

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## ADMINISTRATIVE DIVISION

### REVIEW AND REGULATION LIST

VCAT REFERENCE NO. Z924/2018

### CATCHWORDS

Review and Regulation List - *Working with Children Act 2005* s 26A – category A application – sexual offending against child – no other offences – apparent rehabilitation – implausible explanation of offending by applicant – whether applicant should be given a working with children assessment notice.

<b>APPLICANT</b>	NET
<b>RESPONDENT</b>	Secretary to the Department of Justice and Community Safety
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President I. Proctor
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	28 February 2019
<b>DATE OF ORDER</b>	17 April 2019
<b>DATE OF WRITTEN REASONS</b>	17 April 2019
<b>CITATION</b>	NET v Secretary to the Department of Justice and Community Safety (Review and Regulation) [2019] VCAT 566

### ORDER

The application to be given an assessment notice is refused.

### Notice of proceeding suppression order

On 26 February 2019 the Tribunal ordered, to avoid causing undue distress or embarrassment to a victim and to the applicant's family members, as the proceeding relates to sexual conduct, the Tribunal orders:

- 1 The applicant in this proceeding must be referred to as **NET**.
- 2 Any report of the whole or part of this proceeding or information derived from this proceeding to the extent that it would disclose the name and address of **NET**, of the victim's or the applicant's families must not be published or otherwise disclosed.

- 3 These orders apply throughout Australia. The Tribunal's reasons for decisions are published on the AustLII website, which is accessible throughout Australia. The privacy of the above persons would be breached if persons living outside Victoria know or come to know their identity.
- 4 This order operates until the death of the applicant.

Ian Proctor  
**Deputy President**

**APPEARANCES:**

For Applicant: In person via video

For Respondent: Ms R. Ellyard of Counsel

## REASONS

### Introduction

- 1 NET is 61 years old. As a long-term member of a gun club, with teenagers joining the club, while the club did not require it, in 2018, he thought it a good idea to obtain a working with children assessment notice under the *Working with Children Act 2005* (the WWC Act), from the Secretary to the Department of Justice and Community Safety, (the Secretary). He applied for the assessment notice.
- 2 The Secretary's criminal history check disclosed the offence of, Indecent Act with Child under 16, under the *Crimes Act 1958*.
- 3 Because of this, NET's application is a category A application.
- 4 As s 26A of the WWC Act requires where a category A application is made, the Secretary refused his application and issued him with a negative notice under the WWC Act. The Secretary advised him that he may apply to VCAT for an assessment notice.
- 5 In October 2018, NET applied to VCAT seeking that the Tribunal, under s 26A(5) of the WWC Act, direct the Secretary to issue an assessment notice to him.
- 6 Fundamental in considering his application at VCAT is that the main purpose of the WWC Act is to assist in protecting children from sexual or physical harm by ensuring that people who work with children, or care for them, are subject to a screening process.<sup>1</sup> When VCAT makes a decision under the WWC Act, the protection of children from sexual and physical harm must be the paramount consideration.<sup>2</sup>
- 7 On 28 February 2019, the matter came before VCAT for hearing. NET represented himself<sup>3</sup> and lawyers represented the Secretary. The Secretary opposed NET's application. The parties provided various documentation. NET and referees gave oral evidence.
- 8 At the end of the hearing, I reserved my decision, saying my decision and written reasons would follow
- 9 I turn to the relevant criteria for making this decision under sections 26A(3), (4) and (5) of the WWC Act.

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<sup>1</sup> S 1

<sup>2</sup> S 1A

<sup>3</sup> With a Victoria Legal Aid duty lawyer providing NET brief assistance during the hearing at my request.

## Section 26A(3)

10 Section 26A(3) says:

VCAT must not make an order for the giving of an assessment notice on an application under subsection (1) unless it is satisfied that giving the notice would not pose an unjustifiable risk to the safety of children, having regard to [criteria (a) to (j)].

11 Therefore, on the question of whether I am satisfied that giving an assessment notice would not pose an unjustifiable risk to the safety of children, I turn to the s 26A(3) criteria.

### The nature and gravity of the offence and its relevance to child-related work<sup>4</sup>

12 A Magistrates' Court record shows that in May 1995, NET came before the Court charged with Indecent Act with Child under 16 relating to 1 December 1994 to 31 December 1994. Without conviction, the Court placed NET on a two-year good behaviour bond, fined him \$7,000, payable over 18 months, and required him to attend and undergo treatment and counselling.

