

THE QUEEN

v.

MICHAEL JOSEPH McARDLE

(Applicant)

APPLICANT'S WRITTEN SUBMISSIONS

The course of proceedings

1. On 8 October 2003, the applicant pleaded guilty before Howell DCJ at Brisbane to 62 counts of indecent dealing involving 16 children. His Honour sentenced the applicant to 6 years imprisonment with a recommendation that he be eligible for release on parole after he served 2 years. At the time the offences were committed the maximum penalty was 7 years imprisonment.¹
2. On 20 October 2003, this application was filed.

The conduct

3. The circumstances surrounding the criminal conduct were:
 - 3.1. The applicant was ordained as a priest in the Catholic Church in 1962. He was then 27 years old. He served that Church for 36 years. The complainants were children associated with the Church's communities to which he was sent.²
 - 3.2. Most of the offences were committed in the period 1965-1967, 1972-1978 with one further complainant, a girl, in 1985-7. The applicant was 30 years old when he committed count 1. He was 68 years old at the time of sentence.
 - 3.3. There were 14 boys aged from 8 to 13 years old and 2 girls aged 10 to 13 years old.
 - 3.4. The conduct concerning the boys can be put into two broad categories. A majority of the counts³ comprise his interfering with them by kissing, cuddling and manual manipulation for his own sexual gratification. Also, some of the boys were procured to sexually arouse him by masturbating him⁴ or he masturbated them⁵ or both⁶ and on 5 occasions (3 complainants) there was oral sex.⁷

¹ Section 210 (indecent dealing with a boy under 14 years) and section 216 (indecent dealing with a girl under 14 years) *Criminal Code*. See R130-131 and discussion of the maximum penalties applicable at R2-6, 21-25.

² The centres include Biloela, Rockhampton, Mackay, Bundaberg, Longreach and Monto.

³ Counts 1-23, 25, 27-29, 31-33, 38, 52-53

⁴ Counts 24, 39-44, 46-48, 57

⁵ Counts 26, 58

- 3.5. The conduct involving the girls was by comparison, quite minor.⁸ It involved fondling on the outside of clothing and kissing.
 - 3.6. The applicant's overall conduct, in respect of both girls and boys, did *not* involve any violence or threat of violence. There was no digital, penile, anal, or vaginal penetration or any apparent attempt as such (or any simulation of sex).
4. It is an aggravating feature that at the time the offences were committed the applicant was a priest in an established church. The children were looking to him for religious instruction or had been placed by their parents in his care for that purpose. He was in a position of trust. There was however no suggestion made by the applicant to the children that disclosing his conduct to anyone would attract the wrath of God or the like.
 5. At various points, the applicant's conduct was reported to Church authorities by the children and their families and the only apparent response by the Church was to move him to another centre. The police were not informed. He was never confronted about his behaviour by the Church or anyone else. The failing of the Church and other institutions does not of course excuse or diminish the applicant's conduct. It has meant however that there has not been any attempt to investigate the conduct, counsel or even monitor his further contact with children or attempt to protect other children from him, which factors have contributed to the extended period over which he continued to offend and the total number of offences. If the Church's response was as it might be now the offending conduct could probably have been truncated after the first few counts. This might have prompted him to desist or at least it would have removed him from his position of trust in these communities.
 6. The applicant ceased offending about 17 years ago through introspection, self-insight into his wrongdoing and self-rehabilitation. In fact, it has been 25 years since he last interfered with any boy, followed by a gap of 8 years and then the relatively minor offending associated with one of the female complainants (counts 54-56 & 60-62).

The matters referred to by the sentencing judge

7. Howell DCJ referred to:
 - 7.1. The serious breach of a position of trust: R50, L31-40. For such a breach of trust, a deterrent sentence is clearly called for: R51, L7-9. Deterrence being more than ordinarily important given the offences involved: R51, L10-22.
 - 7.2. The complainants were all young and "naïve and certainly trusting": R50, L45-47.

⁶ Counts 34-36, 45, 59

⁷ Counts 30, 37, 49-51

⁸ Counts 54-56, 60-62.

