



Queensland
Government

Director of Public Prosecutions - Leanne Clare
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Office of the
Director of Public Prosecutions

Department of
Justice and Attorney-General

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CRIME AND MISCONDUCT COMMISSION

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CC BY

Dear Colleagues

Re: SCOTT VOLKERS

I refer to your letter dated 31 March 2003.

I can assure you that any new brief of evidence will be considered carefully and objectively in accordance with established principles. I also need to make clear that I am satisfied that the original decision to discontinue the prosecution was the correct decision on the evidence available to my office.

I sympathise with Mr's Gilbert's desire to have her matter resolved by a jury. At the same time prosecutorial decisions have to be made dispassionately within the legal framework of our system of criminal justice. There is a significant distinction between truth and the capacity to prove the truth. I am acutely aware of the frustration and despair that this distinction can cause victims of crime.

A prosecution should not proceed if there is no reasonable prospect of securing a conviction before a hypothetical jury. This has been the prosecution policy of Queensland for 15 years. It is also the policy of every other jurisdiction in the country. The test must be applied dispassionately in every case. It involves detailed consideration of the strength of the case as it is likely to be presented in court; regard has to be had to the admissibility of evidence and matters that could be properly used to attack the credibility of a witness.

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The decision to discontinue the prosecution in respect of Mrs Gilbert's complaint was never a judgment about her truthfulness. It was a reflection of the heavy burden of proof on the prosecution, or in other words, a reflection of the need for the evidence as a whole to be capable of excluding any reasonable doubt in relation to the offences alleged against Mr Volkens.

The presence or absence of a blackboard was never a factor in relation to the decision to discontinue. The complaint to Mrs Gilbert's husband years after the offences were said to have been committed could not be led by the crown - this is because it would be excluded by the rule against hearsay. Similarly, the charges in respect of the other two swimmers could not be joined in the trial concerning Mrs Gilbert. The fact that they had also complained of sexual abuse would be inadmissible.

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the Freedom of Information Act 1992. At the end of the day, the offences that were more than 15 years old. There was no independent evidence which could be led in support of them. The trial judge would have to warn the jury that it would be dangerous to convict on Mrs Gilbert's evidence alone. The judge would also have to instruct the jury that the ability of Mr Volkens' to properly defend himself was damaged by the long delay in bringing the complaint to police. These are the standard directions that must be given to the jury in every case where the complaint is made a substantial time after the alleged sexual offence.

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The present case was further weakened by the boldness of the conduct described in the massage room. This is not to say that it could not or did not happen. A jury would be bound to consider the unlikelihood of a swimming coach undertaking an overtly sexual and prolonged offence against one of his charges during a training session when there was such an obvious risk of discovery. My ultimate assessment was that the combined weaknesses of the case robbed it of reasonable prospects of excluding any reasonable doubt. The assessment was based upon 17 years experience in prosecuting sexual offences at both trial and appellate level.

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I have no knowledge of details of the current police investigation but it is important to understand the limits of any fresh process. [A prosecution that has been discontinued cannot be revived without substantial, cogent new evidence.]

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outside time frame.

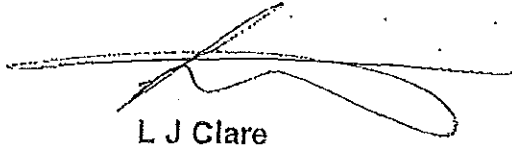
Should a new police brief contain evidence that is capable of corroborating the commission of any of the offences described by Mrs Gilbert, I will refer all of the material to counsel outside of my office and outside of Queensland.

In my view this is the only way to avoid a perception by either Mrs Gilbert or Mr Volkens that any fresh decision has been improperly affected by the extraordinary history and unprecedented media coverage of the case.

As you might appreciate, counsel would have to consider not only the quality of the new evidence, but also the interests of justice. Relevant to that will be

consideration of whether there could now be a fair trial particularly in light of the publication of inadmissible and prejudicial matters.

Yours faithfully



L J Clare
DIRECTOR OF PUBLIC PROSECUTIONS

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