13 A request to Victoria Police for information relating to the charge produced the following response from Police Information Liaison, provided with a qualifier, "Police information provided as a guide only":

Between [1 January 1988 to 20 March 1995]<sup>5</sup> the victim has been touched by the applicant (stepfather), on the breast and vagina whilst in bed. The abuse has never gone further than touching. The applicant admitted that he had sexually interfered with his stepdaughter on about a dozen occasions since she was eight or nine years of age.

14 Concerning the offending, NET gives a different account. He gave evidence that in 1988, he started a relationship with the child's mother. In 1989, she gave birth to his son. By 1991, the relationship had become unsteady due to financial hardship during an economic downturn. He says that when his partner started going out at night, he became a, "convenient babysitter". He described the offending starting in 1994, when the child would come out of the bathroom after showering and dry herself in front of the heater in the lounge room. According to NET, with his partner having the habit of not removing tissues from washing loads before starting the washing machine, quite often the child coming to the lounge room naked to dry herself in front of the heater with tissue fragments on several areas of her body. In a written statement NET said, "after noticing this I was stupid enough to remove those pieces without thinking of any consequences". He said this happened only about six times over about six months and only in the lounge room and bathroom, never in the bedroom as mentioned in the Police information quoted above. He disagreed it happened over years.

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<sup>4</sup> S 26A(3)(a)

<sup>5</sup> Literally written as "01/01/88 to 20/03/95"

- 15 During cross-examination, NET agreed he had removed the tissue from the girl's breasts, vagina and hair. He said his actions, while not providing him any pleasure, they were inappropriate. He said he had provided the explanation about removing tissue to the Police at the time.
- 16 He agreed his conduct could have had negative effects on her and on the girl's mother. He agreed that he would be horrified if one of his daughters was subject to such conduct.
- 17 The period of the offending is material to its gravity, such offending over years being of a graver nature than offending over months or one month.
- 18 With the police liaison information material described as a guide only and Court records indicating the finding of guilt related to December 1994 only, and NET saying the offending happened over six months, I find the offending occurred over the second half of 1994.
- 19 Concerning the nature of the offending, the Magistrates' Court record is the most reliable, scant, evidence.
- 20 NET's account of removing tissue from the girl's body is implausible. I do not accept it. A 12-year-old girl does not need help to take tissue from her body. I do not regard the Police information as quoted above as a reliable source, having no understanding of its source.
- 21 All that said, the offending, over apparently six months, is grave. That gravity is demonstrated by the amount of the fine and the fact that if today NET was convicted of an Indecent Act with a Child under 16, he would become a registered sex offender under the *Sex Offenders Registration Act 2004* (the offence is a Class 2 offence under that Act).
- 22 His offending against a child is relevant to the prospect that a person may undertake child -related work.

The time since the applicant committed the offence<sup>6</sup>

- 23 Twenty-four years have passed since the offending.

Whether a finding of guilt or a conviction was recorded for the offence<sup>7</sup> and the sentence imposed for the offence<sup>8</sup>

- 24 The sentence is described above. While NET was not convicted, on any view a \$7,000 fine in 1995 was a large fine, indicating the Magistrate regarded the offending as serious. With the sea change in community attitudes concerning sexual offending against children, a court would probably have dealt more harshly with NET today.

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<sup>6</sup> S 26A(3)(b)

<sup>7</sup> S 26A(3)(c)

<sup>8</sup> S 26A(3)(d)

The ages of the applicant and of any victim at the time the applicant committed the offence<sup>9</sup>

25 NET was 37. The victim was 12.

Whether or not the conduct that constituted the offence has been decriminalised since the applicant engaged in it<sup>10</sup>

26 The conduct has not been decriminalised.

The applicant's behaviour since he committed the offence<sup>11</sup>

27 NET has no other criminal history. A request to the Department of Health and Human Services for records concerning NET's interactions with children revealed no such records exist.

28 NET gave evidence that in 1996, he formed a new relationship with a woman with two children from a previous relationship. He says he disclosed his offending to her. They had two children. Tragically, she was later diagnosed with breast cancer, dying of the illness in 2003. Her son decided to live with his biological father. The three daughters decided to live with NET. NET says that for 14 years as a single parent he raised the girls, with the help of family and friends.