- 7.3. The 62 counts were committed over quite a period of time: R51, L31-35.
- 7.4. The conduct did “not involve the offences at the most serious end, namely rape, sodomy, carnal knowledge, but the acts involve a number of counts of fellatio...”: R51, L39-53.
- 7.5. Of concern is the fact that two of the complainants were siblings: R52, L7-13.
- 7.6. Citing *Macrossan J in R v Francois C.A. 1 of 1986*, “in all such cases there is no doubt some potential for psychological or emotional harm” to the complainants: R52, L35. Referring to victim impact statements, (Exhibit 4): R79-100 his Honour accepted the “not insubstantial psychological, emotional and understandable after effects on them”: R52, L47-55.
- 7.7. The overall conduct did not involve any violence or threat of violence: R53, L1-7.
- 7.8. The molestation of the girl complainants is at the lesser end of seriousness: R53, L41-45.
- 7.9. Counts 52-54 occurred in the confessional area of the Church. Count 47 occurred 10 mins before the applicant was to perform Mass: R53, L49-55.
- 7.10. The circumstances under which the offences came to light. There was some criticism about the degree of candour shown by the applicant to the journalist to whom he confessed: R55, L1-10.⁹
- 7.11. The timely plea of guilty at the committal stage: R55, L17 – R56, L31.
- 7.12. The substantial delay. The offences occurred 16 to 38 years ago: R56, L35-51.
- 7.13. That there had been limited intervention by the Church authorities after the offences had been disclosed by the applicant to the Church hierarchy: R57, L8 to R58, L1.
- 7.14. That there had been quite a degree of rehabilitation since at least 1990: R58, L5-7.
- 7.15. That there was some evidence of remorse “but one must throw into the melting pot the contents of the taped interviews by the journalist in that regard”: R58, L21-29.
- 7.16. The applicant’s poor health: R58, L25-53.
- 7.17. That sentences imposed by the Courts at or about the time the present offences were committed “seemed to be more compassionate, more lenient, or, to put it another way, quite a bit lower”: R 58, L57 to R59, L7.

The applicant’s contentions on appeal

8. The applicant’s contentions were set out in the written submissions before Howell DCJ: R120-129. They are summarised and augmented below.
9. The imposition of a sentence of 6 years imprisonment in respect of certain counts¹⁰ when the prescribed maximum was 7 years imprisonment suggests that the sentencing judge did not take into proper account his Honour’s finding that the conduct did “not involve the offences at the most serious end” and paid mere ‘lip service’ to the substantial matters of mitigation.¹¹ There was no proper recognition of the applicable maximum penalty.

⁹ “So it is not a matter of the accused saying, “Oh, I offended with John Smith, Bill Brown”, et cetera, and his causing charges to be brought against him. He did not name any victim and each victim came forward thereafter.”

¹⁰ Counts 30, 34-37, 45, 49-51 & 59.

¹¹ Cf. *Khan v Minister for Immigration and Ethnic Affairs* (Gummow J (Fed Ct) (1987) 14 ALD 291 and *Barrington v Minister for Immigration & Multicultural Affairs* [1999] FCA 327: “Mere lip service will not suffice”.

10. Also, having regard to the comparable cases, particularly that of *Wright* [1996] QCA 104 and *R v C; Ex parte A-G (Qld)* [2003] QCA 510, the sentences imposed below are manifestly excessive.

The conduct

*Degree of intrusion & number of offences*¹²

11. The applicant pleaded guilty to 62 specific offences involving 16 complainants. In respect of the boys there were two levels of conduct ranging from the relatively minor fondling (counts 1-23, 25, 27-29, 31-33, 38, 52, 53), to more invasive masturbation of boys, being manipulated by them (counts 24, 26, 34-36 39-44, 45-48, 57-59) and fellatio (counts 30, 37, 49-51). In respect of the girls there was fondling through clothes only.
12. There was no threatened or actual physical violence.¹³
13. Howell DCJ was correct in categorising the conduct at the lower end of the range of conduct that frequents the criminal courts in respect of these offences: R51, L29-47.¹⁴ It is difficult to see how this would permit the penalty imposed which is just short of the maximum.

