

Joshua Smith pleads guilty to one count of using a carriage service to access child pornography material, one count of using a carriage service to transmit child pornography material and three counts of possessing child exploitation material. The first two counts are brought under the Commonwealth *Criminal Code*, s 474.19(1). The remaining counts are brought under the Tasmanian *Criminal Code*, s 130C. All of the charges arise from a police search of the defendant's rented unit in Mowbray on 30 May 2017. The search was conducted as a result of a referral from a monitoring organisation based in the United States. The defendant's mobile phone, Notebook and laptop were seized. When spoken to by the police the defendant admitted that he had a sexual interest in child pornography, that he looked at it every few months and had been using an internet program to find it. He said he had last looked at it the night before when he downloaded a video.

When his devices were examined, 398 files containing child pornography were located, 102 of which had been deleted. There were 55 image files on the phone, 220 files on the tablet and 20 current and 102 deleted files on the laptop. The images were classified according to the Australian National Image Library and, across all the devices, not including the deleted material:

- 143 images and 1 video were category 1, which includes depictions of children with no sexual activity but which were sexually suggestive or sexual in nature;
- 31 images and 1 video were category 2, including images depicting solo masturbation by a child or sexual acts between children in which no penetration occurs, although including penetrative use of sex toys by the victim;
- 53 images and 1 video were category 3, which includes images or movies depicting non-penetrative sexual activity between adults and children, including mutual masturbation;
- 41 images and 5 videos were category 4, which includes penetrative sexual activity between adults and children;
- 13 images were category 5, which includes images depicting sadism, bestiality, humiliation, torture or child abuse;
- 8 images were category 6, which is anime, cartoons, comics, computer generated graphics, drawings, audio and text depicting or describing children engaged in sexual poses or activity.

The 102 deleted files comprised 100 images and 2 videos across every category. There were 9 in category 4 and three in category 5. His possession of all of the material found on 30 May 2017 bases the three charges of possessing child exploitation material. One charge relates to each device.

The charge of accessing child pornography material covers the period of about five months between 14 December 2016 and 30 May 2017. It concerns the images and videos found in the defendant's possession. Analysis of the defendant's internet history found on the phone revealed that the defendant accessed multiple websites consistent with an interest in young boys in March and May of 2017. When interviewed on 13 May 2019 he made more admissions regarding accessing child pornography on the internet. He admitted accessing the internet through numerous false internet profiles he created. Images accessed by the defendant of one

boy are of particular concern. The examination of devices also disclosed communications with another party which resulted in the receipt of child pornography. The defendant communicated on line with a person called Chris, who lived in Melbourne or Sydney. The defendant told Chris of his interest in young boys. Chris sent the defendant four images depicting a four year old boy naked from the torso down. Chris told the defendant that he had taken the photographs and that the boy was his friend's child who he babysat from time to time and liked to see naked.

The police also discovered sexualised chat with a second party about sexual intercourse and sexual activity with children which forms the basis of the charge of transmitting child pornography material. It arises from messages on the Whatsapp messenger service between 9 May 2017 and 13 May 2017 exchanged between the defendant, who identified himself as "Joel", and a person called John Tagged, with whom the defendant was conducting an on-line sexual relationship. The defendant sent messages with graphic and explicit descriptions of him engaging in sexual activity with a 10 year old boy he said he was babysitting from next door. The responses made clear that the other party to the conversation was interested and encouraged by the defendant's statements.

The defendant is now 31. He has no relevant prior convictions. He lived with his mother until he was 16 and then with his sister. For many years he was confused about the identity of his biological father. He was not able to be close with his stepfather or stepsiblings. His mother was troubled by depression and anxiety. He attended school to grade 10 but exhibited behavioural problems before then which disrupted his education. His only employment was for about 18 months in 2015 and 2016 when he held a job as an administration worker for an indigenous student service. He now shares a house with a house mate, but keeps separate. The devices on which he accessed and stored pornography were password protected and, because of his living circumstances, there was little chance of anyone else accidentally viewing them. He contends that he accessed the offending material not constantly, but on a month by month cycle.

The defendant has suffered long term poor mental health. He is socially detached and a loner. He has attempted suicide on a number of occasions. His counsel submits that commencement of the offending coincided with a deterioration of his mental health in 2016 when his job, which he enjoyed, was relocated and he could not continue. The defendant relies on a report from a forensic and clinical psychologist, Dr Georgina O'Donnell. Dr O'Donnell interviewed and psychometrically assessed the defendant on 22 January 2020, but also had a good deal of collateral material. The defendant reported to Dr O'Donnell that he was the subject of sexual abuse when he was 7 or 8 and again when aged 11 or 12. He identified as homosexual and developed an interest in sexual scenarios involving adult males and male children as a result of his childhood experiences. Dr O'Donnell's assessment reflected the defendant's complaints of depression, poor self-esteem, tendency to self-harm and suicide, and borderline personality disorder. He takes mood stabilising medication. Dr O'Donnell concluded that the defendant has been severely depressed and socially withdrawn for significant parts of his life including during the offending period. In Dr O'Donnell's opinion the issues she describes are causally related to the commission of the crimes, but do not reduce the defendant's moral culpability or reduce the imperative for general or specific deterrence. Dr O'Donnell describes, however, a high number of risk factors for prison, including suicide, and predictable deterioration in mental health. A prison term is likely to weigh more heavily on him.

