousness – must be substantially lower than the sentences imposed in those cases.

45 Quite apart from the issue as to the endemic inadequacy of the sentences imposed in those cases as demonstrated in Pt B of the Court of Appeal's reasons, this use of the decisions in *BGJ* and *RSJ* was unorthodox in two respects: first, the imposition of a just sentence is not to be approached as if it were a mechanical or arithmetical exercise[46]; and secondly, the Court of Appeal misunderstood what is involved in identifying an offence as falling within the worst category. In this latter regard, in *R v Kilic*[47], this Court said:

> "What is meant by an offence falling within the 'worst category' of the offence is that it is an instance of the offence which is so grave that it

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**45** See, for example, *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [67]-[69].

**46** *Markarian v The Queen* (2005) 228 CLR 357 at 372-375 [30]-[39].

**47** (2016) 91 ALJR 131 at 137 [18]-[19]; 339 ALR 229 at 234-235; [2016] HCA 48 (footnotes omitted). See also *R v Tait* (1979) 24 ALR 473 at 484; *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 478; *Nguyen v The Queen* (2016) 256 CLR 656 at 668-669 [34]; [2016] HCA 17.

> warrants the imposition of the maximum prescribed penalty for that offence. Both the nature of the crime and the circumstances of the criminal are considered in determining whether the case is of the worst type. Once it is recognised that an offence falls within the 'worst category', it is beside the point that it may be possible to conceive of an even worse instance of the offence …
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> Where, however, an offence, although a grave instance of the offence, is not so grave as to warrant the imposition of the maximum prescribed penalty … a sentencing judge is bound to consider where the facts of the particular offence and offender lie on the 'spectrum' that extends from the least serious instances of the offence to the worst category, properly so called. It is potentially confusing, therefore, and likely to lead to error to describe an offence which does not warrant the maximum prescribed penalty as being 'within the worst category'. It is a practice which should be avoided."

46 Accordingly, an offence of incest properly characterised as being within the worst category would warrant a sentence approaching the maximum prescribed by Parliament. It is the maximum sentence prescribed by law which invites comparison between the worst possible cases and the case before the court[48]. Neither *BGJ* nor *RSJ* fixed a sentence approaching 25 years' imprisonment for each particular instance of incest with which it was concerned. The adequacy of the sentence in the present case could not properly be gauged on the basis that, if the sentences imposed in *BGJ* and *RSJ* were appropriate to the worst category of offending, then a sentence of the order of three and a half years' imprisonment was appropriate for a case of middle range offending.

Current sentencing practices as a controlling factor

47 The respondent contended that the Director was wrong to submit that the Court of Appeal allowed a miscarriage of the sentencing judge's discretion to go uncorrected by treating current sentencing practices as a controlling consideration. Rather, so it was said, current sentencing practices were used merely as a "check"[49] on the exercise of the sentencing discretion.

48 That contention cannot be sustained having regard to the clear statements by the Court of Appeal that are set out above. The effect of the passages cited is clear: only a perceived need to adhere to current sentencing practices prevented

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**48** See also *Markarian v The Queen* (2005) 228 CLR 357 at 372 [31].

**49** *AB v The Queen* (1999) 198 CLR 111 at 122 [18].

the Court from allowing the Director's appeal. The "constraints of current sentencing"[50] were *the* determinative factor in the disposition of the appeal. In particular, it was the overriding importance attached to the need to adhere to the range suggested by the comparable cases in the actual determination of the Director's appeal that inspired the bifurcated approach to the determination of the appeal adopted by the Court.

Individualised justice and consistency in sentencing

49 In *Elias v The Queen*[51], French CJ, Hayne, Kiefel, Bell and Keane JJ said: "[t]he administration of the criminal law involves individualised justice". The imposition of a just sentence on an offender in a particular case is an exercise of judicial discretion concerned to do justice in that case. It is also the case that, as Gleeson CJ said in *Wong v The Queen*[52]: "[t]he administration of criminal justice works as a system … It should be systematically fair, and that involves, amongst other things, reasonable consistency." As was explained by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in *Hili v The Queen*[53]: "[t]he consistency that is sought is consistency in the application of the relevant legal principles."

