

JH pleads guilty to one count of using a carriage service to access child pornography material and one count of possessing child exploitation material. The first count is brought under the Commonwealth *Criminal Code*, s 474.19(1). The second count is brought under the Tasmanian *Criminal Code*, s 130C. As will be explained, the process of sentencing the defendant involves the difficult issue of balancing the need to punish, denounce and deter his criminal conduct with the fact that he was himself the victim of childhood sexual abuse which caused lasting psychological damage and which directly contributed to the offending behaviour.

The crimes came to the attention of the Australian Federal Police as a result of a referral by the Federal Bureau of Investigation in the US. In early February 2015 the FBI infiltrated and then covertly monitored use of a website called Playpen which operated on the Tor network. The Tor network is designed to hide the identity of users through multiple layers of security, and the website Playpen was solely dedicated to the advertisement and distribution of child exploitation material. On 2 March 2015 the FBI identified the defendant as, through a fictitious name, a user of Playpen. Between 20 February 2015 and 4 March 2015 the defendant accessed the site on seven different days. Across the seven occasions, the defendant accessed 669 different threads, that is, conversations with other internet users, from 23 different named forums. A forum is an online discussion site where people can hold conversations in the form of posted messages. The names attributed to the online forums in which the defendant participated made clear that they concerned child pornography of a serious nature. Over the course of those seven occasions the defendant was engaged for almost 23 hours. Embedded in the posted messages were pornographic images, viewable to the user, mostly of females aged between toddler and mid-teen in a range of settings and scenes. A detailed analysis and categorisation of the material accessed by the defendant disclosed images across all categorisations of the Australian National Image Library:

- 560 images were category 1, which includes depictions of children with no sexual activity but which were sexually suggestive or sexual in nature;
- 106 images 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;
- 155 images were category 3, which includes images or movies depicting non-penetrative sexual activity between adults and children, including mutual masturbation;
- 208 images were category 4, which includes penetrative sexual activity between adults and children;
- 25 images were category 5, which includes images depicting sadism, bestiality, humiliation, torture or child abuse;
- 4 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;
- 56 images were category 6, which is not illegal material but is related to child exploitation material.

It is the use of a carriage service to access child pornography material through these forums which forms the basis of the Commonwealth charge.

On 23 November 2015 the police searched the defendant's home. Two laptops, two hard drives and a mobile phone were seized and examined. The hard drives contained a total of seven videos and seven images. Of those, three videos were in category 1, three in category 4 and one in category 5. The images comprised two each in category 1 and 2 and one each in category 4 and 5. One of the laptops contained 1755 images and 32 videos ranging across all categories. Most were in category 1 but more than 200 were in categories 4 or 5. A large amount of deleted images were also recovered by forensic tools, including from the other laptop. That material is not the subject of the charge because the prosecution does not contend that he was in possession of material recoverable only by forensic tools. Accordingly, he may not be punished for possibly having had possession of it in the past before deleting it. In addition, analysis of the devices revealed that sophisticated programs designed to hide identity and remove evidence of past use had been researched and installed across the devices, including the mobile phone. Those facts suggest that the instances of conduct which are the subject of the charges are not to be treated as isolated occurrences, and serve to emphasise the defendant's level of interest in material of this nature.

When interviewed, the defendant made some limited admissions but was not entirely frank. He claimed that he accessed some of the material only through curiosity, and some of the material was downloaded as part of a bulk download and thought he had deleted the unlawful part of it.

The defendant was 26 at the time of the offending and is now aged 31. He is married and his wife is very supportive of him. As a pre-pubescent child, while in the care of his mother and step father, he was the subject of repeated grave sexual abuse accompanied by physical and psychological abuse perpetrated by his step father. The abuse was associated with exposure to child pornography, which became normalised. In the opinion of Dr Georgina O'Donnell, an experienced forensic and clinical psychologist who prepared a report dated 25 June 2020, the result of the abuse is that the defendant suffers from posttraumatic stress disorder. Her psychometric testing and collateral enquiries provide, in her unchallenged opinion, clear diagnostic evidence of his condition. He receives a disability support pension.

The defendant has disordered sexual thoughts and feelings amounting to sexual deviation. He admitted to Dr O'Donnell having masturbated to child pornography as an adult with what Dr O'Donnell described as pedophilic thoughts. Dr O'Donnell described the clear causal link between the childhood sexual abuse and the development of the defendant's sexual deviation and non-contact sexual offending, particularly when co-existing with childhood physical and psychological abuse.

At the time of the offending the defendant had not disclosed the abuse to which he was subjected. He has now done so. Since at least mid-2018 he has been treated by a psychologist. He also has a treating psychiatrist. I do not have reports from them, but Dr O'Donnell described the treatment as extensive, and the defendant's wife and treating team as "an integral part (sic) to his recovery and prevention of re-offending." The defendant's counsel submitted that I could be confident that, in light of the steps taken by the defendant to address the causes of his offending, he would not re-offend. Dr O'Donnell expresses no such opinion, although it is relevant that in the five years since his apprehension there has been no recurrence.

