IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M1 of 2017

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

- v -

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CHARLIE DALGLIESH (A PSEUDONYM)

Respondent

APPELLANT'S SUBMISSIONS

PART I: SUITABILITY FOR INTERNET PUBLICATION

20 1.1 The appellant certifies that this submission is in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF THE RELEVANT ISSUES

2.1 Did the legislature by enactment of section 5(2)(b) of the *Sentencing Act* 1991 (Vic.) intend to alter the common law of sentencing where such law requires that a sentence be imposed by means of the application of a sentencing judge's instinctive synthesis?

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PART III: NOTICE UNDER THE JUDICIARY ACT 1903

3.1 The appellant has considered whether a notice should be given in compliance with section 78B of the *Judiciary Act* 1903 (Cth.) and has decided that no such notice need be given.

PART IV: CITATION OF REASONS FOR JUDGMENT

4.1 *DPP v Charlie Dalgliesh (A Pseudonym)* [2016] VSCA 148 ("the judgment below").

PART V: STATEMENT OF RELEVANT FACTS

5.1 The respondent committed one act of incest and one act of sexual penetration of a child under 16 upon the complainant – Charges 1 and 4 respectively. He committed one act of incest and one act of indecent assault upon the complainant's sister – Charges 2 and 3 respectively.

5.2 This appeal concerns the sentence imposed on Charge 1 – a charge of incest. This charge alleged that the respondent, contrary to section 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 the complainant – a person under the age of 18 years whom the respondent knew to be the child of the respondent's then de-facto spouse – in that the respondent introduced his penis into the vagina of the complainant.

5.3 The respondent had commenced a relationship with the complainant's mother in 2009 and, after some time, commenced living with the mother, the complainant and the complainant's sister.

5.4 The respondent committed Charge 4 upon the complainant between 1 September 2009 and 13 April 2013 before he was in a de-facto relationship with the complainant's mother. The respondent penetrated the complainant's mouth with his penis. The facts of this offending can be found at paragraph [7] of the learned sentencing judge's reasons for sentence. This offending took place in the bedroom that the respondent shared with the complainant's mother.

5.5 Following the commission of Charge 4, the complainant was again in this bedroom with the respondent when the mother was having a shower. On this occasion, the complainant climbed into the bed that the respondent shared with the mother. The respondent was in the bed. The circumstances of Charge 1 were that after the complainant got into the bed the respondent moved himself towards the complainant

and inserted his penis into the complainant's vagina. The complainant was aged 13 at this time. The respondent ejaculated inside the complainant and, as a result of this, the complainant fell pregnant.

5.6 The complainant 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. The commission of Charge 1 caused the family to move to a new town in rural Victoria. The respondent knew of the pregnancy and the lie given as to the pregnancy's cause. The respondent knowingly acquiesced in the telling of the lie, thereby permitting himself to continue to live with the family at the new premises.

5.7 Charges 2 and 3 were committed by the respondent upon the complainant's sister 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) the sister's vagina.

5.8 The respondent entered pleas of guilty before the sentencing court on 11 September 2015. A plea was subsequently delivered on the respondent's behalf on that day. On the same day, the learned sentencing judge sentenced the respondent as follows. On Charge 1 the respondent was sentenced to three years' and six months' imprisonment; on Charge 2 three years' imprisonment; on Charge 3 18 months' imprisonment and on Charge 4 three years' imprisonment. The sentence imposed on Charge 1 was the base sentence. Nine months' of the sentence on Charge 2, six months' of the Charge 3 sentence and nine months' of the Charge 4 sentence were ordered to be served cumulatively upon the base sentence and upon each other. This produced a total effective sentence of five years' and six months' imprisonment. A non-parole period of three years' was imposed. The respondent was declared to be a serious sex offender on Charges 3 and 4.

5.9 On 8 October 2015, the appellant lodged a Notice of Appeal that contained two grounds of appeal. Those grounds were that the sentence imposed on Charge 1 (Ground 1) and the total effective sentence (Ground 2) were manifestly inadequate. The parties then filed written submissions either in support of, or in opposition to, those grounds of appeal. On 20 January 2016, the Deputy Registrar of the Court of Appeal wrote to the parties informing them 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 this question would not affect the outcome of the appellant's appeal. The court set down a date for a directions hearing in order to set a timetable for the filing of written submissions on the adequacy question. The appellant, the Law Institute of Victoria and the Criminal Bar Association of Victoria filed written submissions concerning the adequacy of current sentencing practices for the offence of incest.

5.10 On 15 March 2016, the appellant's appeal was heard in the court below. On 18 March 2016, the court below made an order dismissing the appellant's appeal. On 29 June 2016, the court below delivered its reasons for decision. In Part B of these reasons for decision the court below determined that current sentencing practices for the offence of incest were inadequate.

PART VI: STATEMENT OF ARGUMENT

The instinctive synthesis

6.1 It seems now to be settled that at common law when a sentencing judge sentences an offender, the judge must engage in what is colloquially known as an intuitive or instinctive synthesis. This is a process whereby all relevant sentencing matters are taken into account and synthesised. Once this is done, the judge makes, in essence, a value judgment about the sentence that is to be imposed: see, for example, *Wong v The Queen* (2001) 207 CLR 584 ("*Wong*") at 611[74]-612[76] per Gaudron, Gummow and Hayne JJ; *Markarian v The Queen* (2005) 228 CLR 357 ("*Markarian*") at 373[37]-375[39] per Gleeson CJ, Gummow, Hayne and Callinan JJ, and at 377[50]-390[84] per McHugh J. See, also (in the Victorian context): *R v Williscroft* [1975] VR 292 at 300-301 per Adam and Starke JJ and *R v Young* [1990] VR 951 at 957 per Young CJ, Crockett and Nathan JJ. McHugh J, in *Markarian*, described the essence of sentencing according to the instinctive synthesis in these terms:

> "By instinctive synthesis, I mean the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case... A sentence can only be the product of human judgment, based on all the facts of the case, the judge's experience, the

data derived from comparable sentences and the guidelines and principles authoritatively laid down in statutes and authoritative judgments": *Markarian* at 378[51]-[52].