50 Section 5(2)(b) of the Sentencing Act informs the process of instinctive synthesis as a statutory expression of the concern that a reasonable consistency in sentencing should be maintained as an aspect of the rule of law. Reasonable consistency in the application of the relevant legal principles does not, however, require adherence to a range of sentences that is demonstrably contrary to principle.

51 In *Director of Public Prosecutions (Vic) v OJA*[54], Nettle JA, with whom Ashley and Redlich JJA agreed, said:

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**50** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [132].

**51** (2013) 248 CLR 483 at 494-495 [27].

**52** (2001) 207 CLR 584 at 591 [6]. See also *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 596 [55]; [2011] HCA 10; *R v Pham* (2015) 256 CLR 550 at 557-558 [24].

**53** (2010) 242 CLR 520 at 535 [49].

**54** (2007) 172 A Crim R 181 at 196 [30]-[31].

> "[T]he need to have regard to current sentencing practices does not mean that the measures of manifest excessiveness and manifest inadequacy are capped and collared by the highest and lowest sentences for similar offences hitherto imposed. …
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> [I]t should not be thought that the statutory requirement to have regard to current sentencing practices forecloses the possibility of an increase or decrease in the level of sentences for particular kinds of offences. Over time, views may change about the length of sentence which should be imposed in particular cases and, when that occurs, the notions of manifest excessiveness and manifest inadequacy will be affected. … One must allow for the possibility that sentences to this point have simply been too low."

52 Similarly, albeit in a somewhat different context, in *R v Pham*[55], French CJ, Keane and Nettle JJ said that comparable cases may also serve as "yardsticks" to:

> "illustrate (although not define) the possible range of sentences available[56]. A court must have regard to such a decision in this way unless there is a compelling reason not to do so, which might include where the objective circumstances of the crime or subjective circumstances of the offender are so distinguishable as to render the decision irrelevant, or where the court is persuaded that the outcome itself in the other court was manifestly excessive or inadequate."

53 The Court of Appeal was correct to conclude that current sentencing practices did not reflect the objective gravity of the offending. The Court of Appeal's acceptance that the range so indicated must apply in the present case was not warranted by the need for reasonable consistency in the administration of criminal justice. That is because the range was seen to reflect a disregard of the gravity of the offending as indicated by the maximum sentence prescribed for the offence, and the moral culpability of the offender. The view of the Court of Appeal that this amounted to an error of principle was clearly correct.

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**55** (2015) 256 CLR 550 at 560 [29].

**56** *Hili v The Queen* (2010) 242 CLR 520 at 537 [54]; *Barbaro v The Queen* (2014) 253 CLR 58 at 74 [41]; [2014] HCA 2.

54 In the Court of Appeal's review of the comparable cases in Pt B of the reasons, their Honours referred first[57] to the decision of *Kaye*[58], in which the Court of Criminal Appeal allowed an offender's appeal against a sentence of six years' imprisonment (with a minimum of four years to be served before eligibility for parole) on one count of incest. The complainant was the offender's 14-year-old stepdaughter. The offender had forcibly penetrated the complainant, despite her screams and struggles. The Court of Criminal Appeal set that sentence aside and substituted a sentence of four and a half years' imprisonment, with a minimum of three years to be served before eligibility for parole. Young CJ, with whom Murphy and Fullagar JJ agreed, said[59]:

> "[T]he range of sentences generally imposed for crimes of incest is lower than the sentence which the learned judge passed on this applicant. Indeed, the average sentence is probably somewhere of the order of three years' imprisonment.
>
> The crime of incest is a very serious one and one that greatly disturbs the public. In these days, many members of the public would, I think, take the view that the crime ought to be punished more severely than has recently come to be the case.
>
> …
>
> I am very reluctant indeed to interfere with a sentence passed by an experienced trial judge, and the observations I have made about the level of sentencing for incest should not be overlooked but, nevertheless, for the reasons I have endeavoured to express in this case, I think that the sentence of six years … does warrant the interference of this Court."

