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VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST VCAT REFERENCE NO. Z804/2020

CATCHWORDS

Review and Regulation List; *Worker Screening Act 2020* ss 154(1), 154(2)(c); *Working with Children Act 2005 s*s 14(1)(d), 17(3), 26(1)(b), 105(1)(b), 108; Non-conviction charges.

APPLICANT	Cooky Wong
RESPONDENT	Secretary to the Department of Justice and Community Safety
WHERE HELD	Melbourne
BEFORE	H. Lambrick, Deputy President
HEARING TYPE	Hearing via video conference
DATE OF HEARING	13 July 2021
DATE OF ORDER AND REASONS	26 July 2021
CITATION	Wong v Secretary to the Department of Justice and Community Safety (Review and Regulation) [2021] VCAT 821

ORDERS

1 Under section 146(4)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the Tribunal directs that no person other than a party to the proceeding or their legal representatives may inspect the Tribunal file.

2 The decision of the respondent dated 30 September 2020 is set aside.

3 The Tribunal directs the respondent to give a Working with Children clearance to the applicant.

H. Lambrick
Deputy President

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APPEARANCES:

For Applicant:	Ms B. Franjic of counsel
For Respondent:	Mr P. Panayi of counsel

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REASONS

Introduction

1 Mr Wong, who is a physiotherapist and is also heavily involved in church-related activities, wishes to be given a Working with Children ("WWC") clearance under the *Worker Screening Act 2020* ("the WSA"). He has impeccable references and has previously held equivalent clearances in Victoria under the *Working with Children Act 2005* ("the WWC Act").

2 However, under cover of letter dated 30 September 2020 and pursuant to section 17(3) of the WWC Act, the Secretary to the Department of Justice and Community Safety ("the Secretary") refused Mr Wong's application and gave him a Negative Notice and Statement of Reasons dated 29 September 2020. The Secretary did so based on the cloud surrounding Mr Wong's suitability to work with children in the form of multiple charges of a sexual nature being laid against him in 2010. It is of note that none of those charges ever proceeded to a finding of guilt.

3 Because Mr Wong had been charged with an offence specified in clause 2 of Schedule 3 of the WWC Act, which did not result in a conviction or a finding of guilt, his application was assessed by the Secretary as a category C application. It fell within section 14(1)(d) of the WWC Act.

4 Essentially, the Secretary was concerned that the allegations raised concerns about Mr Wong's ability to impulse control and his understanding of appropriate sexual behaviour and conduct. The Secretary considered that the vulnerability of the alleged victims would cause a reasonable person to have concern about their child having direct contact with Mr Wong in the course of child-related work.

5 On 6 October 2020, Mr Wong made an application to this Tribunal for review of the Secretary's decision under section 26(1)(b) of the WWC Act.

6 He contends that he poses no risk whatsoever to children.

7 Mr Wong emphasises that he is not and never has been found guilty of any offence whatsoever. He emphasises that he has worked with children for many years without complaint. He denies and strongly refutes any suggestion that there are or ever have been any issues surrounding his impulse control and/or sexual boundaries.

8 He contends that any shortfalls in his professional practice have been readily dealt with by the relevant professional body and that he is not viewed as a risk to the public by that professional body.

9 On 1 February 2021, the WWC Act was repealed and substantially re-enacted in Chapter 3 of the WSA.

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10 The WSA provides for two transitional provisions of relevance to these proceedings:

(a) Mr Wong's "Negative Notice" is taken to be a "WWC exclusion" (see sections 154(1) and 154(2)(c) of the WSA); and

(b) the application before the Tribunal for review of the decision made under the WWC Act is to be determined as if the application was made under the equivalent provision of the Act (see section 158(1) of the WSA).

11 Mr Wong's application proceeded before me on 13 July 2021 as though it were made under section 105(1)(b) of the WSA, which provides that a decision to give a WWC exclusion on a WWC category C application is a decision reviewable by this Tribunal.

12 I heard evidence from Mr Wong and a further 10 character witnesses.

13 The Secretary opposed Mr Wong's application.

14 The Secretary maintains that Mr Wong's application must fail because of the serious nature of the allegations levelled against him and their consequent relevance to child-related work.

15 The Secretary emphasises that the alleged offences were said to have been committed over a seven-year period from 2003 to 2010 with similar allegations made by nine women during the provision of therapeutic treatment during Mr Wong's employment.

16 The Secretary contends that there remains an absence of objective expert evidence or other probative evidence about matters such as Mr Wong's impulse control, understanding of sexual and personal boundaries and appropriate sexual behaviour and consent to enable the Tribunal to be satisfied that Mr Wong's engagement in any type of child-related work would not pose an unjustifiable risk to the safety of children.

Non-conviction charges

17 Under section 65 of the WSA, non-conviction charges must be considered by the Tribunal. The Tribunal undertakes the mandatory legislative risk assessment, not to reverse or impugn the finding of a criminal court, but to determine whether or not a particular person can or should be granted a WWC clearance.