6.2 McHugh J, in *Markarian* (at 383[65]-384) went further. His Honour considered that he could do no better to describe "the reality of the sentencing process" than to set out in full the following important passage taken from the judgment of Jordan CJ in *R v Geddes* (1936) SR (NSW) 554 at 555-556:

> "This throws one back upon a preliminary question as to the general principles upon which punishment should be meted out to offenders. In the nature of things there is no precise measure, except in the few cases in which the law prescribes one penalty and one penalty only. In all others, the judge must, of necessity, be guided by the facts proved in evidence in the particular case. The maximum penalty may, in some cases, afford some slight assistance, as providing some guide to the relative seriousness with which the offence is regarded in the community; but in many cases, and the present is one of them, it affords none. The function of the criminal law being the protection of the community from crime, the judge should impose such punishment as, having regard to all the proved circumstances of the particular case, seems, at the same time, to accord with the general moral sense of the community in relation to such a crime committed in such circumstances, and to be likely to be a sufficient deterrent both to the prisoner and to others. When the facts are such as to incline the judge to leniency, the prisoner's record may be a strong factor in inducing him to act, or not to act, upon this inclination. Considerations as broad as these are, however, of little or no value in any given case. It is obviously a class of problem in solving which it is easier to see when a wrong principle has been applied than to lay down rules for solving particular cases, *and in which the only golden rule is that there is no golden rule.*
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> The position of the judge is analogous to that of a civil jury who are called upon to award damages for a breach of contract, or a tort, in relation to goods which have no market value, and for the assessment of the value of which no generally accepted measure exists. The jury must do the best they can; and so must the judge. In applying considerations as general as these, it is necessarily not often that it can be said, with reasonable confidence, that the sentence imposed was wrong."

6.3 Where the complaint is that a sentence is manifestly inadequate or excessive, the form of error invoked is the third type of error described by Dixon, Evatt and McTiernan JJ in *House v The King* (1936) 55 CLR 499 at 505. It is a case where the error is that the result is "unreasonable or plainly unjust". It is a case where "the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred." Put another way, "in the case of manifest excess… [or inadequacy]…, the error in reasoning of the sentencing judge is not discernible; all that can be seen is that the sentence

imposed is too heavy… [or too light]… and thus lies outside the permissible range of dispositions": see *AB v The Queen* (1999) 198 CLR 111 per Hayne J, *in diss*, at 160.

Section 5(2)(b) of the Sentencing Act 1991 (Vic.) – "current sentencing practices"

6.4 But a sentencing judge, in Victoria, must apply section 5 of the *Sentencing Act* 1991 (Vic.) ("the *Sentencing Act*"). In particular, the judge must apply section 5(2). Section 5(2) states that in sentencing an offender a court "must have regard to" certain considerations. The considerations to which regard must be had are then listed, one after the other. One such consideration – listed at section 5(2)(b) – is "current sentencing practices".

6.5 The *Sentencing Act* was introduced by the legislature after consideration of the 1988 report of the Victoria Sentencing Committee chaired by Sir John Starke QC. It is perhaps only of historical interest to record that a concern of the Committee was so-called "disparity" in sentencing as between different offenders by different judges for similar offending: see the *Report of the Victorian Sentencing Committee* 1988, Vol 1 at pp. 146 & ff. The Committee investigated how the legislature could cure this perceived problem. The judges of the Supreme Court of Victoria were invited to prepare a submission to the Committee dealing with this issue as well as other issues that were raised by the Committee. A majority of the judges responded to this invitation: the *Submission by the Majority of Judges of the Supreme Court of Victoria*, 7 September 1987 (included in Vol. 3 of the Report of the Starke Committee). It is not overstating matters to record that the judges and the Committee at times disagreed quite forcefully as to whether a problem of "disparity" as identified by the Committee actually arose and, even if it did, how it might be fixed.

6.6 In any event, in his Second Reading Speech given on 19 March 1991 to the Victorian Legislative Assembly in respect of the *Sentencing Bill*, the then Attorney General, Mr Kennan, announced that: "The Starke committee found that lack of consistency in sentencing constituted a significant injustice… ." He said, further: "This Bill promotes consistency in sentencing in a number of ways. Firstly, in clause 5, the Bill sets out the principles governing sentencing in this State… ." At the time of its introduction, and

still to this day, the *Sentencing Act* at section 1 lists as one of its purposes the promotion of "consistency of approach in the sentencing of offenders".

6.7 The matters in section 5(2) of the *Sentencing Act* to which a sentencing judge must have regard when imposing sentence were not irrelevant to the exercise of the sentencing discretion prior to the *Sentencing Act*'s commencement. Yet it can be seen how consistency might be promoted through the express legislative listing of relevant considerations coupled with a legislative phrase enjoining sentencing judges to "have regard" to the listed matters.

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6.8 This Court recently described some ways in which a Victorian sentencing judge might correctly have regard to one of those listed considerations in section 5(2), namely, "current sentencing practices" as referred to in section 5(2)(b) of the *Sentencing Act*. In *R v Kilic* (2016) 91 ALJR 131 ("*Kilic*") at 137[21]-138[25], this Court said that "having regard" to current sentencing practices might include making "proper use of information about sentencing patterns for an offence". It may include, also, taking into account "comparable cases". Such cases may, so it is said, provide a relevant "yardstick" for the sentence to be imposed in the individual case. The Court in *Kilic*, in this regard, drew upon the earlier authorities of *R v Pham* (2015) 256 CLR 550 ("*Pham*") (see, for instance, *Pham* at 558[26]-560[29]) and *Hili v The Queen* (2010) 242 CLR 520 ("*Hili*") (see, for instance, *Hili* at 535[46]-538[57]). Mention might perhaps also have been made to *Barbaro v The Queen; Zirilli v The Queen* (2014) 253 CLR 58 ("*Barbaro*") at 73[38]-74[41].

