

Director of Public Prosecutions v Dalgliesh (a pseudonym) [2017] HCA 41:
current sentencing practice is not a “controlling factor” when sentencing -
when an offender enters a plea of guilty the only expectation that an
offender can have at sentence is of a just sentence according to law.



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Case: *Director of Public Prosecutions v Dalgliesh (a pseudonym) [2017] HCA 41*

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Three key points from *Director of Public Prosecutions v Dalgliesh [2017] HCA 41:*

- i) Current sentencing practice is not a “controlling factor” when sentencing but rather just one of the several factors a sentencing court must have regard to under s 5(2) of the *Sentencing Act 1991 (Vic)*.¹
- ii) Current sentences for incest were so manifestly disproportionate to the gravity of the offending, the moral culpability of the offender and the maximum penalty of the offence that it resulted in an error of principle: the Court of Appeal had to correct that error of principle and not continue to sentence offenders contrary to legal principle due to current sentencing practices.²
- iii) When an offender enters a plea of guilty the only expectation that an offender can have at sentence is of the imposition of a just sentence according to law (for example, by the court having regard to the numerous factors under s 5(2)). An offender cannot expect current sentencing practices to be a controlling factor when being sentenced.³

¹ *Director of Public Prosecutions v Dalgliesh (a pseudonym) [2017] HCA 41* at [9] per Kiefel CJ and Bell and Keane JJ.

² *Director of Public Prosecutions v Dalgliesh (a pseudonym) [2017] HCA 41* at [53] per Kiefel CJ, Bell and Keane JJ.

³ *Director of Public Prosecutions v Dalgliesh (a pseudonym) [2017] HCA 41* at [65] and [67] per Kiefel CJ and Bell and Keane JJ.

Introduction

Director of Public Prosecutions v Dalgliesh (a pseudonym) [2017] HCA 41 (*Dalgliesh*), is a Victorian Director's appeal regarding current sentencing practice for the offence of incest. The Director argued that the sentence was manifestly inadequate. 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.⁴

However, the High Court (Kiefel CJ and Bell and Keane JJ in a joint decision with Gageler and Gordon JJ agreeing in a separate decision) held that the Victorian Supreme Court of Appeal erred by treating the range established by current sentencing practices as decisive of the appeal before it.⁵

Instinctive synthesis

Section 5(2) cannot be applied mechanically" and the "the balancing of the factors listed in s 5(2) ... is a matter of instinctive synthesis"

Section 5(2)(b) of the *Sentencing Act 1991* (Vic) (the *Sentencing Act*) states that when sentencing an offender a court must have regard to current sentencing practices. However, Kiefel CJ and Bell and Keane JJ (the majority) said that there are numerous factors under s 5(2) that a court must take into account when sentencing. The majority emphasised that the High Court authorities provide that "s 5(2) cannot be applied mechanically"⁶ and that "the balancing of the factors listed in s 5(2) ... is a matter of instinctive synthesis".⁷

Current sentencing practices (s 5(2)(b)) "is only one factor ... it is not ... the controlling factor"

Dalgliesh concerned the significance that the Court of Appeal gave to s 5(2)(b) of the *Sentencing Act* (which compels a court to have regard to current sentencing practices) in determining the adequacy of the sentence given to the accused.

The majority held that in this regard: "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".⁸

⁴ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [64] and [128].

⁵ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA at [2] per Kiefel CJ and Bell and Keane JJ and at [86] per Gageler and Gordon JJ.

⁶ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [4] per Kiefel CJ and Bell and Keane JJ, citing at fn 3: *Elias v The Queen* (2013) 248 CLR 483 at 494 [27] per French CJ, Hayne, Kiefel, Bell and Keane JJ; [2013] HCA 31. See also s 5(1)(a) of the *Sentencing Act*.