The mitigating factors

Guilty plea

14. A timely guilty plea was entered at the committal stage.¹⁵ The following is also evident:
- 14.1. The conduct came to light after the applicant's confessions to a journalist when confronted with the allegations.¹⁶ Some mitigating matters stated in this interview are:
- 14.1.1. That the applicant candidly admitted his wrongdoing with no regard to the forensic consequences.
- 14.1.2. He was obviously contrite and remorseful about any harm he had inflicted upon the children; he indicated that he had been candid with the Church when confronted with allegations.
- 14.1.3. He indicated that he had sought professional help to address his conduct: R122 (para. 8).
- 14.2. Upon this interview receiving front-page circulation in statewide newspapers, other complainants contacted police. Then, on 15 July 2002 he was charged with some of the

¹² S.9(6)(c): *Penalties & Sentences Act* 1992 (Qld)

¹³ S.9(2)(c): *Penalties & Sentences Act* 1992 (Qld)

¹⁴ "In relation to the seriousness of the offence itself, (...) the molestation does not involve the offences at the most serious end, namely rape, sodomy, carnal knowledge, but the acts do involve a number of counts of fellatio by the accused."

¹⁵ Section 13 of the *Penalties & Sentences Act* 1992 (Qld). The committal was justified, as distinct from the matter proceeding ex-officio as some charges were discontinued after submissions to the DPP.

¹⁶ The sentencing judges criticisms of the applicant (R55, L1-12): "So it is not a matter of the accused saying, 'Oh, I offended with John Smith, Bill Brown', et cetera, and his causing charges to be brought against him. He did not name any victim and each victim came forward thereafter") were unfair if one listens to the actual audiotape of the interview. The unwillingness to report the matter himself was genuinely expressed as being due to a belief that it was for the complainants to decide, in making a public complaint, whether they wished to let these matters come to light with all the attendant pain associated with that process: R 44, L11-43.

offences.¹⁷ Some more complainants contacted police following further publicity as to his arrest, resulting in some further charges.

14.3. No complainant was required to give viva voce evidence or endure cross-examination: R122, (para 9).

14.4. The applicant's co-operation from the outset has ensured the orderly disposition of the numerous charges. There is also clear evidence that the victims have been greatly assisted by the applicant's approach to the matter in the civil courts.

15. Both remorse and a preparedness to facilitate the course of justice is acutely apparent.¹⁸

*Character, age, intellectual capacity and other personal circumstances*¹⁹

16. The applicant has no prior convictions.

17. He is elderly and frail.²⁰ He is now 68 years old. It has been more than 17 years since he last offended. He is of very poor health following a cardiac operation a few weeks before he was sentenced: R103-106.²¹ Although this aspect of the matter cannot "overwhelm appropriate reflection of the grave nature of the offences,²² this feature has resulted in substantial reductions in head sentences.²³

*Delay & rehabilitation*²⁴

18. The applicant gave evidence at the sentence proceeding: R107-111. Nearly 37 years has elapsed since the applicant first committed an offence and it is 17 years since his last. This delay in investigation and prosecution was not due to any attempt at avoidance by the applicant; he did not abscond from the jurisdiction nor conceal his identity to attempt to avoid prosecution. The significant delay can be attributed to steps taken by the Church to avoid having to deal with complaints by moving him around to other country centres.

Neither the complainants nor their families pursued the matters any further.²⁵

¹⁷ He spent one night in the watchhouse before being released on bail viz., 15 July 2002.

¹⁸ *Cameron v The Queen* (2002) 209 CLR 339 at 342; (2002) 76 ALJR 382 at 385-6.

¹⁹ Section 9(2)(f) 7 9(6)(g): *Penalties & Sentences Act* 1992 (Qld)

²⁰ *R v Dary* [2001] QCA 325; para 137: "An offender's ill-health is a mitigating factor in sentencing when imprisonment will impose a greater burden on the offender than on others or where there is a serious risk that imprisonment will have a gravely adverse effect on his health: see *R v Pope* (1996) QCA 318; CA No 271 of 1996, 30 August 1996 but cf. *R v Benham* [2000] QCA 42; CA No 345 of 1999, 24 February 2001 where the court noted that the applicant's health was so parlous that he was no worse off in prison than at home." See also *DPP v Che Kien* [2000] VSC 376; *Sopher* (1993) 70 A Crim R 570 at 573; *R v Cumberbatch* [2002] VSC 382.

²¹ It was the applicant's second bout of cardiac surgery.

²² *R v Irlam; ex parte Attorney-General* [2002] QCA 235 (de Jersey CJ, Davies & Williams JJA) at p.16; *R v Svensson ex parte Attorney-General* [2002] QCA 472.