The defendant asserts that, as he told Dr O'Donnell, since his offending was discovered he has not experienced the desire to access child exploitation material and has found other means of

age appropriate communications. He has, through the Tasmanian Aboriginal Services, obtained counselling, although not extending to specific therapeutic work in relation to problematic sexual feelings which Dr O'Donnell regards as the most important step in addressing the risk of further offending. According to Dr O'Donnell, the defendant is insightful and frank about his psychological problems and there is a "positive prognosis for successful therapeutic intervention". Her opinion is relevant to the prospect of rehabilitation which I must take into account.

I take into account the matters under s 16A(2) of the *Crimes Act* (Cth) to the extent that they have been raised. I have described the nature and circumstances of the crimes. There are no relevant family impacts. The defendant has pleaded guilty. He is entitled to mitigation from the plea and from his admissions to the police. They are indicative of some contrition and acceptance of responsibility. They facilitated the administration of justice, although it is hard to see that he gave up any chance of acquittal. The claim to remorse is tempered by the repeated nature of the offending. It is a mitigating factor, although a minor one, that the defendant was not charged until more than two years after the search, and did not appear in court for the first time until October 2019. The delay was not attributable to him. He has had these charges, and the prospect of imprisonment, hanging over his head for some time. There are no other offences to be taken into account and no relevant matter arising from disclosure.

In cases of this nature, there is a strong need to impose a sentence which adequately punishes the defendant and has a deterrent effect not only directed to him, but to others who may be inclined to engage in similar conduct. Factors of general and personal deterrence are predominant. It is now well recognised that child pornography offences put children everywhere at risk of grave sexual abuse by encouraging the creation of child pornography to meet the market and demand for it. The defendant displayed a high level of interest. It is not suggested that he profited from his offending. Compared to some other cases there is not a large number of images, and the period of accessing is limited to five months. However, the children depicted in the material accessed and possessed by the defendant are real victims. They suffer terrible harm. It is not possible to count the number of children depicted in the material in this case, but there must have been many. Some of the material was in the highest category of seriousness, although all of it had the capacity for harm. The defendant's actions added to the demand for child pornography. At least in one case he, in a very direct way, encouraged the production of images of a child said to have been in Melbourne or Sydney. It cannot be known whether what was said about those images is true. What the defendant said in the Whatsapp conversation about engaging in sexual activity with a 10 year old boy is not true. However, it amounted to very serious criminal conduct because the graphic nature and content of the transmitted material was very likely to encourage pederastic thoughts in the other party to the conversation and increase the chance of the creation and dissemination of child pornography.

No sentence other than a sentence of imprisonment is appropriate. To ensure adequate punishment and deterrence I have concluded that, although prison will be difficult for the defendant, some of the term is to be actually served. However I will make orders which result in the defendant's conditional release after having served part of the term. I will also make a community correction order aimed at assisting him, if possible, to obtain access to the therapeutic services he requires. He has been assessed as suitable for supervision, but it is a matter of some concern that the author of the report points out that Community Corrections has not been able to identify any psychologist or qualified counsellor who can provide suitable community based treatment services able to address the type of therapy the defendant requires.

Joshua Smith, you are convicted on each count. I order the forfeiture to the Commonwealth of the Samsung mobile phone, the Hewlett Packard Notebook and the Hewlett Packard Envy laptop computer seized by the police. I am not satisfied that you do not pose a risk of committing a reportable offence within the meaning of that term in the *Community Protection (Offender Reporting) Act 2005* in the future. I make an order directing that the Registrar cause your name to be placed on the Register and that you comply with the reporting obligations under the Act for a period of five years from your release.

On the Commonwealth matters, counts 1 and 2, you are sentenced to imprisonment for 12 months from 24 March 2020. I order that you be released after having served three months of that term upon you giving security by recognisance without surety in the sum of \$2,000 that you will be of good behaviour for a period of two years. On counts 3 to 5 inclusive I impose one sentence. You are sentenced to imprisonment for 12 months also to commence on 24 March 2020. I suspend 9 months of that term for 18 months from your release. It is a condition of that order that while it is in force you do not commit any offence punishable by imprisonment. If you breach that condition then a court must order that you serve that term unless it is unjust. In addition, I impose a condition on the suspended sentence that you be subject to the supervision of a probation officer. That means that on your release you must report to Community Corrections, and while the order is in force you must comply with the directions of a probation officer. You must not leave Tasmania without permission and you must notify of any change of address. I impose an additional condition that while the order is in force you submit to medical, psychological or psychiatric assessment or treatment as directed by a probation officer. If you breach any of those conditions you may be brought back to court and re-sentenced.

The effect of the orders I have just made is that you have been sentenced to imprisonment for 12 months from 24 March 2020, but you will be released from that sentence after having served 3 months of that term upon your signing a recognizance which contains conditions. The purpose of the order is to provide an incentive for you not to re-offend and to encourage your rehabilitation. If you fail to comply with a condition of the recognizance or the suspended sentence, for example by committing some further offence, you may be called upon to pay the sum of \$2,000, and a court may order that you serve the remainder of the term. In the case of the State sentence, if you commit an offence punishable by imprisonment while the suspended sentence is in force, the court must order that you serve the balance of the term unless it is unjust.