⁷ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [5] per Kiefel CJ and Bell and Keane JJ, citing at fn 5: *Wong v The Queen* (2001) 207 CLR 584 at 611 [75] per Gaudron, Gummow and Hayne JJ; [2001] HCA 64 (emphasis in original, footnote omitted).

⁸ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [9] per Kiefel CJ and Bell and Keane JJ.

Careful attention to maximum penalties will almost always be required (s 5(2)(a))

The majority observed the importance of considering the "maximum penalty prescribed for the offence" under s 5(2)(a) of the *Sentencing Act*:

"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*⁹, 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 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."¹⁰

The majority noted that the range of sentences applied by the sentencing judge in *Dalgliesh* "pays scant, if any, regard to the maximum penalty prescribed for the offence of incest".¹¹

The proceedings

Summary of the charges and offending

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.¹²

Charge 1 (incest under s 44(2) of the *Crimes Act 1958* (Vic)) forms the basis of the appeal

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.¹³

A circumstance of this offence is that during one incident, the respondent moved himself towards A and inserted his penis into her vagina and ejaculated inside her. A was aged 13 at the time and as a result, A fell pregnant.¹⁴ The sentencing judge considered this an aggravating factor of the offending.¹⁵

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 respondent knew of both the pregnancy and A's lie to her mother as to its cause. The pregnancy was terminated.¹⁶

⁹ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41, fn 7: (2005) 228 CLR 357 at 372 [31].

¹⁰ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [10] per Kiefel CJ and Bell and Keane JJ.

¹¹ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [11] per Kiefel CJ and Bell and Keane JJ.

¹² *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [12].

¹³ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [13].

¹⁴ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [16].

¹⁵ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [20].

¹⁶ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [17].

Charges 2 and 3

Charges 2, incest, and 3, indecent assault, 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.

The sentence

On charge 1, the respondent was sentenced to three years and six months' imprisonment.

On charge 2, he was sentenced to three years' imprisonment.

On charge 3, to 18 months' imprisonment.

On charge 4, to three years' imprisonment.

Cumulation was as follows: 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.

The total term of imprisonment was five years and six months, with a non-parole period of three years imposed.

The respondent was also declared to be a serious sex offender and placed on the Sex Offenders Register for life.¹⁷

The Director's two grounds of appeal to the Court of Appeal

The Director lodged a notice of appeal on two grounds.

The first ground of appeal was that the sentence imposed on charge 1 was manifestly inadequate.

The second ground of appeal was that the orders for cumulation resulted in a total effective sentence which was manifestly inadequate (ground 2).¹⁸

The Court of Appeal hearing

The Director submitted that the sentence of three years and six months' imprisonment on charge 1 was manifestly inadequate and that the offending fell within the mid-range category of seriousness, with pregnancy being an obvious aggravating factor.¹⁹ In response, the respondent argued that, while the sentence on charge 1 "could be characterised as lenient", it was nevertheless within the permissible range open to the sentencing judge, as demonstrated by current sentencing practices.²⁰

The Court of Appeal (Maxwell ACJ, Redlich and Beach JJA) dismissed the Director's 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."²¹

¹⁷*Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [23].

¹⁸*Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [24] to [25].

¹⁹ For the Director's submissions see *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [26].

²⁰ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [27].

²¹ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] VSCA 148 at [5] per Maxwell ACJ, Redlich and Beach JJA.

Part A of the Court of Appeal's judgment: reasons for dismissing the appeal

The Court of Appeal considered 12 cases of incest involving pregnancy, in which the range of sentences extended from four to seven years' imprisonment.²² The cases of *Director of Public Prosecutions (Vic) v BGJ* (2007) 171 A Crim R 74 (*BGJ*) and *RSJ v The Queen* [2012] VSCA 148 (*RSJ*) persuaded the Court of Appeal that the sentence on charge 1, "though extremely lenient, was not wholly outside the permissible range."²³

Part B of the Court of Appeal's judgment: current sentencing practices for the offence of incest are inadequate and do not reflect the objective gravity of such offending or the moral culpability of the offender.