18 Section 14(1)(d) of the WWC Act was inserted by section 28(2) of the Working with Children Amendment Bill 2016. In the second reading speech to the Bill, the Attorney-General stated as follows:

> As a non-conviction charge is material that, in and of itself, may be less credible in nature than a conviction or finding of guilt, the amendment restricts the use of non-conviction charges to the most

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> serious offences listed in clause 2 of schedule 3 to the act and classifies that in category C.[1]

19 In *QPS v Department of Justice and Community Safety* [2019] VCAT 477 at [51], Vice President Judge Hampel said:

> In approaching the evidence therefore in respect of the non-conviction charges, my starting point is that the evidence concerning them may be less credible in nature than would flow from a conviction or finding of guilt. It is important to bear in mind the circumstances which resulted in the charges being non-conviction charges.

20 In considering the weight to be given to non-conviction charges, her Honour said at [60]:

> The starting point when considering what weight is to be given to the non-conviction charges is, at the risk of stating the obvious that, there is no conviction. The charges were dismissed. Generally, a person is entitled to the full benefit of an acquittal. Here, however, the statutory provision expressly displaces that entitlement.

21 Her Honour then went on to articulate the appropriate approach to be taken.

22 She noted that the four charges in that case *were* found proven after a hearing in the Magistrates' Court where the complainant was cross-examined. The applicant was subsequently sentenced to a term of imprisonment. He appealed to the County Court and the charges were dismissed after the complainant failed to attend court. At [68], her Honour concluded that the non-conviction charges were "deserving of being given some weight". Her Honour said at [82] that:

> it is proper to take into account that, at first instance, the complainant's evidence was accepted and the magistrate was satisfied beyond reasonable doubt of the guilt of the applicant. The original finding of guilt was followed by a sentence of imprisonment, reflecting the magistrate's assessment of the gravity of the offending. The charges were dismissed on appeal without a re-hearing on the merits. Although proper to regard the non-conviction charges as allegations, not convictions, the original finding of guilt and the circumstances in which the charges were ultimately dismissed, give them greater weight than charges dismissed on the merits.

23 I was referred by the parties to other decisions of this Tribunal in which I was coincidently the presiding member.

24 In *XDU v Secretary to the Department of Justice and Community Safety* [2021] VCAT 256, XDU had been acquitted of three charges of sexual penetration of a child under the age of 16 years. Her defence was run on the basis that, although she did sexually penetrate the child, she did not know that the child was under 16.

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[1] Victoria, Parliamentary Debates, Legislative Assembly, 26 October 2016, 4027 (Martin Pakula, Attorney-General.

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25 In that case, I found that the charges were nevertheless relevant for the purposes of the WWC clearance application, despite the acquittal. That was because "whether XDU knew it at the time or not, the end result was that XDU did have sex with a child when she was herself was a mature adult".[2]

26 Conversely, in *JDH v Secretary to the Department of Justice and Regulation* [2019] VCAT 18 (***JDH***) however, I adopted a different approach. I said at [30] to [34] (emphasis added):

> 30 Whilst I agree with the Secretary that it was open to me to investigate the intervention order applications and the assault charges levelled against **JDH**, upon examination I was not satisfied that I could draw any inferences adverse to him based on these matters.
>
> 31 The applications for intervention orders did not proceed to orders being made. I accept that **JDH** would have contested those applications. The applications were however withdrawn/not proceeded with. There is no basis upon which I could draw adverse findings against **JDH** in these cases.
>
> 32 The allegations relating to his stepson resulted in the case being struck out with no case to answer.
>
> 33 I agree with the submissions of **JDH** that these matters have been appropriately tested through the Courts with no adverse findings made against **JDH**.
>
> 34 In circumstances where the Courts have rejected criminal wrongdoing and have not found any basis to impose final intervention orders, it would be inappropriate for me to look and find otherwise.

27 It was submitted by Mr Wong that, by parity of reasoning, the same approach should be taken in this case. Mr Wong contended that the allegations levelled against him had been subject to numerous layers of scrutiny such as:

(a) cross-examination of several complainants at a committal hearing;

(b) scrutiny by the Director of Public Prosecutions (resulting in withdrawal of charges) both before and after the committal hearing, and after pre-trial argument that focused on the credibility and reliability of the remaining complainants' evidence; and

(c) a careful and rigorous Physiotherapy Board of Australia ("the Board") investigation and Australian Health Practitioner Regulation Agency ("AHPRA") Professional Standards Panel ("the Panel") hearing (in relation to one complainant).

28 The Secretary countered this by emphasising that nine separate complainants alleged that they were inappropriately touched by Mr Wong on their breasts over various time periods. The Secretary described this as a

[2] At [30] (emphasis in original).

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concerning pattern which could not so readily be put to one side, particularly given the extenuating circumstances (for example, one complainant died and four others were unwell). The Secretary submitted that, because the evidence of those complainants was unable to be fully tested, for the purpose of *this* application where the Tribunal has to determine risk to children, it was open to me to consider that the allegations made by those women *could* have substance.

29 The Secretary emphasised that whilst the criminal standard of proof was unable to be reached to sustain a conviction, there were issues of grave concern in this case that needed to be considered by the Tribunal.