55 The decision in *Kaye* was, it may respectfully be said, remarkable, even for its own time. The observations of Young CJ suggest an appreciation that the decision of the Court of Criminal Appeal might not accord with the general moral sense of the community[60]. That was hardly surprising, given that if the relevant offending had been committed by an offender who was not a member of

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**57** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [75]-[77].

**58** (1986) 22 A Crim R 366.

**59** *Kaye* (1986) 22 A Crim R 366 at 367-368.

**60** See also *Kaye* (1986) 22 A Crim R 366 at 369 per Fullagar J.

the victim's family, the objective gravity of the offending and the moral culpability of the offending would have attracted a sentence appropriate for what was, in the circumstances of the case, the violent sexual penetration of a young teenage girl against her will by a mature adult male who occupied, as a matter of fact, a position of trust vis-à-vis his victim. It is difficult to imagine that a sentence of less than six years' imprisonment could have been regarded as a just sentence in those circumstances even at that time. It invites the observation that the circumstance that the victim was the stepdaughter of the offender seems to have been treated, anomalously, as a matter in mitigation, rather than aggravation, of the offending.

56 In any event, *Kaye* was a decision of its own time. In *R v Kilic*[61], this Court said of s 5(2) of the Sentencing Act:

> "The requirement of currency recognises that sentencing practices for a particular offence or type of offence may change over time reflecting changes in community attitudes to some forms of offending. For example, current sentencing practices with respect to sexual offences may be seen to depart from past practices by reason, inter alia, of changes in understanding of the long-term harm done to the victim."

57 Those observations are distinctly apposite here. The decision in *Kaye* was delivered in 1986. In the three decades since, sexual abuse of children by those in authority over them has been revealed as a most serious blight on society. The courts have developed – as the Court of Appeal accepted in "emphatically" rejecting the respondent's submission that "there was no violence accompanying the offence" – an awareness of the violence necessarily involved in the sexual penetration of a child, and of the devastating consequences of this kind of crime for its victims[62]. And, importantly, the maximum penalty for the crime of incest when *Kaye* was handed down in 1986 was 20 years' imprisonment. In 1997, the maximum sentence was increased to 25 years' imprisonment.

58 Nevertheless, the gravitational pull exerted by *Kaye* operated to hold sentences for the offence at an anomalously low level. It is evident that the Court of Appeal declined to correct the anomaly because of the controlling effect accorded to s 5(2)(b) of the Sentencing Act.

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**61** (2016) 91 ALJR 131 at 137 [21]; 339 ALR 229 at 235.

**62** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [45]-[47].

The Director's appeal should have been allowed

59 In *R v Pham*[63], French CJ, Keane and Nettle JJ said:

> "Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle."

60 In the present case, the Court of Appeal's conclusion that there had been a misapplication of principle which affected the range of sentences applied by the sentencing judge was sufficient to warrant appellate intervention on the ground of manifest inadequacy.

61 Accordingly, this case is not the occasion to reconsider the bases on which it has been said in the past that Crown appeals on sentence should be a "rarity"[64]. In particular, this case does not require this Court to come to a concluded view of the reservations expressed by Gleeson CJ in *Wong v The Queen*[65] as to the ongoing validity of the reasons previously given for treating Crown appeals on sentence as exceptional.

62 The Court of Appeal concluded that the range of sentencing established by comparable cases was affected by an error of legal principle which was reflected in the sentence the subject of the appeal. The Director's appeal to the Court of Appeal in this case thus afforded that Court the opportunity "to perform its proper function … namely, to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons"[66] and to "maintain adequate standards of punishment for crime … and … to correct a sentence which is so disproportionate to the seriousness of the crime as to shock

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**63** (2015) 256 CLR 550 at 559 [28] (footnote omitted).

**64** *Griffiths v The Queen* (1977) 137 CLR 293 at 310, 327, 329-330; [1977] HCA 44; *Malvaso v The Queen* (1989) 168 CLR 227 at 233-234; [1989] HCA 58; *Everett v The Queen* (1994) 181 CLR 295 at 299-300; [1994] HCA 49.