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Current sentencing practices and the instinctive synthesis

6.9 Nevertheless, this Court is yet to have concluded that the Victorian legislature purported to give greater operative significance to any one of the matters listed in section 5(2) of the *Sentencing Act* to which a sentencing judge "must have regard". For instance, the plain meaning of the terms employed in section 5(2) and section 5(2)'s position within the context of the *Sentencing Act* generally do not suggest, it is submitted, that the legislature sought to direct sentencing judges to give greater emphasis to "current sentencing practices" (section 5(2)(b)) than to any other of the listed matters contained within section 5(2). Put another way, in enacting section 5(2), it is submitted that the

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legislature did not attempt to fetter the exercise of the instinctive synthesis. In *Ashdown v R* (2011) 37 VR 341 at 382(20) ("*Ashdown*"), Ashley JA, in his Honour's dissenting judgment, cited *R v AB (No 2)* (2008) 18 VR 391 at 404[44]-405[45] in support of the proposition just mentioned. Ashley JA quoted from the relevant parliamentary debates. His Honour referred to the fact that the then Attorney told the parliament that clause 5(2) of the *Sentencing Bill* "did not endorse either instinctive synthesis or (in substance) 'two-tier sentencing', but rather left it to judges to… [in the then Attorney's words]… : '… work [their] way through those factors and, having regard to the other considerations in the rest of the clause 5, give the usual sorts of weight and so on, but it is a matter within the ordinary legal discretion of the judges.'" Ashley JA referred to the fact that the then Attorney said that requiring judges to "have regard" to the certain matters enumerated in section 5(2) "is already the law" and that the then Attorney said also:

> "We believe it is desirable to leave a reasonable amount of common-law discretion in these issues. We want to set out general guidelines, but it is not our wish to be overly prescriptive about how the discretion is exercised within those guidelines": see *Ashdown* at 381-382 quoting Hansard, Legislative Assembly, 8 May 1991, p 1941.

6.10 Consistent with this approach, dicta of this Court suggest that in having regard to "current sentencing practices" in compliance with section 5(2)(b) of the *Sentencing Act*, a sentencing judge takes this particular matter into account but ought not consider it *prima facie* dispositive or of determinative significance when it comes to the exercise of the instinctive synthesis: see, for instance, *Hili* at 537[54]-[55], *Barbaro* at 73[38]-74[41] and *Pham* at 559[28](7)-560[29].

6.11 At least two statements of principle that emanate from this Court tend against an approach that would elevate dispositive or determinative significance to "current sentencing practices": (a) a past range of sentences is not necessarily the correct range or otherwise determinative of the upper and lower limits of the sentencing discretion (*Pham* at 558[27]), and (b) appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted, unless having regard to all 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 (*Pham* at 559[28] at pt 7).

6.12 Expression of an approach to sentencing in general, and to the means by which regard may be had to "current sentencing practices" in particular, that is in accordance with those principles set out above, can be found in the earlier judgment of Nettle JA in *DPP v OJA & Ors* (2007) 172 A Crim R 181 ("*OJA*") at 195[29]-196[31] where His Honour observed as follows:

> "I start from the approach that there is no sentencing tariff as such. Apart from the maximum sentence prescribed by Parliament, the intuitive synthesis approach to sentencing implies an absence of necessary relationship between one case and another...
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> Secondly, the 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. In fact, as in theory, each case is different and so it is always possible that a sentence may properly rise above or fall below the greatest and lowest sentences previously imposed...
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> Thirdly, and importantly, it 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."

6.13 Similarly, Buchanan JA and T Forrest AJA said, in *Johnson v The Queen; Morgan v The Queen* [2011] VSCA 348 ("*Johnson*") at [23]-[24]:

> "None of the cases cited by counsel for the appellant were on all fours with the present case. In each case, the circumstances of the offence and the personal circumstances of the offender differed, so that the process of comparison involved adjustments, deducting or adding to compensate for the differences. Such an exercise has evident drawbacks. It is generally impossible to identify all the relevant factors that determine the sentences in other cases. Accordingly, sentences imposed in other cases are not to be treated as precedents which apply unless distinguishable.
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> "Other cases and sentencing statistics constitute material which may be taken into account in the instinctive synthesis that constitutes determination of a sentence but are not to dominate the question whether a particular sentence is manifestly excessive. The sentence imposed upon Johnson was not shown to be outside the range of a reasonable sentencing discretion because another case is arguably more serious and the same penalty was imposed or because a seemingly equally serious cases attracted a lesser penalty."

Current sentencing practices as dispositive of the range – a "two-stage" approach

6.14 These statements emerge from the Victorian Court of Appeal. This may be significant, for it seems that from the same court there has flowed another, materially different, view concerning how section 5(2)(b) of the *Sentencing Act* ought operate.

6.15 This second, different, approach is one that seeks to place greater emphasis on comparable past cases to the point where such past cases are used to set the numerical limits of a range of sentences that will be open to be imposed in an instant, and obviously later, case. It will be submitted below that the present case is a stark example of this second, and, it is submitted, erroneous approach.

6.16 Perhaps the most eloquent expression of the theory lying behind this alternative approach can be found in the judgment of the Victorian Court of Appeal in *Hasan v R* (2010) 31 VR 28 ("*Hasan*") at 38[44]–41[54]. The Court in *Hasan* emphasised the statement concerning the importance of consistency in sentencing that was made by Gleeson CJ in *Wong* at 591[6]. The *Hasan* court made reference to the similar dicta of Mason J in *Lowe v R* (1984) 154 CLR 606 at 611 - dicta that appeared in the context of a case about co-offenders who were engaged in the same criminal enterprise: see *Hasan* at 39[48]. The *Hasan* court cited the observations of this Court in *Hili*, namely, that the consistency that is sought "is not capable of mathematical expression" and "is consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence". Nevertheless, the Court in *Hasan* must be seen to have propounded a staged process of sentencing that is, it is submitted, inimical to the exercise of the instinctive synthesis: one whereby, so it is said, "(c)onsistency is to be achieved by the application of the appropriate range": *Hasan* at 39[49]-40[51].

6.17 What must occur first, according to the *Hasan* court, is that the applicable maximum must be examined, for it is that which will give "a definitive answer to the question where the most serious example of the offence in question stands in the catalogue of criminal behaviours". Once this assessment is completed, the judge will then be in a position to make an *objective* assessment (as distinct from one that is subjective and, thus, discretionary) of the range of sentences that have been imposed in earlier cases that are of similar gravity to the particular case. Once *that* range is arrived at, the judge can *then* exercise his or her discretion in deciding where within that objectively

established range the particular sentence must fall: see *Hasan*, generally, at 38[44]-41[54] where this process of reasoning is explained in full.