30 The Secretary also emphasised that whilst the fact that some of the women had talked amongst themselves may have had implications for the conduct of the criminal trial, when considering risk with respect to children, I could take the view that it was natural women living in the same facility *would* talk and that such discussion did not necessarily mean that the allegations were concocted.

31 In this respect the Secretary noted that many of the women were highly emotional when recounting their version of events to third parties. In these circumstances, it was submitted that I should not incline to the view that the women were lying, even if their reliability was tainted by virtue of the discussion which took place between them.

32 The Secretary further emphasised that Mr Wong's explanations surrounding the potential for misunderstanding could never explain why he would have had his hands either on or cupping the breasts of the women.

33 The Secretary emphasised the number, duration of time and similarity of the allegations as concerning in the context of this application.

Discussion

34 It is of course not for me to make any definitive ruling as to whether the alleged conduct did or did not occur.

35 What I need to do having regard to the legislative provisions under the WSA is determine whether, based on the factual matrix before me, Mr Wong should or should not be granted a clearance to work with children, being mindful of the very serious history of allegations.

36 In this context, I make the following observations.

37 I am keenly aware that Mr Wong denies wrongdoing. He can do no more than plead his innocence.

38 In his evidence before me, he was respectful of the reality that at least some of the complainants clearly felt that something untoward had happened. He acknowledged in this respect that he may have had professional shortcomings in informing the complainants about the procedures he was undertaking with them. Whilst he endeavoured to give some explanations

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for conduct which may have been misinterpreted by the complainants, he was largely unable to explain why the complainants made allegations which could not be explained as part of the treatment.

39 Mr Wong acknowledged that one complainant was upset and agreed he apologised to her. He said he did so not from a consciousness of guilt, but because he was sad to see her unhappy.

40 Mr Wong was unable to further explain the allegations other than to allude to possible racism and/or gossip or concoction.

41 I am mindful that the allegations made by the complainants stand in stark contrast to observations made by other female patients and colleagues about Mr Wong's behaviour at the facility.

42 It is also clear that aside from these allegations there are no other, unrelated examples of concerning conduct (be it towards children or otherwise) to otherwise raise concerns about his character.

43 I also agree that in this case there was significant scrutiny from various bodies including the Director of Public Prosecutions, the Magistrates' Court, the County Court, the Board and from the Panel which was ultimately favourable to Mr Wong in terms of criminal wrongdoing.

44 I accept that:

(a) no adverse findings were ever made against Mr Wong in respect of any of the allegations; and

(b) the Panel concluded that he had "no case to answer" in respect of the allegation made by MR (who was one of the nine complainants).

45 Nevertheless, for the purposes of this application, I retain an open mind to the possibility of there being some substance to the allegations.

46 The fact that multiple allegations were made by multiple complainants and charges laid is very concerning.

47 Even accepting that physiotherapy is a "hands on" occupation, there was no evidence before me to suggest that it would ever be necessary to directly touch or squeeze a woman's breast. It was clear from the evidence before me that there would never be a situation during the practice of physiotherapy in which this would be acceptable.

48 Victoria Police sought a report from Mr Michael Ralston, an independent physiotherapist who reviewed Mr Wong's clinical notes and responses to the allegations. Mr Ralston's uncontroversial observation was that:

> there is nothing in the physiotherapist's response that would explain the need to place his hands over the patients' breasts for either assessment or treatment. Nor is it an accepted technique for physiotherapists to do so. Physiotherapists do place their hands over the lateral chest wall and may palpate with fingertips or thumbs above the breast.

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49 The repeated allegation made by the women that they *were* touched by Mr Wong directly on the breast is therefore of grave concern.

50 I turn then to a consideration of this matter in the context of the WSA.

VCAT review of decisions relating to WWC clearances – category C

51 A decision by the Secretary to give a WWC exclusion on a WWC category C application is reviewable by this Tribunal under section 105(1) of the WSA.

52 On such a review, section 108(1) of the WSA requires this Tribunal to determine whether in the particular circumstances it would be appropriate to refuse to give a WWC clearance, having regard to the matters set out in section 65(2) of the Act.

53 These are the same matters that the Secretary must take into account on a category C application and a category C re-assessment in determining whether giving the WWC clearance would pose an unjustifiable risk to the safety of children.

54 Section 108(2) of the WSA also stipulates that VCAT, on review, must refuse to give a WWC clearance unless it is satisfied that:

(a) a reasonable person would allow their child to have direct contact with Mr Wong while the person was engaged in any type of child-related work (**reasonable person test**); or

(b) Mr Wong's engagement in any type of child-related work would not pose an unjustifiable risk to the safety of children (**unjustifiable risk test**).

55 Finally, section 108(3) of the WSA requires VCAT to refuse to give a WWC clearance unless it is satisfied that it is in the public interest to give the clearance (**public interest test**).