After reviewing the sentencing information provided to it, the Court of Appeal concluded that in regard to incest: "current sentencing does not reflect the objective gravity of such offending or the moral culpability of the offender."²⁴

Their Honours also 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.²⁵

The Court of Appeal concluded that current sentencing practices for incest reveal "error in principle" and are "demonstrably inadequate":

"[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."²⁶

²² *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [31]. See *Dalgliesh* at [30] to [33] for discussion of the cases that the Court of Appeal considered.

²³ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [33], citing *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [64].

²⁴ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [34], citing *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [64].

²⁵ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [34], citing *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [78].

²⁶ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [35], citing *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [128] (citations omitted).

Where the Court of Appeal went wrong in the eyes of the High Court

The Court of Appeal then 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.²⁷

The Court of appeal then concluded that:

"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."²⁸

Appeal to the High Court

The Director's submissions

The Director argued 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 restrict the exercise of the instinctive synthesis.²⁹ The Director also submitted the following: 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; that the Court of Appeal erred in regarding *BGJ* and *RSJ* as fixing the range of sentences appropriate to the worst category of incest; and the Court recognised, in Part B of its reasons, that current sentencing practices were endemically inadequate for the offence of incest.³⁰

Respondent's submissions

The respondent submitted that the Court of Appeal was correct to consider the statutory requirement of having regard to "current sentencing practices", which promotes a consistency of approach in the sentencing of offenders because like cases should be treated in a like manner. The respondent also submitted that the Court of Appeal did not support an approach to sentencing which was inconsistent with the instinctive synthesis.³¹

BGJ* and *RSJ

The Court of Appeal calibrated the range of sentences available in *Dalgliesh* by comparing it to the decisions of *BGJ* and *RSJ*, which Their Honours saw as sentences appropriate to the worst category of incest involving pregnancy. Since Their Honours saw *Dalgliesh* as a case of mid-level seriousness, Their Honours concluded that the sentence in *Dalgliesh*: "must be substantially lower than the sentences imposed in those cases [namely *BGJ* and *RSJ*"]".³²

²⁷ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [36], citing *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [132].

²⁸ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [36], citing *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148 at [132].

²⁹ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [39].

³⁰ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [40].

³¹ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [41] (citations omitted).

³² See *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [44].

The Court of Appeal's use of *BGJ* and *RSJ* was unorthodox in two respects

The majority held that this use of the decisions in *BGJ* and *RSJ*³³ 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;³⁴ and secondly, the Court of Appeal misunderstood what is involved in identifying an offence as falling within the worst category³⁵.³⁶

In regards to the latter point, the majority emphasised the authority *R v Kilic* [2016] HCA 48 (*R v Kilic*), where the High Court held that it is confusing and likely to lead to error, to describe an offence which does not warrant the maximum penalty, as an offence which is in the “worst category” of an offence. The High Court expressly said in *R v Kilic* that the type of description given by the Court of Appeal in *Dalgliesh*, is “a practice which should be avoided”:

"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 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 ...

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.”³⁷

The majority explained why this approach was wrong

The majority in *Dalgliesh* explained that:

“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 court³⁸. 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,

³³ In Part B of the Court of Appeal's reasons.

³⁴ *Markarian v The Queen* (2005) 228 CLR 357 at 372-375 [30]-[39].

³⁵ As stated and explained by the High Court in *R v Kilic* (2016) 91 ALJR 131 at 137 [18]-[19]; 339 ALR 229 at 234-235; [2016] HCA 48.

³⁶ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [45] per Kiefel CJ and Bell and Keane JJ.

³⁷ *R v Kilic* [2016] HCA 48 at [18]-[19]; as cited by the majority in *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [45] per Kiefel CJ and Bell and Keane JJ. See the majority citation for further cases in *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41, fn 47: [*R v Kilic*] (2016) 91 ALJR 131 at 137; 339 ALR 229 at 234-235; (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.