In connection with count 1, 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 repeated nature of the offending removes any claim to immediate remorse, although I accept that he is now ashamed of his behaviour. It is a mitigating factor that the defendant was not charged until almost three years after the search. He pleaded guilty at an early stage. There has been some delay to establish the sexual abuse he contended, an issue resolved in his favour. That process itself has resulted in some non-curial punishment in the nature of re-exposure to the trauma of his childhood. He has had these charges, and the prospect of imprisonment, hanging over his head for now almost five years. There are no other offences to be taken into account and no relevant matter arises from disclosure. 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.

In cases of this nature, there is a strong need to impose a sentence which adequately punishes offenders and has the effect of deterring the offender and others who may be inclined to engage in similar conduct. 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 children depicted in the material accessed and possessed by the defendant are real victims. Some of the material was in the highest category of seriousness, although all of it had the capacity for harm. His actions added to the demand for child pornography. Participation in internet conversations with such content is very likely to encourage pederastic thoughts in the other parties to the conversation and increase the chance of the creation and dissemination of child pornography.

For these reasons, factors of general and personal deterrence are generally predominant. Sometimes, however, when the evidence sufficiently establishes that mental impairment contributes to the offending, the moral culpability of an offender and the importance of general deterrence is reduced. Here, the effects of the abuse suffered by the defendant are serious and long lasting and contributed to his crimes. On the other hand, his condition is not a licence to commit crime. A significant proportion of persons responsible for crime of this nature are damaged by some circumstance which pre-disposes them to such conduct. Protection of the public remains an important countervailing consideration.

No sentence other than a sentence of imprisonment is appropriate. However I will make orders which result in the defendant's immediate conditional release. To provide for punishment and additional deterrence I will order home detention. That order will also contain conditions aimed at assisting the defendant, if possible, to obtain access to the therapeutic services he requires.

JH, you are convicted on complaint 90986/2018, counts 1 and 2. I order the forfeiture to the State the items listed at items 2 to 6 inclusive of property seizure record 153503, the two laptops, the two hard drives and the mobile phone. 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 today.

On the Commonwealth matter, count 1, you are sentenced to imprisonment for 12 months. I order that you be released forthwith, without being required to serve any of that term, upon you giving security by recognizance without surety in the sum of \$2,000 that you will be of good behaviour for a period of two years from today. 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, 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 all or part of the term in addition to any other term you may be required to serve.

On count 2 I make a home detention order. The operative period of the order is 12 months from today. I specify the premises at which you are to reside during the operational period of the order as [home detention premises]. I order that immediately upon your leaving Court you report to the office of Community Corrections at 111 Cameron Street Launceston, for induction into this order, and a further explanation as to its full terms. The order will be subject to all of the core conditions set out in the *Sentencing Act* 1997, s 42AD(1). They will be set out in the order that you will be given, but include that you will submit to electronic monitoring and must, during the operational period of the order, if directed to do so by a police officer, probation officer or prescribed officer, submit to a breath test, urine test, or other test, for the presence of an illicit drug. I specify that you must be at the home detention premises at all times unless for a relevant reason. In short, that means that you must be at those premises unless there is a need for urgent medical treatment, there is a serious risk of death or injury, or you already have the approval of a probation officer to be absent. It will be for the probation officer to determine what to approve so as to allow for treatment or rehabilitation, for employment, or for any other purpose. The conditions will include that you not commit another offence punishable by imprisonment and that you comply with all directions given to you by your probation officer. I impose special conditions that:

- you must submit to the supervision of a probation officer as required by that officer;
- you must not take any illicit or prohibited substances. Illicit and prohibited substances include any controlled drug as defined by the *Misuse of Drugs Act* 2001, and any medication containing an opiate, benzodiazepine, bupropion, hydrochloride or pseudoephedrine, unless you provide written evidence from your medical professional that you have been prescribed the relevant medication;
- you must submit to any rehabilitation or treatment program as directed by a probation officer;
- you must submit to a medical, psychological, psychiatric or physical or mental health assessment or treatment as directed by a probation officer;
- you must maintain an active mobile phone service, provide the contact details to Community Corrections and be contactable at all times.

This order comes into effect immediately. You must understand that if you do not comply with the conditions, imprisonment is likely. If you breach the order by committing another offence, the order must be cancelled unless there are exceptional circumstances, and in that case imprisonment would be highly likely. In the event that one or both of the sentencing orders I have made are breached, it will be for a judge dealing with the breach to determine how the re-sentencing orders are structured.