²³ In *Dary* [2001] QCA 325, a heart condition prompted the Court of Appeal to reduce head terms of 12 years (for rape) to 10 years and in *Schloss* (1998) 100 A Crim R 80 from 12 years (again for rape) to 9 years.

²⁴ Section 9(1)(b) 7 9(2)(q): *Penalties & Sentences Act* 1992 (Qld)

²⁵ Criminal compensation was probably not that frequently pursued at the time.

19. In *Connolly* (2001) 124 A Crim R 485 at 491 Slicer J conveniently summarised matters which arise from such a delay and which apply in this case:

“Nearly 30 years have elapsed between the occurrence of these crimes and the date of sentence. In such cases the courts are entitled to take into account a range of mitigating factors including the type of life led by the offender subsequent to the crime as being evidence of rehabilitation (*Smith* (1992) 7 A Crim R 437) the effect of imprisonment so long after the event, (*Crawley* (1981) 5 A Crim R 451) and the disintegration of the offender since exposure (*Todd* [1982] 2 NSWLR 517).”

20. There has been an increase in the maximum penalties. Of course the applicant should only be subject to the tariffs then applicable viz. 7 years for all of the charges.²⁶
21. Moreover, the second principle identified in *R v Law; ex parte A-G* [1996] 2 Qd R 63 at 66 (as to when delay resulting in unfairness should mitigate the sentence that would otherwise be imposed) has application:

“... where the time between the commission of the offence and sentence is sufficient to enable the court to see that the offender has become rehabilitated or that the rehabilitation process has been made good...” [authorities cited]

See also *Duncan v The Queen* [1983] 47 ALR 746; (1983) A Crim R 354 where the Court of Criminal Appeal of Western Australia said, at ALR 749:

“... where, prior to sentence, there has been a lengthy process of rehabilitation and the evidence does not indicate a need to protect society from the applicant, the punitive and deterrent aspects of the sentencing process should not be allowed to prevail...”²⁷

Delay was seen as a significant mitigating feature in *R v C; ex parte A-G (Qld)* [2003] QCA 510.

22. In the present case, the applicant ‘confessed’ his conduct to church authorities from the outset. He has been receiving the support from what seems to be a group of decent and devout people: R112-119. He ceased Church duties in 1988: R109 (para 9). He has abstained from any unsupervised contact with children since then and in fact he has lived a hermitic life in recent years: R109 (para 11).²⁸ He is now also physically incapable, one would think, from committing any other offences at his age and state of health.²⁹ His refrain from manifesting his prior predilections seems to be based on his own moral insight into his wrongdoing. This insight has only increased since being charged: R124 (para 23).

²⁶ Sections 11 and 210: *Criminal Code*. *R v Lipinski* (1994) 75 A Crim R 54 at 57.

²⁷ This point was adopted with approval by the Court of Appeal in *R v Dary* (supra) at para [134].

²⁸ See observations of Pincus & McPherson JJA in *Wright* (supra) at pp 1 & 3 as to this feature.

²⁹ S.9(6)(j): *Penalties & Sentences Act* 1992 (Qld)

Public Vilification

23. The applicant has been the subject of significant public vilification: R107-108, 111: *R v C; Ex parte A-G (Qld)*,³⁰ Davies JA (with whom de Jersey CJ and McMurdo J agreed):

“Because the respondent was a priest, his arrest and conviction were publicly humiliating for him as indeed they should have been. But the public disgrace, deserved though it was, and its effect on him is of general relevance in considering whether the sentence imposed was inadequate.”

24. His Honour makes little mention of the humiliating treatment that the media had subjected the applicant to and there is no evidence that he has taken this factor into proper account.

Comparable cases

25. Sentences imposed in recent years which are broadly comparable with the applicant’s circumstances were placed before the sentencing judge, viz., *Wright* [1996] QCA 104 and *R v C; ex parte A-G (Qld)* [2003] QCA 510.³¹