Considerations under section 65(2) of the WSA

<u>(a) – the nature and gravity of the conduct and its relevance to child-related work</u>

56 Mr Wong was charged with 16 offences of indecent assault.

57 The allegations related to the touching of the complainants' breasts.

58 It was variously alleged that Mr Wong ran his hands over various complainants' breasts; slid his hand under the bra of various complainants; moved his hand around or held the breasts of various complainants, sometimes quite aggressively; moved his hands under slacks and across the stomach of a complainant; moved his hands over clothing in the region of the breasts of various complainants; cupped the breasts of various complainants; and placed his hand on the bare breasts of various complainants.

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59 Allegations involving the touching of various clients' breasts during employment as a physiotherapist are serious and relevant to child-related work.

60 If substantiated, the conduct could only be described as serious sexual offending over a sustained period. It would be aggravated by the fact that it took place when Mr Wong was alone with vulnerable women and took place under the guise of professional health treatment.

61 It would raise significant concerns relating to Mr Wong's capacity to control his impulses and understand appropriate sexual and personal boundaries.

62 It would suggest a compromised ability to maintain a safe environment for any vulnerable persons placed in his care.

63 However, there has never been any such finding against Mr Wong.

64 To the contrary, decisions have been made in various forums that the allegations were unable or unlikely to be substantiated.

65 Apart from the criminal law proceedings, the Board undertook an independent investigation into Mr Wong's conduct. MR also made a notification to the Board about Mr Wong.

66 Even when applying a different standard of proof to the criminal standard, neither the Board investigator nor the Panel found that there was sufficient evidence to support a finding that Mr Wong *indecently* touched MR in 2007.

67 Rather, the findings centred around his professional practices and the potential lack of insight into those practices and the need for further professional training. Findings were made of unsatisfactory professional conduct.

68 This is not at all the same as a finding that conduct of a sexualised nature has been proven.

69 It was nevertheless contended by the Secretary that this factor ought to strongly weigh against the application being granted.

70 I did not agree with the Secretary that the disciplinary proceedings themselves brought into question Mr Wong's ability to control his impulses. I considered that, at their highest, they raised concerns about Mr Wong's then understanding of professional personal boundaries and informed consent in the context of his profession.

71 I am nevertheless not prepared to go as far as I did in *JDH* and refuse to place any weight on the fact of the charges having been laid.

72 I am ever mindful of the volume of complaints and the extenuating circumstances in relation to several of them not proceeding to hearing.

73 Taking all of the above matters into account, I consider the nature and gravity of the allegations and their relevance to child-related work to be a

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serious red flag sounding a word of warning against the granting of the application, subject however to the following important considerations.

(b) - the period of time since Mr Wong engaged, or allegedly engaged, in the conduct

74 The alleged conduct occurred between 11 and 18 years ago. That is a significant period of time.

75 It is of note that, during the intervening period, Mr Wong:

(a) successfully completed supervised performance assessments, education courses, supervision with a senior physiotherapist and written reporting requirements imposed by AHPRA;

(b) has continued to work as a physiotherapist (unsupervised and without any restrictions since 2014) in an aged care facility, with both male and female patients, without any reported incidents or complaints;

(c) has volunteered at several religious organisations, which has included working with children;

(d) has committed no criminal offending of any description; and

(e) has not been the subject of any further reports, complaints or concerns about his conduct in any context – be it at work, in his personal life, or as a volunteer.

76 The length of time since the offending occurred is a significant factor when determining risk to children. In *BHB v Secretary to the Department of Justice* [2008] VCAT 1946, the Tribunal said the following at [12] about the passage of time:

> It is self-evident that an offence which occurs in recent time will generally be more concerning than an offence which has occurred a long time ago. The fact that an offence may have occurred a long time ago may be an indication that the person concerned may no longer have a predilection for committing such an offence. On the other hand, it may just be an indication that the person may not have had the opportunity to commit further offences of this kind, having been found out once and punished in such a public way. The individual circumstance of each applicant must therefore be considered when deciding the weight to be attributed to this element.

77 It is significant in Mr Wong's case that, for seven years, he has worked in the same context as that in which these allegations arose, without any further alleged incident.

78 It is significant that he has engaged in child-related volunteer work without incident.

79 His character references speak glowingly of his work in both arenas.

80 The passage of time can have a significant bearing on the risk assessment that must be undertaken by the Tribunal.

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81 The Secretary, however, contended that less weight ought to be given to this factor due to the lack of insight, remorse or contrition shown by Mr Wong to the women involved. The Secretary emphasised the admissions made by Mr Wong with respect to professional deficiencies leading on one occasion to an apology.

82 It was submitted by the Secretary that there is no evidence before the Tribunal that Mr Wong has now developed insight, contrition or has been successfully rehabilitated.

83 I disagreed with the Secretary that Mr Wong has not demonstrated insight, remorse, or contrition.

84 It goes with the territory that a person who claims innocence may struggle to concurrently claim contrition.

85 Nevertheless, I accept that he has fully accepted that shortfalls in his professional obligations may have led to misunderstandings and that he has shown significant insight into the need to be vigilant about consent and about other people's personal boundaries.

86 I further accept that he also has an understanding of the impact that inappropriate physical contact can have on a person.