6.18 This method of sentencing, it is respectfully submitted, should be seen for what it is. It is, in essence, no different to a form of "two-stage" or "two-tiered" sentencing of the very type that was deprecated by this Court in *Markarian*: see *Markarian* at 373[37]-375[39] per Gleeson CJ, Gummow, Hayne and Callinan JJ. The form of "two-stage" reasoning from, first, objective gravity to then, secondly, the consideration of subjective matters was, similarly, the subject of trenchant criticism by McHugh J in *Markarian*: see *Markarian* at 377[50]-390[84]. But Kirby J was fundamentally of a different view: see *Markarian* at 397[110]-408[140] per Kirby J. It is an approach that, it is respectfully submitted, attempts to inject into an exercise of discretion *par excellence* a form of mathematical certainty. It is an approach of the type that moved the judges of the Supreme Court of Victoria in their submission to the Starke Committee to say that "(s)entencing is a relatively blunt instrument and there is no reason not to improve it, but it is essential to keep close touch with reality": see the *Submission by the Majority of Judges of the Supreme Court of Victoria* at p. 23. It is an approach that moved those very judges, and McHugh J almost 20 years later in *Markarian*, to cite with approval the following dicta of Lord Porter in the *Banking Case* – dicta that concerned "the way in which the human mind tries, and vainly tries, to give a particular subject matter a higher degree of definition than it will admit": see the *Submission by the Majority of Judges of the Supreme Court of Victoria* ibid, and see *Markarian* at 378[52] citing *The Commonwealth v Bank of NSW* (1949) 79 CLR 497 at 642.

The Error in the court below

6.19 The court below's approach to the assessment of the learned sentencing judge's exercise of the instinctive synthesis was, it is submitted, an instance of the erroneous *Hasan*, or "two-stage", approach to sentencing. At paragraph [49] of the judgment below the Court referred to section 5(2)(b) of the *Sentencing Act*. One can see at this point in the judgment the reference to "comparable cases" and the citation of *Hasan* at footnote 38. The Court of Appeal then surveyed a list of comparable cases that had emanated from the court or its predecessor – the Court of Criminal Appeal: see the judgment below at paragraphs [25] – [42]. These were cases of incest involving pregnancy. These

particular past cases revealed a range of sentences extending from four to seven years' imprisonment. The case of *DPP v CJA* [2013] VSCA 18 ("*CJA*") where an individual sentence of three years' imprisonment was imposed was not, as shall be seen, thought by the Court of Appeal to be relevant. It is easy to see why this was so: the victim in *CJA* was aged 19 at the time of the offending.

6.20 At paragraphs [52]-[53] of the judgment below, the Court of Appeal concluded that by dint of the sentence of four years' imprisonment imposed in two of the cases, namely *RSJ* and *BDJ*, the individual sentence of three years' and six months' imprisonment here "was not wholly outside the permissible range" and, crucially, that "*(b)ut for the constraints of current sentencing practice, the objective seriousness of the conduct constituting charge 1 demanded a considerably larger sentence than three years and six months, even allowing for the factors in mitigation*" (emphasis added).

6.21 It can be seen, therefore, that in determining whether the present sentence was manifestly inadequate the Court of Appeal has – in line with the approach described in *Hasan* – engaged in an objective assessment of past comparable cases as setting the numerical range of sentences that were reasonably open in the present case. The Court of Appeal then determined, perhaps surprisingly given that the Court of Appeal relied on no prior comparable case where a sentence of three years' and six months' imprisonment was imposed, that the present sentence was not *wholly* outside that past range.

6.22 In practice the operation of the *Hasan*, or "two-stage", approach to sentencing will mean that if on a sentence appeal complaining of either manifest excess or inadequacy, there exists a comparable case from the past where the same or similar sentence was imposed, the appellant will be in serious difficulty. The retort is always the same: the range is set by the past cases, here is a past case where the sentence is at or about what the offender received at first instance, if this is accepted how then can the instant case be considered to be wholly outside the range?

6.23 It may be enough for this appellant to rely, in the establishment of error below, upon the learning of this Court in *Kilic*. In that case this Court held that the Court of Appeal had erred in reducing a sentence by reference to other, past, cases. According to this Court, the Victorian Court of Appeal had "impermissibly treated the sentences in the few cases

mentioned... [the past cases]... as defining the sentencing range and, on that basis, concluded that, because the sentence imposed in this case exceeded the sentences imposed in all but one of the cases referred to, the sentence imposed in this case was beyond the range of available sentences": see *Kilic* at 138[24]. But, strictly speaking, it might be said that the *ratio decidendi* of *Kilic* – at least on this particular point – is to be found in the following paragraph of this Court's judgment. At paragraph [25] this Court said:

> "Cases of intentionally causing serious injury by fire are not common. The few cases mentioned by the parties could not properly be regarded as providing a sentencing pattern. There were too few of them, one dealt with a different offence, another was more than 12 years old and, in any event, as will be explained, the circumstances of the offending in each of those cases were too disparate. At best they were representative of particular aspects of the spectrum of seriousness."

6.24 In other words, it might be said that the appellant in *Kilic* succeeded not because too much emphasis was placed on current sentencing practices in a manner antithetical to the proper exercise of the instinctive synthesis, but because there were no current sentencing practices in the first place. But, even if current sentencing practices could be established in the instance of a particular offence and offender, it would be wrong, it is submitted, to look back at that practice – in the manner propounded in *Hasan* and carried out here – and use such practices in the name of consistency to set the objective range into which is then situated or plotted the individual case. To reason thus is, it is submitted, contrary to the proper exercise of the instinctive synthesis – an exercise which requires that an assessment of that which has gone before be considered to be one, and one only, of all of the relevant matters that may be taken into account in the reasoning process that produces the imposition of a just sentence. The proper application of the instinctive synthesis does not permit identification of inordinate weight or emphasis having been given to one particular relevant sentencing factor as "the chief factor" (*Hili* at 535-6[49]), nor, indeed, does it permit knowledge or identification of why a particular sentence is within or outside of the range (*Barbaro* at 75[43]). On a complaint of manifest excess or inadequacy the express or overt reasoning process followed by the judge is accepted, but it is concluded nevertheless that the instinctive synthesis must in some manner have gone awry because the sentence imposed is either too much or too little.