R v Wright [1996] QCA 104

26. In *Wright* the Court of Appeal did not interfere with a sentence of 3 years imprisonment (Ambrose J dissented and would have allowed the appeal and ordered eligibility for parole after 9 months) in circumstances where:
- 26.1. *Wright* was an assistant parish priest in the Catholic Church.
 - 26.2. He was 58 years old at the time of sentence and aged between 30 and 37 at the time of the offences
 - 26.3. There were 17 counts of indecency with children aged from 9 to 16 years committed over a period from 1969 to 1977. Most of the offences occurred over a two-year period with one committed 7 years later.
 - 26.4. He frequently had the children masturbate him and on one occasion at least simulated intercourse to the point of ejaculation.³²
 - 26.5. He pleaded guilty.
 - 26.6. There had been a delay of 28 years since the commission of the first offence and 21 years since the commission of the last offence.
 - 26.7. Pincus JA, who joined with McPherson JA, in refusing *Wright*’s sentence application observed:³³

³⁰ *R v C; Ex parte A-G (Qld)* [2003] QCA 510

³¹ The other case referred to by the Crown Prosecutor are distinguished in a written submission before Howell DCJ: R101-102 and R125-126.

³² Excerpt from the judgement of McPherson JA at page 3: “She felt that he had an erection. He was rubbing his penis on her stomach in a thrusting motion and he began to kiss her, and his hands were fondling her breasts and they were both clothed. She remembers him squeezing both her breasts very hard, so hard it hurt. He said to her, ‘I want to make love to you.’ She said, ‘you can’t’. He ignored her. He kept squeezing her breast and thrusting his penis between her legs. He was breathing heavy, quickly, and sweaty while he was thrusting. She just laid (sic) there, and she didn’t move.”

³³ At pp. 8-9.

“... I would add that in a case like the present, where there appears to be no real prospect of re-offending, so that individual deterrence is hardly an issue, I doubt if any higher penalty, for offences of this degree of heinousness, would necessarily have been warranted. In the circumstances of this case, being sent to prison at all is a catastrophe, albeit a deserved one, for the applicant.

I cannot think that the sentence, although not one with which we should interfere, was light.”

C; ex parte A-G (Qld) [2003] QCA 510

27. In *R v C; ex parte A-G (Qld)*, this Court (de Jersey CJ, Davies JA & McMurdo J) unanimously dismissed an appeal by the Attorney-General of a sentence of 3 years imprisonment suspended after 15 months. This appeal had been lodged but not heard at the time of the applicant’s sentencing:

- 27.1. C was a Catholic Priest. He was associated with a school attached to the Church.
- 27.2. He was 63 years old at sentence and 33 to 41 years old at the time of the commission of the offences.
- 27.3. There were 34 charges of indecency committed upon 20 girls aged 6 to 12 years taking place over about 8 years. Some of the offences were committed whilst C was hearing or giving instruction about confession, in the primary school and in the victim’s own home. The most invasive conduct was on two occasions when there was digital penetration of a girl’s vagina. On many occasions he kissed girls on the lips and on some occasions pushed his tongue into their mouths.
- 27.4. He pleaded guilty.
- 27.5. There had been a delay of 30 years since the commission of the first offence and 22 years since the commission of the last offence.
- 27.6. Davies JA was of the view that Wright’s conduct was “of a more serious kind” and that a longer period of time had elapsed since the last of the offences which permitted a finding that the C “had rehabilitated himself.”

Points of distinction with present case

28. Whilst it is clear that the applicant pleaded guilty to significantly more offences and they span over a greater period of time, there are points of distinction in his favour:
- 28.1. Although it is probably unhelpful to seek to compare seriousness along a scale of invasiveness alone, C’s conduct was arguably more serious than in the present case.³⁴ Wright’s conduct was generally a little more offensive, given in particular, the simulated intercourse.³⁵
 - 28.2. Both Wright and C were younger than the applicant; Wright by 10 years.

³⁴ There was digital vaginal penetration on two occasions in *C* [2003] QCA 510. See observations in *Connolly* (2001) 124 A Crim R 485 at 485 by Slicer J in this context: “The acts of indecency were not, by comparison with other conduct frequently before the courts, as physically intrusive as they could have been. No physical violence was used, there was no penetration in the sense that the term is ordinarily used.”

³⁵ This accords with the findings of Davies JA in *C* [2003] QCA 510. The present circumstances suggest an infatuation and desire rather than use of another as an object. Slicer J in *Connolly* (supra) at 487 thought that such conduct “differs from coercion and disdain for the victim.”