87 I accept that he has benefited greatly from the reflection, education, training and mentoring that he has undertaken since the allegations were made.

88 Mr Wong has also regularly worked with children as a volunteer for several years with no issues. There is evidence of his positive engagement with children in that time.

89 The lengthy period that has passed without any offending, complaints or concerns strongly favours Mr Wong. Apart from the alleged conduct, Mr Wong's life can properly be described as exemplary.

90 The passage of time, in my opinion, is a very favourable factor in favour of Mr Wong's application.

(c) and (d) – in the case of an offence, whether a finding of guilt or conviction was recorded for it or a charge for it is still pending; and the sentence imposed for the offence

91 Mr Wong was not convicted or found guilty of any offence.

92 Nine of the 16 charges were withdrawn by the Director of Public Prosecutions and struck out by the Magistrates' Court on 28 January 2011 before the matter went to committal hearing.

93 On 9 June 2011, a further charge was discharged by a magistrate at the committal hearing on the basis that there was insufficient evidence to support a conviction.

94 Although Mr Wong was committed to stand trial on a further six charges relating to three of the complainants, all of these charges were discontinued

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by the Director of Public Prosecutions on 25 October 2011 during pre-trial argument in the County Court. The essence of the submissions made by counsel for Mr Wong were that:

> There is a real possibility that each complainant's evidence has been concocted, contaminated, or otherwise innocently infected … by discussions that each of them had with the other prior to the making of their statements …[3]

95 The charges were therefore never proven.

96 No adverse findings of a sexualised nature were ever made against Mr Wong.

97 Mr Wong was not convicted or found guilty of any indecent assault offences.

98 It was submitted by the Secretary that, had Mr Wong been found not guilty, this factor would have some weight; but because the charges remain untested and were not proceeded with, this fact is of little assistance in determining risk.

99 Accordingly, it was submitted that this factor does not favour Mr Wong to any significant extent.

100 I disagree.

101 I am mindful of and have read the detailed application for discontinuance filed with the Director of Public Prosecutions on 7 October 2011. I read the transcript of the submissions put on Mr Wong's behalf at the County Court.

102 Decisions not to proceed with serious charges are not generally made lightly. The decisions were clearly made after considerable scrutiny of the relevant material.

103 They were considered decisions made by experienced practitioners as to the likelihood or prospect of successful prosecution.

104 The subsequent professional conduct findings, whilst indicating a concern with Mr Wong's professional standards, did not conclude that he had conducted himself in a sexualised manner toward a client.

105 Whilst, as I have already indicated, the fact of the allegations having been made and the subsequent charges having been levelled against Mr Wong are of grave concern, it is nevertheless highly relevant to my determination that none were proceeded with and no findings of guilt were ever made.

(e) – the ages of Mr Wong and of any victim at the time Mr Wong engaged, or allegedly engaged, in the conduct

106 Mr Wong was aged between 39 and 46 years during the period of the allegations.

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[3] Transcript of pre-trial argument at TB, 414, lines 21 - 415, line 11.

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107 The alleged victims' ages ranged between 56 to 81 years. Some, if not all, because of their age had age-related vulnerabilities.

108 I agree, however, with the submissions made on behalf of Mr Wong that there has never been any allegation or complaint relating to Mr Wong's involvement with children.

109 To the contrary, there is a significant body of positive evidence before me relating to Mr Wong's past engagement with children, spanning many years.

(f) – whether the conduct has been decriminalised or has ceased to be subject to disciplinary charges since Mr Wong engaged, or allegedly engaged, in it

110 The alleged conduct has not been decriminalised.

(g) – Mr Wong's behaviour since he engaged, or allegedly engaged, in the conduct

111 Mr Wong was first issued an Assessment Notice under the WWC Act in 2007. The Assessment Notice was surrendered in 2010 following the laying of the charges.

112 Mr Wong was again issued with an Assessment Notice on 18 June 2015, after the resolution of the matters described above. This Assessment Notice expired on 18 June 2020.

113 It is highly relevant and noteworthy that, during that time, there were no further allegations of offending of any description.

114 It is also relevant that Mr Wong has continued to practice as a physiotherapist without further reported incident and remains employed as a physiotherapist.

115 Since satisfying the requirements imposed by AHPRA in 2014, Mr Wong has worked in an unrestricted and unsupervised physiotherapy practice.

116 He has continued to practise as a physiotherapist *in an aged care setting* without further incident. During that time, Mr Wong has had regular unsupervised involvement with elderly women in a "hands on" occupation. He has therefore had many opportunities to act inappropriately. He has not done so. That is significant.

117 There have been no further allegations whatsoever of misconduct or impropriety concerning Mr Wong.

118 Mr Wong has demonstrated a commitment to learning and improvement, having satisfied the education and mentoring requirements that were imposed by AHPRA and having successfully completed the Anglican Diocese of Melbourne Professional Standards and Child Safe Quiz on 6 August 2020.