6.25 It is submitted that the range that is searched for by an intermediate appellate court in the instance of a sentence appeal where the complaint is manifest excess or inadequacy

is the range of possible sentences that are open to be imposed in the *instant* case, not a range solely established by other, *earlier*, cases. The act of sentencing is, in the end, but one manifestation of an attempt to protect the community where such protection is the broader or more general goal of the criminal law. The sentencing judge must, therefore, in the words of Sir Frederick Jordan quoted above in *Geddes*' case: "impose such punishment as, having regard to all the proved circumstances of the particular case, seems, at the same time, to accord with the general moral sense of the community in relation to such a crime committed in such circumstances, and to be likely to be a sufficient deterrent both to the prisoner and to others."

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6.26 As soon as this is understood, it must be appreciated that a judge cannot fulfil that obligation if he or she is compelled to divine the sentence to be imposed in the instant case by reference to an objectively established range said to be thrown up by earlier, different, cases. If, for instance, the general moral sense of the community alters and now demands significantly lesser sentences for certain forms of offending, is the sentencing judge – in the name of consistency – to impose a sentence higher than what current community expectations demand simply because of a range derived from earlier cases?

20 6.27 Perhaps, more commonly, if a sentencing judge senses that the community – expressed through its democratic representatives, or otherwise – is calling for sentences that are longer for certain types of offences committed by a particular type of offender, is that judge prevented from answering this call simply in the name of consistency, or perhaps until the appellate court signifies a prescriptive uplift for the future? This is not an idle concern. It is notorious that legislatures give real consideration to the means by which Parliament may, by legislative fiat, confine the exercise of the sentencing discretion through the legislative imposition of mandatory or mandatory-like sentences.

30 *Part "B" of the judgment below – the uplift procedure*

6.28 Correct answers to these questions necessarily throw up for consideration part "B" of the judgment below – the part of the judgment that deals with uplift: see the judgment below at paragraphs [54] & ff. This is so, because on one view of matters, it might be said that the very existence of part "B" is a further symptom of the error to which the

current ground of appeal relates. From such a perspective, it might legitimately be asked: how can a sentencing judge, if the judge is - as it were - hidebound by a range of sentences that is established by earlier cases, ever sentence in accordance with community expectations given that those very expectations will, necessarily, wax and wane over time to the point where they are out of kilter with what has gone before? The answer may be that the sentencing judge must wait until the appellate court by way of uplift (or, perhaps, downgrade) is released from the shackles of the past. But of course where this occurs the judge will not have erred in the instant case by sentencing otherwise than in accordance with the moral sense of the community. Thus, in the instance of the prescriptive uplift or downgrade, there is left arguably a manifest injustice in the individual case.

6.29 If this is so and the uplift procedure is a symptom of the problem to which the present ground relates, it may legitimately be asked whether the appellant's position is necessarily compromised by its participation in the uplift procedure that occurred in this case.

6.30 In answering that question it may first be observed, as a preliminary point, that a court has always possessed a discretion not to visit a supposed increase in the prevailing standard of sentences for a particular offence upon an individual offender, albeit there is no "binding principle" that the court must not do so: see, for instance, *Poyner v R* (1986) 66 ALR 264 per Gibbs CJ, Murphy, Wilson, Brennan and Deane JJ. Yet, where an appellate court does not visit an increase in sentence upon a particular offender because the prevailing standard of sentences for a particular offence is too low, it is doubtful that the court would refrain from pronouncing the sentence to be manifestly inadequate. Otherwise, the *ratio decidendi* of the decision would be that the sentence is within range. In such circumstances, it might be expected that the court would simply exercise its residual discretion not to intervene: as to which, see generally: *CMB v Attorney-General (NSW)* (2015) 256 CLR 346 at 358[33] per French CJ and Gageler J and 365[53]-371[69] per Kiefel, Bell and Keane JJ.

6.31 The uplift procedure carried out in the present case occurred in the name of *Ashdown* and, in particular, the judgments of Maxwell P and Redlich JA in that case. It occurred over the dissent of Ashley JA to which reference has already been made. *Ashdown* approved of a procedure whereby the Court of Appeal, on invitation by the Crown,

could signal a future uplift in "current sentencing practices" for a particular offence but in a manner that would have no bearing upon the decision in the particular case. In essence, Ashley JA was not convinced that the procedure countenanced by the majority was, *inter alia*, more than the proffering of an advisory opinion that was of no binding significance. In opposition to the reasoning of the majority, Ashley JA cited with approval the manner in which the Victorian Court of Appeal had, years earlier, increased the "tariff" for offending by way of culpable driving. This increase had occurred, so Ashley JA described, by means of the court deciding the particular cases that had come before it. Ashley JA noted that the Court of Appeal in those cases had not felt itself constrained by "current sentencing practices" or section 5(2)(b) in the process of so doing: see *Ashdown* at 374 & ff.

6.32 With respect, the reasons for decision authored by Ashley JA in *Ashdown* repay close scrutiny. Notwithstanding their length, they encapsulate – with respect – in many senses the essence of that which the appellant has attempted to convey in these submissions. Importantly, Ashley JA's reasons describe, with some portent given what occurred in this case, a relationship between an erroneous primacy or dispositive effect being given to "current sentencing practices" pursuant to section 5(2)(b) of the *Sentencing Act* in the process of sentencing generally and a consequent need for future uplift in those "current sentencing practices". Ashley JA's dissenting judgment in *Ashdown* approaches essentially the same problem that is identified by the appellant in this case, but does so primarily from the position of analysis of the uplift procedure rather than through examination of correct sentencing method. But, importantly, in striking down the uplift procedure, Ashley JA made the necessary link. His Honour cautioned that the emphasis that the uplift procedure placed on "current sentencing practices" could have the deleterious consequence of giving birth to a "two-stage" process of sentencing and thus the distortion of the process of instinctive synthesis generally: see, for instance, *Ashdown* at 371[151]-374, 397[159] and 398[167] per Ashley JA.