- 28.3. More significantly there was no suggestion that C or Wright were of poor health at the time of sentence. The applicant had just endured cardiac surgery a few weeks before sentence and his cardiologist³⁶ expressed the following opinions:³⁷
- “Mr McArdle has significant problems with the viability of his skin tissue especially in the lower limbs but also in his arms. He already has, (...), an ulcer on his leg.”
- “It should be emphasised that Mr McArdle is very elderly and will, per force, not stand up well, physically or emotionally, to prolonged incarceration.”
- “While I believe he has made excellent progress from his surgery, it has to be reiterated that this was significant cardiac surgery and full recovery will be slow. He will continue to need ongoing care and attention once in jail.”
29. Sentences imposed in the seventies, that is at the time the applicant committed most of the offences, reveal that a significantly more lenient approach was then taken:³⁸
- 29.1. *R v Donges*, C.A. 43 of 1972 (Hangar CJ, W.B. Campbell & Williams JJ), 20 June 1972: Unlawful and indecent dealing of a 5yr old girl; applicable maximum penalty 7 years: 3yrs imprisonment with a recommendation for parole
- 29.2. *R v Grills; ex parte A-G*, C.A. 126 & 127 of 1973 (Hangar CJ, Stable & DM Campbell JJ)³⁹: Unlawful treatment of 9 year old daughter (forced oral sex and attempted carnal knowledge to the point of ejaculation after simulated intercourse); applicable maximum penalty 14 years (with or without whipping): 2 years probation was not interfered with on an Attorney’s appeal
- 29.3. *R v Saville*, C.A. 141 of 1976 (Wanstall SPJ, Douglas & Matthews JJ); unlawful and indecent dealing with a 5 month old daughter (conduct unspecified in the report); convicted after a trial; applicable maximum penalty 14 years imprisonment: 2 years imprisonment not interfered with on appeal.
30. The approach of this Court in *Lipinski* (1994) 75 A Crim R 54 was to take into proper account what punishment an offender would have received if he/she had been dealt with at a time proximate to the offending.

Summary

31. Having regard to the applicable statutory maximum,⁴⁰ the head sentence of 6 years cannot be supported by any of the recent comparable cases, particularly if due regard is given to the relevant mitigating factors prescribed under section 9 of the *Penalties & Sentences Act*.

³⁶ Dr Roger K Wilkinson.

³⁷ R103-106

³⁸ *Lipinski* (1994) 75 A Crim R 54 at 57: Counsel were unable to refer us to the range of sentences imposed for similar offences 25 years ago.”

³⁹ The Chief Justice observed: “But there is today an attitude towards the treatment of offenders which indicates a much saner approach to crime than existed previously. The feelings of the community illustrated by the not unreasonable statement, ‘I like the rascal to be punished’ have become of less weight than they used to be (...) While the effect of punishment as a deterrent to others has been regarded as a factor for consideration, cases do arise in which the affect is doubtful”

⁴⁰ Section 9(2)(b): *Penalties & Sentences Act*

32. If the applicant had been charged when he first committed the offences it is likely that his life would have taken a completely different course. The neutral response of the Church (and it has to be said the complainants and their families) kept him in a position of trust – despite his repeated disclosures as to his conduct – and did not activate any prosecutorial or even protective action. His flaws in terms of his sexual dysfunction went untreated and were even tolerated by the Church hierarchy.
33. Moreover the range established and recently approved of in the cases of *Wright* (3 years) and *C; ex parte A-G (Qld)* (3 ½ years, suspension after 15 months) permit a head sentence in this case for the more serious category of conduct in the vicinity of 3 to 3½ years and significantly less for the other counts. Then, having regard to the mitigating factors, the applicant is entitled to a suspension after he serves a short period of imprisonment of up to 12 months.⁴¹ Besides the guilty plea, co-operation with the system of justice (including in the civil courts), the public vilification and fall into disgrace, the significant delay and obvious self-rehabilitation and containment, there are two significant features in his case which are absent in the other two, viz., his advanced age and his significant health complications.
34. In circumstances such as the present any period of gaol, served so long after the event, and regardless of advanced age is a condign punishment and a significant deterrence to the applicant and to others in the community.⁴²
35. A suspension, rather than an early recommendation for parole is warranted due to the absence of any need for rehabilitation and the merciful provision of certainty to an elderly frail man.

⁴¹ Before Howell DCJ the submission was that a suspension after 6 months would have been appropriate.