**65** (2001) 207 CLR 584 at 592-593 [9]-[10]. See also *R v Pham* (2015) 256 CLR 550 at 565-566 [49].

**66** *Griffiths v The Queen* (1977) 137 CLR 293 at 310; *Malvaso v The Queen* (1989) 168 CLR 227 at 234.

the public conscience."[67] And yet because of the bifurcated approach adopted by the Court of Appeal, this error was not corrected.

63 Having reached a conclusion that current sentences were so manifestly disproportionate to the gravity of the offending and the moral culpability of the offender as to bespeak an error of principle, there was no good reason for the Court of Appeal not to correct the effect of the error of principle which it recognised[68]. To the extent that the sentencing judge sentenced the respondent in conformity with the range of sentences descending from *Kaye*, and in doing so imposed a sentence that was manifestly too low, it was the proper function of the Court of Appeal to correct that injustice. The Court of Appeal, in failing to do so, proceeded as it did for a particular reason which may now be discussed.

Current sentencing practices and the plea of guilty

64 Rather than determine the Director's appeal in the ordinary way, the Court of Appeal adopted a bifurcated approach to the Director's appeal. It proceeded, it seems, on the basis that this course was necessary to avoid perceived unfairness to the respondent, while at the same time allowing the Court of Appeal to correct, for the future, the unjustifiably low level of sentences for offending of this kind. This approach was explained in *Ashdown v The Queen*[69]: it is founded on the assumption that the offender pleaded guilty in the expectation that he or she would be sentenced consistently with current sentencing practices[70].

65 The Court of Appeal's concern to avoid this perceived unfairness to the respondent did not warrant the adoption of the bifurcated approach taken by the Court. The only expectation that an offender can have at sentence is of the imposition of a just sentence according to law. The Court of Appeal's assumption as to the basis on which the plea of guilty was entered does not warrant a different view.

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**67** *R v Osenkowski* (1982) 30 SASR 212 at 213; *Wong v The Queen* (2001) 207 CLR 584 at 591-592 [8].

**68** *Everett v The Queen* (1994) 181 CLR 295 at 300; *R v Clarke* [1996] 2 VR 520 at 522.

**69** (2011) 37 VR 341 at 345-346 [5], 410-411 [207].

**70** Cf *Director of Public Prosecutions v CPD* (2009) 22 VR 533 at 549 [69]; *Director of Public Prosecutions v DDJ* (2009) 22 VR 444 at 460 [65]; *Hasan v The Queen* (2010) 31 VR 28 at 38 [43]; *Winch v The Queen* (2010) 27 VR 658 at 663 [23]; *Trowsdale v The Queen* [2011] VSCA 81 at [22].

66 It is well established that even an express plea bargaining agreement between the prosecution and the accused cannot affect the duty of either the sentencing judge or a court of criminal appeal to impose a sentence which appears to the court, acting solely in the public interest, to be just in all of the circumstances[71]. A manifestly inadequate sentence is a failure of the due administration of criminal justice.

67 An offender can have no expectation of a manifestly inadequate sentence whether or not he or she has pleaded guilty. It must be accepted, of course, that, as s 5(2)(e) recognises, a plea of guilty may ameliorate the sentence otherwise appropriate to the gravity of the offence for reasons which may be utilitarian or because the plea reflects well on the offender's prospects of rehabilitation. It is another thing altogether to say that an offender who pleads guilty thereby becomes entitled to be sentenced by reference to an erroneous understanding of the principles bearing upon the fixing of a just sentence.

68 In addition, where the application of current sentencing practices, unbalanced by the other considerations in s 5(2), would lead to the imposition of a sentence that is manifestly inadequate, any expectation of such an outcome on the part of the offender would be inconsistent with s 5(2)[72]. That is because s 5(2) contemplates that current sentencing practices must be taken into account, but only as one factor, and not the controlling factor, in the fixing of a just sentence.