29 In August 2014, NET was diagnosed with serious illness and has undergone major surgeries. He is significantly disabled by medical conditions. He is grateful for the support from the three girls as well as those around him.

30 NET describes himself as fortunate in his employment with one company since 1981, which continues to support him through his illness.

31 NET said he has recently formed a relationship with a woman with two teenage children, having known her for approximately eight years after they met at the club.

32 Turning to the reason why NET first applied for an assessment notice, he described being an active member of the club since the 1980s, holding a variety of senior positions with the club. He described his current volunteering as setting up equipment for others to use at the range. This does not involve interaction with the teenage members of the club. If it does not receive an assessment notice, it will not really affect his engagement with the club, apart from the relatively minor limitation of not being able to go with the teenagers on the club's "away trips" for competition.

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<sup>9</sup> S 26A(3)(e)

<sup>10</sup> S 26A(3)(f)

<sup>11</sup> S 26A(3)(g)

Any information given by the applicant in, or in relation to, the application and any other matter that VCAT considers relevant to the application<sup>12</sup>

#### NET's other evidence

- 33 NET said in the context of the then alleged offending, in 1995 his partner left him, taking her daughter. He learned the child had reported his touching of her to school authorities who reported to police, after which he was interviewed and charged.
- 34 While he agreed that the victim had reported events at her school, which would have taken a degree of bravery and which indicated she thought the conduct was wrong, he also described the girl of being a liar, being deceptive and causing arguments.
- 35 NET says after the Court dealt with him, he paid the \$7,000 fine, attended a clinical psychologist, and served out the good behaviour bond without incident. In cross-examination, NET said he saw the clinical psychologist once who wrote a report to his solicitor. He recalls it describing him as a male of normal intelligence with no further counselling recommended. He recalled the psychologist asking him questions related to sexual desire and him telling the psychologist he derived no sexual pleasure from his conduct.
- 36 NET says he is remorseful concerning his conduct towards the girl. He agreed his conduct could have had negative effects on her and on the girl's mother. He agreed that he would be horrified if one of his daughters was subject to such conduct.
- 37 NET says of the three girls he raised, only his eldest daughter knows of the conduct, being his description. He said when he told her she was in disbelief. He spoke of having good relationships with each of his three daughters, two who have grandchildren.
- 38 When asked what parents of teenagers at the club would think if they knew about his past offending and him interacting with them, he said they would not be overly impressed and an element of doubt about him would be created.

#### Referees

- 39 NET provided three references from senior members of the club. The referees were available to be asked about their references at the hearing. Before they gave evidence, it became apparent they were not fully informed about NET's offending. When advised cross-examination of them would reveal details of the offending to them, NET decided to proceed, saying them learning these details was unlikely to change their good opinion of him. He said he had not previously disclosed the information to them, him having moved on in his life and in the context that he had not been convicted.

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<sup>12</sup> S 26A(3)(i) and (j)

- 40 A Justice of the Peace wrote of knowing NET since the 1980s. He regards NET as reliable and trustworthy and a, “dedicated leader of his family despite the unfortunate passing of his partner”. He describes NET’s long-term steady employment and has no hesitation in describing him as of, “good character for any purpose that he may require”.
- 41 This referee came to give evidence at VCAT, aware that NET had been refused an assessment notice. On the morning of the hearing, NET had for the first time told this man of his offending in some detail. In cross-examination, this man agreed the conduct, as described, was wholly unacceptable and highly inappropriate, as was the idea that a 12-year-old girl would be standing naked in the family lounge room. Here agreed there would be no valid reason for a man to pick tissue of a naked 12-year-old girl. He would never place his own daughter in that situation.
- 42 However, based on his personal experience over many years of NET, knowing him to be a genuine reliable decent person for whom he has high regard, while he saw the past conduct as most regrettable, he judges NET on what he knows of him, not conduct long ago.
- 43 In his view parents of teenagers at the club, if properly informed of the events in context would not be overly concerned. He agreed that observation is based on an assumption that such parents share his philosophy on life.
- 44 A retired teacher wrote of meeting NET when his son, who suffers from cerebral palsy, joined the club as a 16-year-old. He describes NET being a strong mentor and coach to his son, encouraging him to be the best he can. This parent spoke of finding it very comforting that NETs was happy to spend much time with his son, not treating him differently to the other juniors in the club. He wrote of NET being well respected within the club and within the local community.
- 45 This referee also came to give evidence at VCAT aware that NET had been refused an assessment notice. He also had very recently learnt more of the offending. He preferred not to know of these issues in detail. In his view, there was no appropriate explanation for NET’s actions in removing tissue, as NET described it.
- 46 That said, this referee holds NET in high regard based on his experience of him. In large part this relates to NET’s support of his son. He spoke as the parent of a child with disability watching those who interact with his son, “like a hawk”. He has no concerns with NET interacting with children. He said it would take something dramatic for him to change his view and based on his limited understanding, the past events under discussion were not sufficiently dramatic to change his view (my words describing his evidence).