⁴² Section 9(1)(d): *Penalties & Sentences Act*.

IN THE DISTRICT COURT
OF QUEENSLAND
AT BRISBANE

THE QUEEN

v.

MICHAEL JOSEPH MCARDLE

Cases to be referred to by the Crown

1. The Crown has foreshadowed referring the Court to *R v Bennetto* CA 367 of 1997; *R v Manns* CA 155 of 1998 and *R v Lynas* [2001] QCA 377.
2. The points of distinction in these cases from the circumstances in the present matters are:
 - *R v Bennetto* CA 367 of 1997
 - Bennetto was 59 years old at the time of sentence, he was between 51 to 57 at the time of committed the offences.
 - There was no significant delay in the prosecution.
 - He pleaded guilty to 58 counts of indecent dealing with six children under the age of 12 and two under 16 years. One complainant was about 4 or 5 years old. He made admissions and co-operated with police in their investigations.
 - The prescribed maximum penalty was 10 years imprisonment.⁴³
 - His conduct included having a child masturbate him; undressing with a child, showering with a child, rubbing the outside of a child's vagina with his foot or hand; showing pornographic images, rubbing a girl's clitoris. Some inducements were offered to the children and they were prone to corruption. B was described as "sometimes aggressive."
 - The Court of Appeal reduced the original sentence to one of 6 years imprisonment with a recommendation after 2 ½ years.

Whilst the number of offences and the conduct might be similar there are matters in McArdle which are clearly absent or significantly different in B:

- The maximum penalty in the McArdle's case is 7 years imprisonment
 - There has been a significant delay in prosecution of McArdle
 - McArdle is nearly 10 years older
 - McArdle is of poor health following major surgery
-
- *R v Manns* CA 155 of 1998

⁴³ The *Criminal Law Amendment Act* 1997 did not apply to B

- Manns was 59 years old at the time of sentence, he was 42 at the time he committed the offences.
- He pleaded guilty, after the commencement of the trial, to 20 counts of indecent dealing with a girl under the age of 16 and 23 counts under 16 years. The three complainants were step-children living with him and their mother. He was *loco parentis* in respect of the children.
- The prescribed maximum penalty was 7 years imprisonment.
- Derrington J described the conduct as:
 - “Although his offences fell somewhat short of rape, the respondent’s conduct was gross and extensive, involving some degree of depravity and degradation and some physical pain” ... “grave and persistent”
- The sentence was increased to 7 years imprisonment with a parole recommendation after 3 years

The judgment makes no reference to the delay between the commission of the offences and sentencing. There is no apparent discussion of the principles set out in *R v Law; ex parte A-G* and the subsequent cases on that issue. In any event the conduct was discernibly worse, the offender a decade younger and there is no suggestion that he was of ill health.

- *R v Lynas* [2001] QCA 377
 - Lynas was 58 years old at the time of sentence, he was between 23 and 35 years at the time he committed the offences.
 - He had been previously convicted of some offences committed subsequent to the matters he was being sentenced for (wilful exposure in 1979 and again in 2000)
 - He pleaded guilty to 16 counts of indecent dealing with a boy under the age of 14, 10 counts of indecent dealing with a boy under 16 and 1 count of permitting sodomy.
 - The Court described his conduct as
 - “On 27 occasions (...) [he] sexually interfered with four vulnerable boys in breach of trust. Most involved masturbating boys or having boys masturbate him, oral sex or simulated intercourse. On one occasion (...) he permitted a child to sodomise him.”
 - The prescribed maximum penalty in respect of the sodomy was 14 years imprisonment.
 - Davies JA referring to the original sentence of 6 years imprisonment with a parole recommendation after 2 ½ years observed:
 - “... although the recommendation was by no means a generous one and could have been substantially less than that, when looked at in the light of the global sentence which was imposed (...) I do not think that the global sentence was manifestly excessive...”
 - The sentence of 6 years imprisonment with a parole recommendation after 2½ years was not disturbed

There are significant features of distinction:

- McArdle is a decade older. There was no issue of poor health in respect of Lynas
- Lynas seems to not have abstained in the intervening period from his predilections until just shortly before sentencing.

- The prescribed maximum penalty is double that which is applicable here
- The permitting sodomy count is far more physically intrusive than any conduct of McArdle.

A Boe
Boe Lawyers
21 January 2003