

***R v Grech* [1999] NSWCCA 268 (6 September 1999) – New South Wales Court of Criminal Appeal**

‘Deterrence’ – ‘People with disability and impairment’ – ‘Person in authority having sexual intercourse with person with intellectual disability’ – ‘Position of trust’ – ‘Sentencing’ – ‘Sexual and reproductive abuse’

Charge/s: Person in authority having sexual intercourse with a person with intellectual disability x 2.

Appeal Type: Appeal against sentence.

Facts: The male complainant, who had an intellectual disability, lived in a group home where the male applicant worked as a team leader. They formed a sexual relationship. The complainant gave evidence at trial that the sexual contact commenced when he turned 18 and that they loved each other. The applicant was found guilty after a trial of two counts of a person in authority having sexual intercourse with a person who has an intellectual disability under *Crimes Act 1900* (NSW) s 66F. The applicant was sentenced to a minimum term of three years imprisonment with an additional term of two years imprisonment.

Issue/s: The sentencing judge failed to adequately take into account the evidence of the nature of the relationship between the applicant and the complainant together with the lack of evidence of psychological or other injury suffered by the complainant and his borderline degree of intellectual disability.

Decision and Reasoning: The appeal was dismissed. Carruthers AJ held that even if one were to accept that there was a genuine mutual loving relationship on the facts (of which there was some doubt), this did not reduce the criminality of the applicant as assessed by the trial judge. His Honour noted that the legislature did not encumber s 66F(2) with qualifications and it was clearly intended to prohibit absolutely, persons with authority (as defined) having sexual intercourse with intellectually disabled persons over whom they have authority (See [32]). Deterrence looms large for offences under s 66F(2) as *‘it is the mark of a civilised society that those who are incapable fully of protecting their own interests, should be protected from exploitation by those in whom society vests the responsibility of caring for them. Carers who breach this trust must expect condign punishment’* (See [37]). The seriousness of the offence was explained by Carruthers AJ at [33]-[34]:

‘strong emotional relationships are quite capable of developing between carer and intellectually disabled person, whether they are of the same gender or not. It is essential, therefore, that persons in authority exercise the utmost care to avoid such situations developing, and immediately there are indications of such a situation arising, the obligation is on the person in authority to remove himself or herself from the relationship or, at the very least, immediately to seek expert counselling.

'Neither of these courses was adopted in the subject case and, intolerably, the relationship developed into one of a continuing and prolonged violation of the provisions of s 66F(2). The applicant knew not only that he was in breach of his position of trust, but that he was in breach of the criminal law, and he was also aware that the complainant had previously been the victim of sexual exploitation and as a consequence a prior carer was serving a lengthy custodial sentence. The fact that the relationship may have developed, as the applicant contends, into a mutual loving relationship could fairly be described as an aggravating feature of the case rather than a mitigating factor'.