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119 I accepted the evidence of Mr Wong's clinical mentor, Dr Robert Laird, (with whom he completed eight months of observation and clinical mentoring) who said:

> I have continued to be impressed with his enthusiasm for further education and his passion for providing excellent quality of care. To the best of my knowledge, I have no hesitation in recommending Cooky as a person who is trustworthy, honest and reliable with competent and informed physiotherapy skills.

120 I also heard the evidence of Mr Wong during this proceeding.

121 I disagreed with the submissions of the Secretary that Mr Wong's understanding of the importance of boundaries in child-related work could not be accurately determined. Mr Wong gave very clear evidence about his understanding of such boundaries.

122 I did not consider that the requirement that Mr Wong undertake further professional performance assessments detracted from the application.

123 Such a requirement could in no way lead to a finding that the serious allegations had been made out. In some ways, the findings of the regulator lent credit to Mr Wong's own assertions of misunderstanding about the treatment processes engaged in.

124 In any event, Mr Wong successfully completed the required performance assessments and the senior supervisor gave glowing evidence on his behalf before me.

(h) – the likelihood of future threat to a child caused by Mr Wong

125 In *Maleckas v Secretary to the Department of Justice* (***Maleckas***) [2011] VSC 227 at [71]-[72], Kyrou J discussed the meaning of the expression "the likelihood of future threat" to a child caused by the applicant and said:

> A chance of a future threat, irrespective of its magnitude, is a relevant consideration under s 13(2)(h). Clearly, where the chance is minimal, the consideration may favour the applicant. The greater the chance, the less favourable is the consideration from the applicant's perspective.

126 As to the meaning of the word "likelihood" (in the context of the analogous provision in the now-repealed WWC Act), in *ZZ v Secretary, Department of Justice & Anor* [2013] VSC 267 ("***ZZ***"), Bell J said at [139]:

> the relevant ordinary meaning of 'likelihood' in s 13(2)(h) is 'the quality or fact of being likely or probable'. The relevant ordinary meaning of 'likely' is likewise 'probable'. This too requires an assessment, one that may count in favour of or against the applicant depending on the level of the probability.

127 Ultimately, I agree with the submissions made on behalf of Mr Wong that apart from the discontinued charges, there is no evidence to support a

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reasonable inference that Mr Wong represents *any* future threat to children generally, let alone in the context of child-related work.

128 There is a complete absence of any other issues of concern in Mr Wong's private or professional history.

129 Several witnesses gave evidence before me, each of whom were cross-examined.

130 They variously described Mr Wong as a loving, caring, stable, gentle, responsible, and law-abiding member of the community. Several gave very positive evidence in relation to Mr Wong's engagement with children.

131 Mr Wong was described by his wife and son as "a tender and loving father". He was described as being "tender loving and caring" towards other children.

132 Those who have worked with Mr Wong within the church community described him in similar terms. They described the gratitude felt by parents and children alike to his teachings and guidance.

133 I read further positive material in relation to Mr Wong's work with children with a disability.

134 Evidence from an applicant's family and friends reflecting his social and familial support network is important in these types of matters and I accepted the evidence whilst noting its limited value in terms of risk assessment.

135 In this respect, I am very mindful that most of the character witnesses were unable to comment on the allegations before me because they largely knew little about them. The only witnesses holding real knowledge of the sexual allegations against Mr Wong were Reverend Sherman Huang and Mr Wong's wife, Eva Wong.

136 Although I accepted that there were cogent reasons for Mr Wong not detailing the full nature of the allegations to his social network, this meant that in terms of their assessments of his future risk, the assessments were of limited value.

137 It is often submitted by the Secretary, and it was in this case, that psychological reports are of considerable assistance to the Tribunal for the purposes of assessing the likelihood of future threat to a child caused by an applicant.

138 This is true. But I take the opportunity to emphasise that it will not be so in all cases. Each case must be determined on a case by case basis.

139 I disagreed with the proposition put by the Secretary that, in the absence of any psychological assessment, I would be unable to assess risk in any meaningful way.

140 I was not in this case troubled by the lack of expert evidence or reports from treating or assessing professionals. In my experience, psychological risk

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assessment reports rarely explore untested and/or unproven allegations in any great detail.

141 There were, however, other factors in this case to assist in the risk assessment exercise.

142 It is relevant to the assessment of risk that, although there was no finding of guilt and Mr Wong denies the charges, Mr Wong demonstrated in his evidence before me a sound appreciation of the need to respect other people's personal boundaries, in all facets of his life. I accept that Mr Wong, whilst denying engaging in criminal conduct, intellectually fully understands the wrongfulness of the alleged offending and has a level of insight that is appropriate in the circumstances.

143 Mr Wong was able to explain and I accepted that he had learnt a great deal from the training courses, supervision and education that he undertook after the investigation by AHPRA. He was able to demonstrate a clear understanding of the need for consent when engaging in any physical contact with other people.

144 I am mindful that Mr Wong has continued to work as a physiotherapist in aged care for over seven years since these matters were finally determined without further incident or allegation.

145 I accept that Mr Wong has had a lengthy involvement with children over many years (both professionally and as a volunteer).