- 47 The third referee, a friend of 30 years described NET as dealing with “a number of challenges of a personal and of a medical nature” in a calm and measured manner. He also regards him to be of good character and of a tolerant nature. Having very recently learnt some of the details of the offending, while he regarded NET’s conduct, as explained by NET as inappropriate, with it being hard to imagine a proper explanation, he also tended to minimise the issue, speculating it might have happened in a naïve way in a family context and NET’s guilty plea presumably made to avoid trauma to the girl during a trial. That said, this witness agreed parents at the club would be concerned about NET if they knew the detail. His final comment was that he was not concerned about NET being a risk to children, noting that he had never seen NET’s daughters show any apprehension about NET.

The likelihood of future threat to a child caused by the applicant<sup>13</sup>

- 48 As Kyrou J said in *Maleckas v Secretary, Department of Justice* [2011] VSC 227:

... while the Act does not impose any onus of proof on an applicant and does not specify any standard of proof, as a matter of practical reality, it is difficult to see how an applicant could succeed in satisfying the VCAT that the giving of an assessment notice would not pose an unjustifiable risk to the safety of children, unless the applicant adduces probative evidence going to that issue. As a matter of common sense, the more objective, direct and unequivocal is the evidence before the VCAT on the question of risk to the safety of children, the greater the prospects of the VCAT being satisfied that the giving of an assessment notice would not pose an unjustifiable risk to the safety of children.

- 49 Concerning the serious offending in question, as VCAT said in *Wright-Smith v Secretary to the Department of Justice and Regulation* (Review and Regulation) [https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2017/2029.html?context=1;query=2029;mask\\_path=au/cases/vic/VCAT-disp1](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2017/2029.html?context=1;query=2029;mask_path=au/cases/vic/VCAT-disp1) [2017] VCAT 2029: [https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2017/2029.html?context=1;query=2029;mask\\_path=au/cases/vic/VCAT-disp3](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2017/2029.html?context=1;query=2029;mask_path=au/cases/vic/VCAT-disp3)

Any offending of a sexualised nature is serious. It is conduct that is neither sought nor wanted by the victim. Mr Wright-Smith’s behaviour was uninhibited. When somebody wishes to work with children, sexual disinhibition raises concerns. If an individual is prepared to touch another person, without their consent, simply because he is intoxicated, it is not automatically clear whether or not he will extend the risk to others, including children, who happen to be in close proximity. A lack of insight into appropriate boundaries is of

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<sup>13</sup> S 13(2)(h)

concern. It is in this context that the offending is relevant to child-related work.

- 50 With NET's offending happening 24 years ago, his lack of offending before and after, his apparent rehabilitation, his maintaining his employment, him facing tragic life circumstances and responding by raising three daughters as a single parent, with him apparently being well regarded in the community, noting almost everyone does not know of the offending, and referees recently advised of the offending and maintaining their support for him, in my view, the likelihood of a future threat to a child caused by NET is negligible.
- 51 While, NET's implausible account of his offending and his describing the girl as deceptive, when he pled guilty, raises a concern as to his insight about his offending, these factors do not bring me to regard there to be more than a negligible risk. However, as will be seen below, they are pivotal in refusing him an assessment notice.

#### Conclusion concerning s 26A(3)

- 52 As Bell J said in *ZZ v Secretary to the Department of Justice* [2013] VSC 267<sup>14</sup> at [134]:

The test of 'unjustifiable risk' requires the specified considerations to be addressed. As part of that consideration, the Secretary (and the tribunal) must make a rational, objective and evidence-based assessment of the nature and degree of the risk (if any) which giving the notice would pose. The assessment must be rational in the sense of balanced and not arbitrary and refusing to give a notice must be a proportionate decision in the circumstances.