69 It may be noted that the Sentencing Act makes express provision in Pt 2AA for the Court of Appeal to give guideline judgments. These provisions were not invoked in this case. It might be said that Pt 2AA deals exhaustively with the circumstances in which, and the extent to which, a court may go beyond the characteristic judicial function of quelling the particular controversy before it in order to give quasi-legislative guidance for the resolution of future cases[73]. And even where the procedure for a guideline judgment is invoked, it is far from clear that the provisions of Pt 2AA contemplate that a judgment might be given

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**71** *Malvaso v The Queen* (1989) 168 CLR 227 at 233; *Barbaro v The Queen* (2014) 253 CLR 58 at 72-74 [34]-[39]. It is a different question whether such an agreement would warrant the refusal by this Court of special leave to appeal where it affected the course of proceedings.

**72** Cf *Green v The Queen* (2011) 244 CLR 462 at 497 [106]; [2011] HCA 49.

**73** Cf *Wong v The Queen* (2001) 207 CLR 584 at 601-602 [45], 613-615 [80]-[83], 635 [142], 642 [165].

as a guideline judgment without itself giving effect to the guidelines it propounds.

70 On that basis, it might be said that, quite apart from the considerations of the limits of judicial power which would arise if a matter involved the exercise of federal jurisdiction (which this appeal did not), the giving of general judicial guidance for the future which plays no part in the actual determination of the matter before the court is inconsistent with the Sentencing Act. But it is not necessary in this case to reach a conclusion as to whether the bifurcated approach adopted in this case is in conformity with the Sentencing Act: that issue was not argued before this Court. It is sufficient to conclude that the perception of possible unfairness to the respondent arising from an expectation assumed to attend his plea of guilty was not a sound reason for the Court of Appeal to decline to give effect to its conclusion as to the inadequacy of the sentence which had been imposed by the sentencing judge.

The residual discretion?

71 The respondent sought to sustain the decision of the Court of Appeal by invoking the residual discretion available to a court of appeal on a Crown appeal against sentence not to interfere with the sentence imposed by a sentencing judge, even when satisfied that an error has occurred in the exercise of the sentencing function and that a different sentence should have been imposed at first instance[74]. In this regard, it was said that the Director acquiesced to the determination of the appeal by reference to the range fixed by current sentencing practices.

72 The respondent's contention should be rejected. The Court of Appeal did not suggest that it was disposed to exercise its residual discretion against the Director. That is hardly surprising, because the Director did not at any stage of the proceedings suggest or accept that a conclusion by the Court of Appeal on its review of the comparable cases that the range of sentences was too low should not be reflected in the actual determination of the appeal.

73 Nothing the Director did, or did not do, contributed to the bifurcation of the appeal so that the determination of the Director's appeal in Pt A of the Court's reasons occurred in isolation from the review of current sentencing practices in

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**74** See *CMB v Attorney-General (NSW)* (2015) 256 CLR 346 at 360-361 [38]-[39]; [2015] HCA 9. See also *Director of Public Prosecutions v Karazisis* (2010) 31 VR 634 at 657-658 [100], 658-660 [104]-[115]; *Green v The Queen* (2011) 244 CLR 462 at 477 [36].

Pt B. It could not be suggested that the Director was responsible for the position adopted by the Court of Appeal and communicated to the parties in its email of 21 January 2016, as the Court did not hear from either party before adopting that position.

74 The grounds of appeal filed by the Director in the Court of Appeal did not assert that the manifest inadequacy of the sentence imposed on charge 1 was demonstrable exclusively by reference to current sentencing practices. Nor did the grounds of appeal particularise the contention of manifest inadequacy on the assumption that current sentencing practices were sound. Indeed, in Pt B of its reasons, the Court of Appeal acknowledged that it was the Director's submission that[75]:

> "if the Court concluded that the sentence of three years and six months on the charge of incest resulting in pregnancy was within the permissible range, that would be strongly indicative of the fact that existing sentencing standards were inadequate."