6.33 But returning to the position of the appellant, what can be said is that when the appellant launched its appeal it did so on a traditional basis. Although it referred to comparable cases in its Written Case "for purposes of comparison", it submitted that the sentence was manifestly inadequate "in all the circumstances" – circumstances that were listed in paragraph five, and those paragraphs that followed, of the appellant's Written Case. The terms of the appellant's Notice of Appeal lodged with the court below complained,

traditionally, that the sentence on Charge 1 was manifestly inadequate "in all the circumstances". The particulars of Ground 1 in fact made no mention of "current sentencing practices".

6.34 Nevertheless, after the appellant's material had been filed, the court below communicated with the parties via email. The Court advised the parties that: "The 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: "The related question which arises is whether current sentencing practices for incest are adequate, having regard to the gravity of the offence as reflected in the maximum penalty of 25 years' imprisonment." The Court advised, further: "The Court considers that this is an appropriate case for that question to be addressed, as occurred in *Hogarth* (2012) 37 VR 658 ("*Hogarth*") and *Harrison* [2015] VSCA 349 in relation to other offences". Details were then given as to a future directions hearing and the notification of other possibly interested parties or interveners. The email concluded with the following: "The Court's decision on the general question will not, of course, affect the outcome of the appeal."

6.35 The appellant then filed further material in line with such advice. The material sought an uplift in "current sentencing practices" for incest in respect of a category or type of case into which it was said that the current respondent fell.

6.36 But the appellant did not in effect abandon its appeal by suggesting that any increase in the instant sentence was contingent upon success in its uplift submission. Notwithstanding the content of the second sentence of the court's email quoted above, the appellant was entitled to assume that its appeal – its complaint of manifest inadequacy – would be determined as per its ground of appeal, that is to say, having regard to "all the circumstances of the case". So much, of course, is mandated by authority in this Court generally and the terms of section 5 of the *Sentencing Act* in particular. Yet, as shall be seen below, the reference in the court's email to the cases of *Hogarth* and *Harrison v R; Rigogiannis v R* (2015) 74 MVR 58 ("*Harrison*") ought perhaps have stood as a warning as to how the appellant's appeal might be approached.

6.37 The reasoning that underpinned the result of the present case, where consistent with the court's email the question of manifest inadequacy was determined by reference to prevailing current sentencing practices and those practices alone, established perhaps

the link in erroneous principle between the manner of the disposition of the appellant's appeal and the procedure that followed thereupon in part "B" of the judgment below. It is, perhaps, a demonstration of what Ashley JA in *Ashdown* warned might occur, namely, how it might be that an over-emphasis on "current sentencing practices" might have the effect of fettering the exercise of the instinctive synthesis.

Conclusion

6.38 The appellant's case in this Court is that it seeks, if successful, the remittal of this matter to the court below to be dealt with according to law. It would then seek in that court that the question of manifest inadequacy be dealt with in accordance with the instinctive synthesis approach to sentencing and not the "two-stage" or *Hasan* approach that is described above, as was employed in this case, and is – it is submitted – inimical to the proper performance of the instinctive synthesis.

6.39 The basic point that the appellant seeks to make in this Court is, it is respectfully submitted, of some significance. This is not the only occasion in which the erroneous approach described herein has been brought to bear upon the disposition of a sentence appeal. Much the same thing as occurred here occurred in *Harrison* at 75[71], where it was concluded by a similarly constituted court that but for the constraints of current sentencing practices the sentence imposed would have been "quite inadequate". In *Winch v R* (2010) 27 VR 658 at 664[27] a similarly constituted court, again, considered itself "constrained by current sentencing practices". The Court of Appeal in *Hogarth* at 674[63] allowed the "constraints of current sentencing practice" to stand in the way of an appropriate sentence in the individual case.

6.40 This Court in *Hili* pronounced in clear terms the manner in which consistency in sentencing is to be ensured by reference to comparable cases – terms that were repeated in the later cases of *Barbaro*, *Pham* and *Kilic*. Essential to the statements of principle in those cases was the recognition that past comparable cases did not set the limits of the range to be applied in any later case. Soon after *Hili* was decided the Victorian Court of Appeal decided *Hudson v R* (2010) 30 VR 610 ("*Hudson*"). In *Hudson* it was stated, in apparent conformity with *Hili*, that "(a) general overview of sentences imposed for offences of a similar character will play *a part* in informing the 'instinctive reaction'

when a court is asked to consider whether a sentence is manifestly inadequate or excessive": *Hudson* at 617[28] (emphasis added). The court in *Hudson* derided the process of close comparison between an instant sentencing case and past sentencing cases. But then, not much time later, the court in *Hasan* appeared to invite the very same close comparative analysis by insisting that past cases establish the objective range in the instance of an instant case.

6.41 It is not apparent that any other State or Territory in Australia struggles with the question of consistency of sentencing in quite the manner experienced in Victoria. It is respectfully submitted that the correct role to be played by "current sentencing practices" should be decided. From what appears above, it might be said that there is not a united position in the Victorian Court of Appeal on the issue. The appellant has propounded a method that it submits is congruent with authority. Resolution of the question can be seen to be material to the disposition of the case.

6.41 It is submitted that this appeal be allowed, the orders made below dismissing the appellant's appeal be quashed, and the matter be remitted to the Victorian Court of Appeal to be dealt with according to law.

PART VII: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

7.1 Section 5, *Sentencing Act* 1991 (Vic.). See Annexure.

PART VIII: ORDERS SOUGHT

8.1 The appellant seeks orders allowing the appellant's appeal, quashing the orders of the Court of Appeal dismissing the appellant's appeal to the Court of Appeal and remitting the matter to the Court of Appeal for determination according to law.

PART IX: PRESENTATION OF ORAL ARGUMENT

9.1 The appellant estimates 1 – 2 hours are required for the presentation of oral argument.

Dated: 27 January 2017

10

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Authorised Version No. 178

Sentencing Act 1991

No. 49 of 1991

Authorised Version incorporating amendments as at
1 March 2016

TABLE OF PROVISIONS

Part 2—Governing principles

5 Sentencing guidelines

(1) The only purposes for which sentences may be imposed are—

(a) to punish the offender to an extent and in a manner which is just in all of the circumstances; or

(b) to deter the offender or other persons from committing offences of the same or a similar character; or

(c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or

(d) to manifest the denunciation by the court of the type of conduct in which the offender engaged; or

(e) to protect the community from the offender; or

(f) a combination of two or more of those purposes.