³⁸ in *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41, fn 48: See also *Markarian v The Queen* (2005) 228 CLR 357 at 372 [31].

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."³⁹

Current sentencing practices as a controlling factor

The majority held that it was clear that the Court of Appeal dismissed the Director's appeal due to "only a perceived need to adhere to current sentencing practices" and that the perceived "constraints of current sentencing" were the determinative factor in the appeal.⁴⁰ The majority emphasised the bifurcated approach to the determining the appeal (namely, delivering a judgment split into 'Part A' and 'Part B'), was the result of "the overriding importance attached to the need to adhere to the range suggested by the comparable cases" when determining the Director's appeal.⁴¹

Individualised justice and consistency in sentencing

The majority re-stated three key High Court authorities regarding individualised justice and consistency in sentencing.

Individualised justice

Regarding individualised justice, the majority cited, *Elias v The Queen* [2013] HCA 31 (*Elias*), where French CJ, Hayne, Kiefel, Bell and Keane JJ said: "[t]he administration of the criminal law involves individualised justice".⁴² After citing *Elias* the majority noted that 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".⁴³

Consistency in sentencing

The majority then addressed consistency in sentencing. On this topic, the majority cited *Wong v The Queen* [2001] HCA 64 (*Wong*) where Gleeson CJ said: "[t]he administration of criminal justice works as a system ... It should be systematically fair, and that involves, amongst other things, reasonable consistency."⁴⁴

The majority then restated what French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ explained by in *Hili v The Queen* [2010] HCA 45 (*Hili*): "[t]he consistency that is sought is consistency in the application of the relevant legal principles."⁴⁵

³⁹ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [46] per Kiefel CJ and Bell and Keane JJ.

⁴⁰ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [48] per Kiefel CJ and Bell and Keane JJ.

⁴¹ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [48] per Kiefel CJ and Bell and Keane JJ.

⁴² *Elias v The Queen* [2013] HCA 31 at [27]; (2013) 248 CLR 483 at 494-495, as cited in *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [49] per Kiefel CJ and Bell and Keane JJ.

⁴³ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [49] per Kiefel CJ and Bell and Keane JJ.

⁴⁴ *Wong v The Queen* [2001] HCA 64 at [6], as cited in *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [49] per Kiefel CJ and Bell and Keane JJ, at fn 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].

⁴⁵ *Hili v The Queen* [2010] HCA 45 at [49]; (2010) 242 CLR 520 at 535 [49], as cited in *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [49] per Kiefel CJ and Bell and Keane JJ.

Subsection 5(2)(b) is a statutory expression of the concern that a reasonable consistency in sentencing should be maintained, however reasonable consistency does not require adherence to a range of sentences that is demonstrably contrary to principle

Subsection 5(2)(b) of the *Sentencing Act* compels a court to have regard to current sentencing practices. The majority said that this subsection informs the process of instinctive synthesis when sentencing and that it is “a statutory expression of the concern that a reasonable consistency in sentencing should be maintained as an aspect of the rule of law”.⁴⁶

However, the majority held that:

“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.”⁴⁷

The Court of Appeal erred in concluding that the range according to current sentencing practice must apply. By doing so, the Court disregarded the gravity of offending, moral culpability of the offender and the maximum sentence for that offence

The majority said that the Court of Appeal was correct to conclude that current sentencing practices did not reflect the objective gravity of the offending. However, the majority held that the Court of Appeal erred in concluding that the range according to current sentencing practice must apply due to the need for reasonable consistency when sentencing.

The majority said that by doing so, the Court of Appeal disregarded the gravity of offending, moral culpability of the offender and the maximum sentence for that offence:

“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.”⁴⁸

⁴⁶ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [50] per Kiefel CJ and Bell and Keane JJ.

⁴⁷ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [50] per Kiefel CJ and Bell and Keane JJ.

⁴⁸ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [53] per Kiefel CJ and Bell and Keane JJ.