146 I accept that Mr Wong was able to readily demonstrate through his own evidence and that of his witnesses a demonstrated ability to provide a safe and nurturing environment for children.

147 It is relevant that Mr Wong has faced the Magistrates' Court, the County Court, the regulator and this Tribunal in relation to these matters. These matters would all weigh heavily on his mind were he to ever consider transgressing the law in any way.

148 I am satisfied that the likelihood of a future threat to a child by Mr Wong being permitted to engage in child-related work is minimal.

(i) and (j) – any information given by Mr Wong in, or in relation to, the application; and any other matter that the Secretary considers relevant to the application

149 Mr Wong seeks a WWC clearance to engage in child-related work with volunteer organisations Crossway Baptist Church, Mullum Mullum Anglican Parish, St Pauls Anglican Cathedral Melbourne and CMS Victoria. Mr Wong's volunteer duties include reading and teaching bible studies to children in group settings with parents and other members of the church parish present. Mr Wong gave evidence that he also requires a WWC clearance to go to CMS Victoria, a religious organisation which requires volunteers to have a WWC clearance, regardless of whether they work with children or not.

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Conclusion

150 Given my above observations, I am not satisfied in the particular circumstances of this case that it would be appropriate to refuse to give a WWC clearance to Mr Wong having regard to the matters set out in section 65(2) of the WSA.

151 I turn then to a consideration of the reasonable person test.

Reasonable person test (section 108(2)(a))

152 In *VQB v Secretary to the Department of Justice* [2013] VCAT 789 at [36], Vice President Judge Macnamara stated:

> The reasonable person would, in reaching his or her conclusions, acquaint himself or herself with all of the matters that have been placed before me, giving an applicant for a positive assessment a right to be heard, as well as considering the material gathered by the Secretary. A reasonable person would not approach the task with a closed mind, thinking that once a person has offended, he or she can never be redeemed. The reasonable person, however, would not put aside all scepticism and reasonable caution in this most difficult area in some over-optimistic attempt to facilitate rehabilitation.

153 The test, as reiterated by the Supreme Court, is an objective one which relies on a reasonable person having knowledge of all facts and surrounding circumstances (see *PQR v Secretary, Department of Justice and Regulation (No 2)* [2017] VSC 514).

154 It is significant that this provision requires a reasonable person to allow contact not just with a child, but with the person's own child. It has been observed that because "*as a matter of human nature people are more cautious and concerned about their own child, than about others' children, the subsection places a more onerous test on an applicant for an Assessment Notice*" (see *OYJ v Secretary to the Department of Justice and Regulation* [2019] VCAT 33).

155 It was submitted on behalf of Mr Wong that a reasonable person who acquainted themselves with all the material before the Tribunal would have real doubts about whether the conduct occurred at all.

156 I disagree.

157 I consider that the alleged conduct would remain of grave concern to a reasonable person.

158 I consider a reasonable person would feel somewhat left in the dark as to whether the alleged conduct occurred.

159 The reasonable person could probably not reach a firm determination either way. The reasonable person would be left guessing. Whilst this is an unfortunate position, it is in this instance the reality.

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160 The reasonable person would therefore find their mind floating, as I have, between the unlikelihood of so many women making totally unfounded allegations against Mr Wong and the unlikelihood of someone with the otherwise law abiding nature of Mr Wong committing the offences.

161 The reasonable person would not place undue weight on the evidence of several witnesses who indicated that they would allow Mr Wong to have unsupervised contact with their own children (or, in one case, with a nephew and niece), because the reasonable person would be mindful of the limited factual knowledge possessed by them.

162 Ultimately, however, I consider that the reasonable person would allow their child to have direct contact with Mr Wong whilst he was engaged in any type of child-related work.

163 The reasonable person would understand the evidence, albeit for various reasons, was unable to support any charges proceeding to final determination. They would be very mindful of the lack of a finding of guilt in even one instance.

164 The reasonable person would be very mindful of the passage of time both before and after the allegations, with nothing further alleged, and would place significant weight on the fact that the alleged conduct occurred between 11 and 18 years ago.

165 The reasonable person would look to Mr Wong's exemplary conduct both before and since that time.

166 The reasonable person would also give weight to the fact that the professional standards regulator allowed Mr Wong to return to his practice of physiotherapy, even after hearing evidence from a key witness. The reasonable person would appreciate that the Board, as another tier of scrutiny, did not consider the public, which includes children, were placed at risk from Mr Wong.

167 The reasonable person would have access to the various responses given by Mr Wong both during the initial stages of the investigation and during the AHPRA investigation.

168 The reasonable person would be aware, for example, of:

(a) the minutes of a meeting between Mr Wong and Baptcare manager Cameron Sinclair on 3 June 2010, where he provided clinical reasons for contact with the complainants that may have been misunderstood or misinterpreted;

(b) a letter that was written by Mr Wong to AHPRA on 24 July 2010;

(c) evidence that was given by Mr Wong to the Panel hearing on 17 December 2012; and

(d) the affidavit that has been filed by Mr Wong in these proceedings.