S. 5(2AA) inserted by No. 48/1997 s. 5.

(2AA) Despite anything to the contrary in this Act, in sentencing an offender a court must not have regard to[1]—

(a) any possibility or likelihood that the length of time actually spent in custody by the offender will be affected by executive action of any kind; or

S. 5(2AA)(b) amended by No. 69/2014 s. 7.

(b) any sentencing practices arising at any time out of section 10 of this Act as in force at any time before its expiry on 22 April 1997.

(2AB) If, in sentencing an offender, a court imposes a less severe sentence than it would otherwise have imposed because of an undertaking given by the offender to assist, after sentencing, law enforcement authorities in the investigation or prosecution of an offence, the court must announce that it is doing so and cause to be noted in the records of the court the fact that the undertaking was given and its details.

S. 5(2AB) inserted by No. 69/1997 s. 4.

(2AC) Nothing in subsection (2AB) requires a court to state the sentence that it would have imposed but for the undertaking that was given.

S. 5(2AC) inserted by No. 69/1997 s. 4.

(2) In sentencing an offender a court must have regard to—

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

(ab) the baseline sentence for the offence; and

S. 5(2)(ab) inserted by No. 52/2014 s. 4.

(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

(daaa) whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated; and

S. 5(2)(daaa) inserted by No. 77/2009 s. 3.

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

S. 5(2)(daa) inserted by No. 15/2005 s. 3.

S. 5(2)(da) inserted by No. 24/1994 s. 5.

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

S. 5(2)(db) inserted by No. 24/1994 s. 5.

(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.

S. 5(2A) inserted by No. 90/1991 s. 34.

(2A) In sentencing an offender a court—

S. 5(2A)(a) amended by No. 108/1997 s. 156(a)(i).

(a) may have regard to a forfeiture order made under the **Confiscation Act 1997** in respect of property—

(i) that was used in, or in connection with, the commission of the offence;

(ii) that was intended to be used in, or in connection with, the commission of the offence;

S. 5(2A)(a)(iii) amended by No. 108/1997 s. 156(a)(ii).

(iii) that was derived or realised, or substantially derived or realised, directly or indirectly, from property referred to in subparagraph (i) or (ii);

(ab) if it is satisfied that property was acquired lawfully, may have regard to automatic forfeiture under Division 2 or 3 of Part 3 of the **Confiscation Act 1997** in respect of property—

S. 5(2A)(ab) inserted by No. 63/2003 s. 50(1), amended by No. 55/2014 s. 48(1).

(i) that was used in, or in connection with, the commission of the offence;

(ii) that was intended to be used in, or in connection with, the commission of the offence;

(iii) that was derived or realised, or substantially derived or realised, directly or indirectly, from property referred to in subparagraph (i) or (ii);

(b) must not have regard to a forfeiture order made under that Act in respect of property that was derived or realised, or substantially derived or realised, directly or indirectly, by any person as a result of the commission of the offence;

S. 5(2A)(b) amended by No. 108/1997 s. 156(b).

(c) may have regard to a pecuniary penalty order made under that Act to the extent to which it relates to benefits in excess of profits derived from the commission of the offence;

(d) must not have regard to a pecuniary penalty order made under that Act to the extent to which relates to profits (as opposed to benefits) derived from the commission of the offence;

(e) subject to paragraph (ab), must not have regard to any property forfeited under automatic forfeiture or a pecuniary penalty order made in relation to a Schedule 2 offence or a serious drug offence under that Act.

S. 5(2A)(e) inserted by No. 108/1997 s. 156(c), amended by Nos 63/2003 s. 50(2), 87/2004 s. 24(a), 55/2014 s. 48(2).

S. 5(2B) inserted by No. 90/1991 s. 34, amended by No. 108/1997 s. 156(d).

(2B) Nothing in subsection (2A) prevents a court from having regard to a forfeiture order or civil forfeiture order made under, or automatic forfeiture occurring by operation of, the **Confiscation Act 1997** as an indication of remorse or co-operation with the authorities on the part of the offender.

S. 5(2BA) inserted by No. 1/2005 s. 48.

(2BA) In sentencing an offender, a court—

S. 5(2BA)(a) amended by No. 21/2008 s. 25(1).

(a) must not have regard to the fact that the offender is subject to an extended supervision order or interim extended supervision order under the **Serious Sex Offenders Monitoring Act 2005** but, if relevant to the conditions of any sentence imposed by it, may have regard to the conditions of that order and the terms of any current directions or instructions given by the Adult Parole Board under section 16 of that Act;

S. 5(2BA)(b) amended by No. 21/2008 s. 25(1), repealed by No. 91/2009 s. 219(Sch. 3 item 2.1).

* * * * *

S. 5(2BB) inserted by No. 1/2005 s. 48.

(2BB) For the purposes of subsection (2BA)(a), the court may request the Secretary within the meaning of the **Serious Sex Offenders Monitoring Act 2005** to provide it with a report setting out—

S. 5(2BB)(a) amended by No. 21/2008 s. 25(1).

(a) the conditions of the extended supervision order or interim extended supervision order to which the offender is subject under that Act; and

(b) the terms of any current directions or instructions given by the Adult Parole Board under section 16 of that Act in relation to that order.

(2BC) In sentencing an offender a court must not have regard to any consequences that may arise under the **Sex Offenders Registration Act 2004** or the **Working with Children Act 2005** from the imposition of the sentence.

S. 5(2BC) inserted by No. 34/2005 s. 27, amended by No. 57/2005 s. 50(1).

(2BD) In sentencing an offender, a court—

S. 5(2BD) inserted by No. 91/2009 s. 219(Sch. 3 item 2.2).

(a) must not have regard to the fact that the offender is subject to an order made under the **Serious Sex Offenders (Detention and Supervision) Act 2009** but, if relevant to the conditions of any sentence imposed by it, may have regard to the conditions (if any) imposed on that order and the terms of any current directions or instructions given by the Adult Parole Board under section 119, 120(2) or 121 of that Act;

(b) must not have regard to any possibility or likelihood of an application being made under that Act for an order in respect of the offender.