75 While it is true that, in the Appellant's Written Case filed by the Director with its notice of appeal, it was contended, inter alia, that comparable appellate cases demonstrated the extraordinary leniency of the sentence on charge 1, this contention was but one aspect of the Director's argument that the sentence was manifestly inadequate. It may therefore be concluded that the failure by the Court of Appeal to determine the appeal on the basis that the other aspects of the Director's argument were compelling was not due to any failure on the part of the Director to do what was reasonably required to assist the Court to avoid error.

Conclusion and orders

76 Given the Court of Appeal's conclusion that a sentence significantly higher than seven years' imprisonment for charge 1 was plainly warranted having regard to the maximum penalty prescribed for the offence, the gravity of the offence, the respondent's culpability, and the impact of the offence on the complainant, the Court should have allowed the Director's appeal. Section 5(2)(b) of the Sentencing Act did not require the Court to refrain from acting to remedy what it recognised to be a manifest injustice resulting from the perpetuation of an error of principle.

77 The appeal to this Court should be allowed; and the order of the Court of Appeal dismissing the Director's appeal should be set aside. The matter should

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**75** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [62].

be remitted to the Court of Appeal for determination of the appeal against sentence.

78 GAGELER AND GORDON JJ. Section 5(2) of the *Sentencing Act* 1991 (Vic) specifies matters that a court "must have regard to" when sentencing an offender. One of the specified matters, under s 5(2)(b), is "current sentencing practices". Others include the maximum penalty prescribed for the offence, the nature and gravity of the offence, the offender's culpability and degree of responsibility, the impact of the offence on any victim, the personal circumstances of any victim and the presence of aggravating or mitigating factors concerning the offender.

79 The mandatory considerations in s 5(2) are diverse. 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[76]. Sentencing an offender is not a mechanical or mathematical exercise. And it is a task done in accordance with applicable statutory provisions governing sentencing[77].

80 In this case, the Court of Appeal stated that current sentencing practices for the offence of incest had "resulted in an unworkably narrow band within which judges are *able* to sentence for offending of this nature"[78] (emphasis added). In relation to the respondent, it concluded that "[b]ut for the constraints of current sentencing practice, the objective seriousness of the conduct constituting charge 1 demanded a considerably longer sentence"[79] and stated that "[b]ut for the constraints of current sentencing which … reflect the requirements of consistency, we would have had no hesitation" in finding the sentence manifestly inadequate[80]. The apparent explanation for not imposing a longer sentence was that, although current sentencing practices did not reflect the gravity of the offending and sentences were too low, it was not permissible to

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**76** *Wong v The Queen* (2001) 207 CLR 584 at 611 [75]; [2001] HCA 64; *Markarian v The Queen* (2005) 228 CLR 357 at 373-375 [37], 378 [51]; [2005] HCA 25; *Muldrock v The Queen* (2011) 244 CLR 120 at 131-132 [26]; [2011] HCA 39.

**77** *Markarian* (2005) 228 CLR 357 at 371 [26]; *Elias v The Queen* (2013) 248 CLR 483 at 493 [25]; [2013] HCA 31.

**78** *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [64].

**79** *Dalgliesh* [2016] VSCA 148 at [53].

**80** *Dalgliesh* [2016] VSCA 148 at [132].

sentence, or to determine questions of manifest inadequacy, other than in conformity with a range or "band" established by those practices.

81 The approach to current sentencing practices described by the Court of Appeal appears to have originated in its decision in *Director of Public Prosecutions v CPD*[81]. The approach was adopted in the present case before the decision of this Court in *R v Kilic*[82]. It manifests the error identified in *Kilic* of treating current sentencing practices as fixing quantitative boundaries within which future sentences were required to be passed[83].

82 Section 5(2)(b) does not in terms provide that current sentencing practices set boundaries on what a court may reasonably impose as a sentence. The court must have regard to current sentencing practices, as well as every other matter listed in s 5(2). Current sentencing practices stand in the same position as every other matter listed in s 5(2). There is nothing to suggest that current sentencing practices should be treated in a conceptually different manner from any of the other listed matters. Of course, an express purpose of the Sentencing Act is to promote consistency of approach in the sentencing of offenders[84], to which the requirement in s 5(2)(b) may contribute. But that purpose, which reflects the well-recognised importance of consistency in the application of sentencing principles[85], provides no basis for treating s 5(2)(b) as though it were a statutory command to sentence within a "band" derived from current sentencing practices.