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169 The reasonable person would be mindful of the fact that Mr Wong gave sworn evidence before the Tribunal and made himself available for cross-examination.

170 The reasonable person would be satisfied that Mr Wong had done all he reasonably could to answer the allegations levelled against him.

171 The reasonable person would consider that Mr Wong has done his best to respect and understand the perspective of the complainants.

172 The reasonable person would be satisfied that he (now) has a solid understanding of sexual and personal boundaries and an appropriate understanding of appropriate sexual behaviour and consent.

173 I am comfortably satisfied that a reasonable person would allow their child to have direct contact with Mr Wong while he engaged in any type of child-related work.

174 This does not, however, end the matter.

Unjustifiable risk and any type of child-related work test (section 108(2)(b))

175 I must further consider whether Mr Wong's engagement in any type of child-related work would not pose an unjustifiable risk to the safety of children.

176 I must consider the risk posed by Mr Wong in other areas of child-related work besides his professional and volunteer work.

177 If granted a WWC Clearance, Mr Wong would be free to engage in any type of child-related work, anywhere, in an unsupervised capacity.

178 In *ZZ* at [160], Bell J said the following about the test of "unjustifiable risk" to be applied by the Tribunal (in the context of the analogous provisions in the now-repealed WWC Act):

> the performance of [this] function requires the tribunal to make a rational, objective and evidence-based assessment of the nature and degree of the risk (if any) which giving the notice would pose in the given facts and circumstances. The concept of 'unjustifiable risk' incorporates notions of weighing, balancing and proportionality. Taking into account the considerations specified in s 13(2), the seriousness of the potential harm must be assessed against the probability of it occurring. The tribunal's risk assessment must be an evaluative judgment about whether giving the notice would not pose an 'unjustifiable risk' to the safety of children …

179 In relation to the meaning of the term "unjustifiable risk" (in the context of the analogous provisions in the now-repealed WWC Act), Bell J in *ZZ* said at [138]:

> The interpretation of s 13(2) which I have here explained is carried by the plain and ordinary meaning of the words 'unjustifiable risk'. A 'risk' is a 'hazard' or 'danger' or an 'exposure to mischance or peril'

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> and may be great or small depending on the probability of the event occurring and the nature of the hazard or danger concerned. The legislation creates an important scheme for protecting children from the hazard or danger of being sexually or physically harmed by employees, volunteers and others. But it is not a scheme for protecting children from all hazards and dangers whatsoever, however insignificant be the nature of the potential harm or small be the degree of the probability of that harm occurring. That comes from the word 'unjustified'. Something is 'unjustified' where it is '[n]ot brought into a state of justification' or '[n]ot proved to be right or proper'. Something is justified where it is '[m]ade just or right; made or accounted righteous; warranted; supported by evidence'.

180 I am satisfied for the reasons already articulated that Mr Wong does not pose an unjustifiable risk to children in any situation.

181 Finally then, I turn to the public interest test.

Public interest test (section 108(3))

182 In *Secretary to the Department of Justice and Community Safety v EDX* [2020] VSC 583 at [61], Richards J (citing *Secretary, Department of Justice v LMB* [2012] VSCA 143 at [61] and *ZZ* at [199]-[209]) observed that:

> if the Tribunal is satisfied that an applicant does not pose an unjustifiable risk to the safety of children, the paramount consideration will rarely preclude a finding that it is in the public interest to give an assessment notice.[4]

183 Although Mr Wong continues to work as a practising physiotherapist, he does not intend to provide physiotherapy treatment to children. He is not involved in any other child-related work with any other organisations.

184 It was submitted by the Secretary that, because Mr Wong's present and future employment and income are unaffected by a lack of a WWC clearance, Mr Wong's wishes to engage in unsupervised, volunteer work at various religious institutions are secondary considerations as the need for children to be protected is the first and foremost consideration.

185 It is clear from the evidence before me that Mr Wong is well regarded in the community. He has skills that could benefit children and has demonstrated himself over the years to be a positive role model for children.

186 I consider that there is a public interest in Mr Wong being able to work and volunteer in the community in circumstances where I have not found that he poses an unjustifiable risk to children.

187 I accept that Mr Wong has a history of engaging well with the children he has worked with and that his voluntary work is highly valued by both children and parents alike.

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[4] At [35] (citation omitted).

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188 Further, Mr Wong has described the personal satisfaction that he receives from his volunteer work:

> I have always believed in the importance of raising children and assisting their development. I find it a joy and extremely rewarding to give back to my church community in the same way that I raised my own family.[5]

189 I agree with the submissions made on behalf of Mr Wong that it is in the public interest for Mr Wong to be permitted to continue volunteering in the community.

190 In circumstances where I have found that Mr Wong does not pose an unjustifiable risk to children, but conversely has skills which would benefit children, I am satisfied that the public interest favours him doing so.

Conclusion

191 I will set aside the decision of the Secretary and direct the Secretary to give Mr Wong a WWC clearance.

H. Lambrick
Deputy President

[5] Affidavit of Tak Suen (Cooky) Wong dated 3 May 2021 [31].

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