(2BE) For the purposes of subsection (2BD)(a), the court may request the Secretary to provide it with a report setting out—

S. 5(2BE) inserted by No. 91/2009 s. 219(Sch. 3 item 2.2), amended by No. 65/2011 s. 4(1).

(a) the conditions of the supervision order or interim supervision order to which the offender is subject under that Act; and

(b) the terms of any current directions or instructions given by the Adult Parole Board under section 119, 120(2) or 121 of that Act in relation to that order.

S. 5(2C) inserted by No. 60/1993 s. 26, amended by Nos 35/1999 s. 37(1)(a)(b), 68/2009 s. 97(Sch. item 110.2).

(2C) In sentencing an offender a court may have regard to the conduct of the offender on or in connection with the trial or hearing as an indication of remorse or lack of remorse on his or her part.

S. 5(2D) inserted by No. 60/1993 s. 26, substituted by No. 35/1999 s. 37(2), amended by Nos 68/2009 s. 97(Sch. item 110.3), 30/2010 s. 24.

(2D) In having regard to the conduct of the offender under subsection (2C), the court may consider the extent to which the offender complied with, or failed to comply with, a requirement imposed on the offender by or under Part 5.5 of Chapter 5 of the **Criminal Procedure Act 2009**.

S. 5(2E) inserted by No. 60/1993 s. 26, amended by Nos 109/1994 s. 34(14)(a), 19/1999 s. 16(2), 68/2009 s. 97(Sch. item 110.4).

(2E) An offender who pleads guilty to an offence after the determination by the Court of Appeal[2] of a question of law reserved under section 302(2) of the **Criminal Procedure Act 2009** is to be taken to have pleaded guilty immediately after arraignment.

S. 5(2F) inserted by No. 74/2014 s. 17.

(2F) In sentencing an offender for the incidents of the commission of an offence included in a course of conduct charge (within the meaning of clause 4A of Schedule 1 to the **Criminal Procedure Act 2009**) a court—

(a) must impose a sentence that reflects the totality of the offending that constitutes the course of conduct; and

(b) must not impose a sentence that exceeds the maximum penalty prescribed for the offence if charged as a single offence.

Note

If a jury finds a person guilty of a course of conduct charge, in making finding of facts relevant to sentencing the sentencing judge determines the course of conduct in which the person engaged and by reference to which the person will be sentenced.

(3) A court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed.

(4) A court must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a sentence that does not involve the confinement of the offender.

* * * * *

S. 5(4A) inserted by No. 48/1997 s. 8(1), amended by No. 2/2002 s. 4(4), repealed by No. 65/2011 s. 4(2).

(4B) A court must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a drug treatment order.

S. 5(4B) inserted by No. 2/2002 s. 4(5), amended by No. 65/2011 s. 4(3).

S. 5(4C) inserted by No. 69/2014 s. 16.

(4C) A court must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a community correction order to which one or more of the conditions referred to in sections 48F, 48G, 48H, 48I and 48J are attached.

S. 5(5) amended by No. 65/2011 s. 4(4).

(5) A court must not impose a drug treatment order unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a community correction order.

S. 5(6) amended by No. 65/2011 s. 4(5).

(6) A court must not impose a community correction order unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by imposing a fine.

(7) A court must not impose a fine unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a dismissal, discharge or adjournment.

S. 5A inserted by No. 41/1993 s. 5, repealed by No. 48/1997 s. 7(3), new s. 5A inserted by No. 52/2014 s. 5.

5A Sentencing for a baseline offence

(1) If the Act that creates an offence, or prescribes the maximum penalty for an offence, specifies a period as the baseline sentence for the offence, then—

(a) the offence is a baseline offence; and

(b) the period specified as the baseline sentence for the offence is the sentence that the Parliament intends to be the median sentence for sentences imposed for that offence in accordance with this section.

(2) Sentencing practices must give effect to the intention set out in subsection (1)(b).

(3) In sentencing an offender for a baseline offence, a court—

(a) must do so in a manner that is compatible with Parliament's intention as set out in subsection (1)(b); and

(b) for the purpose of doing so, must disregard any provision of this Part (including the requirement to have regard to current sentencing practices) if not to do so would be incompatible with that intention; and

(c) subject to paragraph (b), is required or permitted to take into account any matters that a court is required or permitted to take into account in sentencing an offender.

Note

Matters that the court is required or permitted to take into account may, depending on the circumstances of the case, include the entering of a plea of guilty or the presence of any other mitigating factor or of any aggravating factor. Taking those matters into account contributes to the court's consideration of what is an appropriate sentence to impose in the case before it compared with a case for which the median sentence would be appropriate. The outcome of that consideration will determine whether the sentence imposed should be equal to, or the degree to which it should be greater or lesser than, the baseline sentence.

(4) A court that sentences an offender for a baseline offence must at the time of doing so state the reasons for imposing that sentence including its reasons for it being equal to or greater or lesser than (as the case requires) the baseline sentence for the offence.

(5) In imposing a total effective sentence in respect of 2 or more sentences, one or more of which is for a baseline offence, a court must sentence in accordance with this section for any baseline offence included in the total effective sentence.

S. 5A(6) amended by No. 63/2014 s. 7(17).

(6) A reference in this section to a baseline offence includes being involved in the commission of a baseline offence.

(7) This section does not apply in relation to sentencing for a baseline offence if—

(a) the offender was under the age of 18 at the time of its commission; or

(b) the offence is heard and determined summarily.

S. 5B inserted by No. 52/2014 s. 5.

5B Median sentence

A reference in section 5A to a median sentence for sentences imposed for an offence is to a median where—

(a) both custodial and non-custodial sentences are considered, other than sentences imposed—

(i) on an offender for an offence committed when he or she was under the age of 18; or

(ii) for an offence heard and determined summarily; and

(b) if a total effective sentence is imposed in respect of 2 or more sentences, at least one of which is for a relevant offence, the term of the individual sentence for any such relevant offence is treated as the term of the sentence for that offence; and

(c) the length of that part of a partially suspended term of imprisonment that is not held in suspense is treated as the term of the sentence; and