83 Sentences are not binding precedents[86], but are merely "historical statements of what has happened in the past"[87]. As was said in *Hili v The Queen*, "[t]hat history does not establish that the range is the *correct* range, or that the upper or lower limits to the range are the *correct* upper and lower limits"[88]

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**81** (2009) 22 VR 533.

**82** (2016) 91 ALJR 131; 339 ALR 229; [2016] HCA 48.

**83** (2016) 91 ALJR 131 at 137-138 [22]; 339 ALR 229 at 235-236.

**84** s 1(a) of the Sentencing Act.

**85** See *Hili v The Queen* (2010) 242 CLR 520 at 535 [49]; [2010] HCA 45.

**86** *Wong* (2001) 207 CLR 584 at 605 [57].

**87** *Hili* (2010) 242 CLR 520 at 537 [54] quoting *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1 at 71 [304].

**88** (2010) 242 CLR 520 at 537 [54]. See also *Director of Public Prosecutions (Vic) v OJA* (2007) 172 A Crim R 181 at 196 [31].

(emphasis added). Examination of sentences imposed in comparable cases may inform the task of sentencing but such examination goes beyond its rationale when it is used to fix boundaries that, as a matter of practical reality, bind the court.

84 The Court of Appeal's treatment of current sentencing practices as fixing quantitative boundaries within which future sentences were required to be passed evidently infected its consideration of manifest inadequacy in the present case. Having accepted that a significantly higher sentence was warranted in the circumstances of the case "but for" current sentencing practices, the Court of Appeal was not correct to end its task by treating those current sentencing practices as a complete answer to the question whether the sentence imposed was manifestly inadequate. It was required to determine that question, and to sentence, according to law. The earlier decisions of the Court of Appeal to the contrary[89] are wrong and are not to be followed or applied.

85 A plea of guilty does not alter these principles. As the Director submitted, recourse to the notion of an expectation or entitlement to be sentenced in accordance with current sentencing practices in the event of a plea of guilty is unlikely to be helpful. A plea of guilty does not diminish or alter the duty of the sentencing judge or a court of criminal appeal to sentence according to law. The duty is to impose a sentence that is appropriate in all the circumstances of the case[90]. It is not consistent with that duty to permit a manifestly inadequate sentence to stand. Again, the earlier decisions of the Court of Appeal to the contrary[91] are wrong and are not to be followed or applied.

86 We agree with the orders proposed by Kiefel CJ, Bell and Keane JJ.

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**89** *Hasan v The Queen* (2010) 31 VR 28 at 38 [42]-[43]; *Ashdown v The Queen* (2011) 37 VR 341 at 345 [4], 358 [48], 359 [55]; *Harrison v The Queen* (2015) 49 VR 619 at 635-636 [71], 638 [86].

**90** See, eg, *Hoare v The Queen* (1989) 167 CLR 348 at 354; [1989] HCA 33; *Ryan v The Queen* (2001) 206 CLR 267 at 283-284 [49]; [2001] HCA 21; *Wong* (2001) 207 CLR 584 at 599 [36]; *Markarian* (2005) 228 CLR 357 at 384 [66]; *Barbaro v The Queen* (2014) 253 CLR 58 at 77 [52]; [2014] HCA 2.

**91** *Director of Public Prosecutions v DDJ* (2009) 22 VR 444 at 460 [65]; *CPD* (2009) 22 VR 533 at 549 [69]; *Winch v The Queen* (2010) 27 VR 658 at 663-664 [23]-[27]; *Hasan* (2010) 31 VR 28 at 38 [43]; *Ashdown* (2011) 37 VR 341 at 352 [32], 410-411 [207]-[208]; *Harrison* (2015) 49 VR 619 at 630 [49].