

COPY

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Attention: Mr Tolhurst

Re: Mrs J. Gilbert

This is to confirm oral advice I gave today in conference with Mrs Gilbert and her husband.

Mrs Gilbert says that when she was a young girl (about 13, I believe), her then swimming coach, a Mr Volkers, indecently assaulted her on a number of occasions. Volkers was charged by the police, and, after a committal hearing, committed for trial. The DPP has subsequently decided not to proceed with the case.

In conference today I advised Mrs Gilbert what avenues are open to her in order to redress what she sees as a wrong. I must say that, in my opinion, the way the decision was arrived at appears irregular, and the reasons given for it inadequate. She is justified in feeling that there has been an injustice.

When a person is assaulted as Mrs Gilbert says she was, the assault is both a civil wrong against her and a crime against the State. She can sue in the civil court for

damages. The State can prosecute in the criminal court seeking a penalty by way of fine or imprisonment.

I set out below the various remedies which are, and are not available to Mrs Gilbert.

Civil Action for Assault

Mrs Gilbert could issue civil proceedings seeking damages for assault. However, these proceedings must be commenced within a certain time, and time has long since expired for commencing this action. If she sues, Volkers can be expected to plead the limitation statute (although he is not obliged to) and the proceedings will be dismissed. She will be ordered to pay his costs.

A Private Prosecution

Prosecutions for the more serious offences (which are tried by a jury) are conducted by the Director of Public Prosecutions. The DPP has an absolute discretion whether or not to proceed with a charge, what charge to prefer and whether or not to accept a plea of guilty from the accused. There is no appeal from, or review of the DPP's decision. The court has no control over the DPP's decisions, except in the rare case where the court believes that a prosecution amounts to an abuse of the court's process.

However, there is provision in the Criminal Code (s. 686) for a private person to seek from the Supreme Court leave to conduct a private prosecution.

There are two difficulties.

In the first place, the circumstances have to be exceptional. The court would be very reluctant to intervene in the prosecutorial process when the DPP has made a decision about a particular case. Nonetheless, I think that the circumstances of this case are so unusual that there are reasonable prospects of obtaining leave.

The second difficulty is that, as a condition of obtaining leave, the applicant (Mrs Gilbert) must give security in case she is ordered to pay Volkens' costs of defending the prosecution, if, after a trial, he is acquitted. This means putting up e.g. cash or a bank guarantee for a sum thought by the court to be sufficient (a sum of \$50,000 was suggested in conference). If Mrs Gilbert is unwilling or unable to offer security, there is no point in making an application.

Defamation Action by Volkens

The ideal situation for Mrs Gilbert, short of the DPP deciding to go on with the case, is for Volkens to sue her for defamation based on her statements on the "Australian Story" programme on 10 February last. If he does, she can plead a defence of truth and public benefit. This will allow her to prove, in the civil court (where the standard of proof is lower than in the criminal court) that the statements she made about him on the programme are true.

However, as I advised in conference, if Volkens is properly advised, he will be told that he would be most unwise to commence such proceedings, unless he wants to have Mrs Gilbert's allegations aired and tried in the civil court.

Defamation Action Against Volkert's Solicitor

I was shown draft proceedings for a defamation claim against Shields based on his public utterances after the DPP decided to drop the charges.

His statements were certainly defamatory, in that they carry the implication that Mrs Gilbert's complaint to the police was false. However, whether or not it is wise to sue him for defamation is another matter.

In the first place, he will plead defences which it will not be easy for Mrs Gilbert to overcome. For example, he will plead that he made the statements in good faith for the purpose of protecting the interest of his client, Volkert. This leaves Mrs Gilbert to plead and prove that the statements were not made in good faith, in that he went further than was reasonably necessary for the purpose of protecting his client's interests. Whether that is so is a matter of degree and opinion. If the judge (or jury) trying the case was not persuaded that he went further than necessary, then his defence would succeed and Mrs Gilbert would lose and be ordered to pay his costs.

Secondly, whether or not Mrs Gilbert's allegations against Volkert are true would not be aired in that action. The question would be whether Shields went too far.

Thirdly, I think, having seen the ABC programme, that Mrs Gilbert has achieved much towards vindicating her complaint by being able to air it on nation-wide TV. A national audience has seen and heard her tell her story. The audience is in a position to judge whether she is truthful or not - something that only those attending a

criminal trial would have the opportunity to do. A much wider audience is now able to judge whether her complaint is likely to be true.

For the above reasons, I doubt that it is wise to proceed with the action against Shields, at least at this stage.

Judicial Review of the DPP's Decision

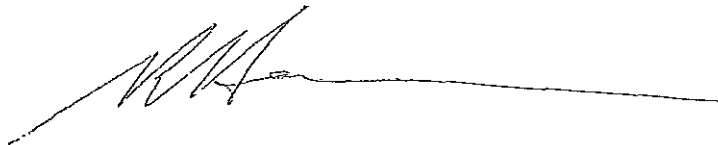
The *Judicial Review Act* 1991 empowers the Supreme Court to review certain decisions by public officials. This is often a useful remedy for citizens dissatisfied with a decision by an official.

The court does not decide whether or not the decision was correct, but looks at whether the proper procedures were followed during the decision-making process.

However, many decisions are exempt from review, and the DPP's decisions are amongst the exemptions.

If you think I can be of any further assistance, please contact me.

With compliments,

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.