- 53 Based on the evidence in this case, and regarding the likelihood of a future threat to a child by NET as negligible, I am satisfied NET does not pose an unjustifiable risk to the safety of children. Concerning the assessment under s 26A(3), the obvious concern about risk to children that arises from his offending 24 years ago is met by the positive factors concerning him as described above.

#### **Section 26A(4)**

- 54 Under s 26A(4) of the WWC Act, being satisfied that giving NET an assessment notice would not pose an unjustifiable risk to the safety of children, before giving an assessment notice I must also be satisfied:
- a) a reasonable person would allow his or her child to have direct contact with NET while he was engaged in any type of child-related work; and
  - b) NET's engagement in any type of child-related work would not pose an unjustifiable risk to the safety of children.

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<sup>14</sup> Reiterated by Bell J in *PQR v Sec, Department of Justice and Regulation* (No 2) [2017] VSC 514 from [40].

### The 'reasonable parent test'

55 In *JGF v Secretary to the Department of Justice* (Review and Regulation) [2013] VCAT 1728 at [25] Macnamara J, said:

a reasonable person would be acquainted with the truism ... that there are no risk-free encounters in human life. A reasonable person would in considering the situation of JGF wish to acquaint himself or herself with the full range of material that has been placed before me including the character evidence, the history of his good character during his adult life and the expert opinions. A reasonable person would retain a measure of scepticism and caution but would not approach an issue such as this with the thought that once a person had, if you will, shown the cloven hoof, albeit decades ago and as a very young man, that he could never be redeemed.

56 I am not satisfied a reasonable person would allow his or her child to have unsupervised direct contact with NET while he was engaged in providing any type of child-related work.

57 In my view a reasonable parent, knowing of the offending, as I have found it, his remorse, his conduct since then and his standing in the community now, his implausible description of the offending and him describing the girl as deceptive, would not allow his or her child direct contact relevant to child-related work.

58 His implausible description and his description of the girl, in the context that he pled guilty, in the context of the grave offending, would for the reasonable person, tip the balance against NET. A person would not trust his description and would question his attitude toward the girl and therefore would be unlikely to trust NET to provide any type of child-related services to his or her child.

59 The evidence from the referees is insufficient to bring me to a different view. While on learning of the details of the offending, they continued to support NET, based on their personal knowledge of him, in substance they agreed the details of the offending were most concerning and agreed this account was implausible. It is those latter factors that would influence the reasonable person.

### 'Unjustifiable risk test'

60 For the reasons given above, in my view engagement by NET, in any type of child-related work would not pose an unjustifiable risk to the safety of children.

### **Section 26A(5) criterion**

61 Section 26A(5) of the WWC Act says:

If, in accordance with this section, VCAT is satisfied that giving an assessment notice would not pose an unjustifiable risk to the safety of

children, VCAT may by order direct the Secretary to give the assessment notice to the applicant if it is satisfied that, in all the circumstances, it is in the public interest to do so.

62 In *JGF* at [27] Macnamara J, further said:

The statute does not explain precisely what the public interest is. Self-evidently, the public interest is concerned that unjustifiable risks not be taken by allowing children to be in the company of adults of dubious moral standing. There are other public interests as well.

Public interest is not in my view served by saying once a person has taken a wrong turn, that person can never be redeemed. There is a public interest in family men being able to participate in the lives of their families and their children to the fullest extent possible which necessarily would require such persons to engage in volunteer in child related work in connection with the rearing of their own children. It is in my view in the public interest that this occurs so long as no unjustifiable risk is entailed. I have already explained why in my view no unjustifiable risk is entailed here. ... there is a public interest and encouragement a volunteer work and finally, and perhaps most importantly, there is a strong public interest in rehabilitation. Those who have offended should at all times be encouraged to accept and believe. that by turning aside from wrongdoing and bearing a good character they can redeem themselves in the site of the community and be readmitted in every respect is persons in good standing.

63 This is an unusual case where the person applying for the assessment notice largely does not need it and has not been required to obtain it. NET is able to largely conduct his activities at the club without an assessment notice. Therefore, the public interest in supporting rehabilitation is not a strong factor here.

64 In this context, and in the context of NET's implausible description of the offending and his description of the girl, I am not satisfied it is in the public interest that he be given an assessment notice.

## **Conclusion**

65 For the above reasons, NET will not be given an assessment notice.

Ian Proctor  
**Deputy President**