ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE
CASE STUDY 15

SUBMISSIONS ON BEHALF OF JULIE GILBERT, SIMONE BOYCE, KYLIE ROGERS, SHARYN ROGERS AND JOHN ROGERS AS TO THE EFFECT OF *R V WRUCK* [2014] QCA 39

THE ISSUE

1. In her advice memorandum of 26 March 2004, Ms Cunneen SC advised that the offences alleged against Mr Volkers were *"relatively trivial"* and that *"the likely outcome even if there was the prospect of conviction would be a non-custodial penalty"* (Tender Bundle tab 28, page 16 para 72).

2. Ms Cunneen maintained this position in her evidence before the Commission, saying: *"I did look at the statistics and I found that they broadly reflected the situation in New South Wales, and it was certainly the case that had Mr Volkers been convicted, he almost certainly would have been given a non-custodial sentence because of the antiquity and the nature of the offences"* (Transcript page 8670).

3. In this context, there was discussion of the principles applicable in Queensland upon sentence for historical child sex offences at the time of Ms Cunneen's advice. In particular, would an offender being sentenced in 2004, for offences occurring in 1984 to 1987, be sentenced according to the approach described in *R v Pham* [1996] QCA 003 at page 3: *"...this Court has clearly indicated that, other than in exceptional circumstances, those who indecently assault or otherwise deal with children should be sent to jail"*?

4. For the purposes of considering this question, his Honour Justice McClellan sought submissions in relation to the effect of *R v Wruck* [2014] QCA 39.

RETROSPECTIVITY

5. If the approach taken by Holmes JA at paragraphs [25]-[31] in *Wruck* was applied, the "*Pham* approach" would have no application upon a sentence for the alleged offences against Volkers if they were dealt with now. That is, her Honour found that there was no rule prior to *Pham* which required exceptional circumstances to be identified before a non-custodial sentence could be imposed.

6. However, it may fairly be observed that this position was far from clear at the time of Ms Cunneen's advice in 2004 in circumstances where:

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a. As Holmes JA observes at [24], there was prior to *Wruck* no appellate determination in Queensland of whether current sentencing practices should be given retrospective effect;

b. Of the interstate authorities her Honour identified as addressing the matter, only one pre-dated Ms Cunneen's advice – *R v MJR* (2002) 54 NSWLR 368; and

c. In *MJR*, Mason P in dissent (albeit alone on a five member bench) had opined that (in Holmes JA's summary):

> *"... current practices, which were likely to reflect a greater understanding about the long-term effects of child sexual abuse and judicial response to changing community attitudes, should prevail"*.

PRINCIPLES AT THE TIME OF MS CUNNEEN'S ADVICE IN 2004

7. Further, notwithstanding *Wruck*, Queensland authorities as at 2004 did not support the view that Mr Volkers was almost certain, or even likely, to receive a non-custodial sentence for each of the alleged offences.

8. As noted by Holmes JA in *Wruck* at [16], the Queensland Full Court in 1979 considered that *"it could not be said that a gaol sentence should necessarily be regarded as the norm"* for indecent dealing offences and *"the circumstances surrounding [such offences] are so varied as well as the circumstances of the individual that any suggestion of a 'tariff' for offences of this nature is inappropriate*": *R v Warren; ex parte Attorney General* [1979] Qd R 268.

9. In *R v H* (1993) 66 A Crim R 505, the Queensland Court of Appeal conducted a review of appellate decisions, in cases between 1984 and 1993, involving sentencing for indecent dealing based on interference with young girls by parents or persons in the positions of parents (including a tutor, a family friend, a day care centre proprietor, a foster parent and a boarder), most of which involved (at 509) "*very intimate sexual contact short of penetration and in most there was an absence of physical injury"*.

10. In a joint judgment, the Court of Appeal said (at 510):

> *"The review of the cases would seem to indicate that whilst it is not impossible for a non-custodial sentence to be imposed, very special circumstances will be needed before such a result may occur. .... The most common recent range in cases of this kind is between two and three years imprisonment."*

11. In *R v H* a total of 13 decisions involving indecent dealing charges was examined. Only three of the 13 cases attracted non-custodial sentences. The Court explained the

upholding of non-custodial sentences in two of the cases by virtue of "*special circumstances*".

12. *R v Goulding* [1994] QCA 276 was a case of indecent dealing with a child under the age of 14 that occurred between 31 December 1981 and 1 January 1983. It involved an offender in a position of trust and authority (a family friend), and disparity of age between the offender and complainant. The offender was sentenced to two years imprisonment, which was upheld on appeal.

13. *R v Solway* [1995] QCA 374 involved four counts of indecent dealing with a girl under the age of 14 years and one with a girl under the age of 16 years. The offences took place between 1986 and 1990. The offender was sentenced to two years and six months on each count, which was undisturbed on appeal. President Fitzgerald, at page 4, said *"Leaving aside matters in which, by such evidence or otherwise, a case for special consideration is established, child molesters should, in my opinion, be sent to jail."*

14. *R v Jackson; ex parte AG* [2001] QCA 445 concerned multiple counts of indecent dealing committed between 1979 and 1987. Davies JA, who delivered the leading judgment, referred to the matter as "a most unusual case for a number of reasons" which prevented a finding that a four year suspended sentence was manifestly inadequate. Ambrose J, agreeing, said there were "exceptional circumstances which in the present case justified the fully suspended sentence" but that the type of offending involved would normally attract a custodial sentence.

15. Nothing in *Wruck* contradicts the line of authority identified in *R v H* and the subsequent decisions referred to above, which shows that, in 2004, custodial sentences were more likely than non-custodial sentences for indecent assault offences against children committed at about the time of Mr Volkers' alleged offences or, at least, that it could not be accurately said in 2004 that a non-custodial sentence was likely.

16. Upon a sentence of Mr Volkers for the matters alleged by the complainants here, there are a number of features which would support the imposition of a custodial component in sentencing:
    a. Conviction after a trial;
    b. A complete lack of remorse;
    c. Multiple complainants, ranging from 12 years old;
    d. His position of trust; and
    e. The impact upon the complainants.

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