The decision of *Kaye* (1986) 22 A Crim R 366 started a sentencing practice in Victoria where incest offences received lower sentences

The majority identified that the decision of *Kaye* (1986) 22 A Crim R 366 (*Kaye*) started a sentencing practice in Victoria where incest offences received lower sentences:

“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... 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.

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*.”⁴⁹

Patrick Tehan QC,⁵⁰ has identified one key matter that the majority has either overlooked or, taken into account, but not expressly acknowledged regarding *Kaye*: the offender in *Kaye* was a “mental defective” and this no doubt enlivened sentencing principles which led to a reduced mental element of offending which therefore reduced the moral culpability of the offender and in turn lowered the sentence imposed in *Kaye*.

The Director's appeal should have been allowed

The majority held that the 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.⁵¹

The majority explained that:

“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 recognised⁵². 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.”⁵³

⁴⁹*Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [57] – [58] per Kiefel CJ and Bell and Keane JJ.

⁵⁰ Patrick Tehan QC is a senior Appellate Advocate at the Victorian Bar who has appealed in many landmark appeals. In 2017 Patrick was officially inducted as a ‘Legend of the Victorian Bar’ as part of the ‘Bar Legends’ scheme of the Victorian Bar, which is essentially the Victorian Bar’s equivalent of the ‘Hall of Fame’.

⁵¹ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [60] per Kiefel CJ and Bell and Keane JJ.

⁵² *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41, fn 68: *Everett v The Queen* (1994) 181 CLR 295 at 300; *R v Clarke* [1996] 2 VR 520 at 522.

⁵³ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [63] per Kiefel CJ and Bell and Keane JJ.

Current sentencing practices and the plea of guilty

When an offender enters a plea of guilty the only expectation that an offender can have at sentence is of the imposition of a just sentence according to law

When *Dalgliesh* was heard before the Court of Appeal, the Court adopted the approach taken in its previous decision of *Ashdown v The Queen* [2011] VSCA 408 (*Ashdown*), where the Court of Appeal held that when an offender pleads guilty he or she does so in the expectation that he or she will be sentenced consistently and in accordance with current sentencing practices.⁵⁴

The majority in *Dalgliesh* held that this approach was expressly wrong:

“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.”⁵⁵

The majority elaborated that:

“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 [that there are benefits for a plea of guilty] ... 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.”⁵⁶

The majority then emphasised that if an offender expected to be sentenced in accordance with current sentencing practices, in a way that was not balanced by the other considerations in s 5(2), and which would result in a sentence that was manifestly inadequate, then that expectation would be inconsistent with s 5(2).⁵⁷ The majority concluded that:

“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.”⁵⁸

⁵⁴ *Ashdown v The Queen* [2011] VSCA 408 at [5] and [207], as cited in *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [64] per Kiefel CJ and Bell and Keane JJ.

⁵⁵ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [65] per Kiefel CJ and Bell and Keane JJ.

⁵⁶ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [67] per Kiefel CJ and Bell and Keane JJ.

⁵⁷ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [68] per Kiefel CJ and Bell and Keane JJ, citing at fn 72: Cf *Green v The Queen* (2011) 244 CLR 462 at 497 [106]; [2011] HCA 49.

⁵⁸ *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [68] per Kiefel CJ and Bell and Keane JJ.

Conclusion and orders

The majority held that 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.⁵⁹

Accordingly, the majority allowed the appeal, set aside the Court of Appeal's order which dismissed the Director's appeal and remitted the matter back to the Court of Appeal for determination of the appeal against sentence.⁶⁰

A handwritten signature in black ink that reads "Harry Venice". The signature is written in a cursive style with a large, stylized 'H' and 'V'.

Harry Venice

Owen Dixon Chambers

31 October 2016

⁵⁹*Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [76] per Kiefel CJ and Bell and Keane JJ.

⁶⁰*Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 at [77] per Kiefel CJ and Bell and Keane JJ.