

Comments on Passing Sentence:

The defendant has pleaded guilty to 2 counts of maintaining a sexual relationship with a young person, 8 counts of indecent assault, 1 count of producing child exploitation material, and 1 count of possessing child exploitation material. The defendant is convicted of all counts and there is a compensation levy of \$600 which will have to be paid within 28 days of release. I order the forfeiture of items numbered 15, 25 and 26 on Tasmania Police Property Seizure Record No 73970.

The conduct the subject of the counts happened at various stages between December 1978 and the middle of 2013. There are 9 complainants involved, all youths aged between 12 and 15 years at the time of the offending. I will refer to them by fictitious first names for anonymity reasons, and meaning no disrespect. The youths were all entrusted to the defendant in various roles he had over time, such as teacher, mentor, physical trainer and massage therapist. The first count on the indictment is one of maintaining a sexual relationship with a young person in the period between December 1978 and December 1979. It relates to Stephen. At the time, the defendant was a teacher at a Hobart high school, having qualified in 1973 when he was 22. Some of his responsibilities at the school included helping with the sports programs, training sessions, and school camp programs. Stephen started at the school in 1978 when he was 11. He went to the school camp in which the defendant was involved, and later the two were involved in a school musical. The defendant showed Stephen a lot of attention and Stephen came to admire the defendant as a role model. Ultimately Stephen's parents trusted the defendant with Stephen and they spent time together outside school hours. Identified occasions of sexual offending are as follows. The first occasion happened at the defendant's parent's two bedroom unit between Christmas and New Year 1978. The defendant showed Stephen pornography, began to fondle his genitals, took him to a bedroom and masturbated him. The second occasion happened at the same unit. In a bedroom, the defendant masturbated Stephen to ejaculation. This was something new to Stephen and he was confused, upset, ashamed and embarrassed. During this period when Stephen was entrusted to the defendant's care, the defendant would, when taking Stephen home, socialise with Stephen's parents. A further identified occasion happened on New Year's Eve in 1978 at the defendant's parent's house in Lewisham. Stephen was permitted to stay there with the defendant. In a downstairs bedroom the two got into bed naked and the defendant performed oral sex on Stephen until he ejaculated. Further incidents happened in early January 1979 at a farm which the defendant had on the east coast. Stephen spent a week there. During this time the defendant regularly, both in the mornings and at night, performed oral sexual intercourse on him. Stephen attempted to reciprocate but the defendant often masturbated himself to ejaculation. On one identified occasion the defendant lay face down on the bed, told Stephen to lay on top of him, and had Stephen penetrate his anus. Further incidents of reciprocated oral sex happened at the farm later in the same month. On a later identified occasion, again at the farm, another youth was also staying there. The two boys were in a caravan. The defendant performed oral sex on Stephen in the caravan in the presence of the other youth which made Stephen very anxious. During the remainder of 1979, the relationship continued, although the incidents were sporadic. At the end of 1979 the defendant left the school. In August 2014 Stephen reported his experiences to the Royal Commission into Institutional Responses to Child Sexual Abuse.

The next three counts are of indecent assault. There are two complainants who are brothers, who I will call Nigel and Thomas. The events occurred in 1991. By this stage, the defendant had stopped teaching. Still within the education environment, he became a science consultant and manager at a science education centre conducted in part by a government department. Within that centre was a science club which aimed to engage young children in various scientific disciplines and to focus on creativity in science and technology. In early 1991, Nigel and Thomas were enrolled by their father in the club. The defendant befriended them. He helped them with their school assignments. He began to interact with them physically, progressing from bear hugs to tickling to play wrestling, and then to touching their genitals. The first of these counts relates to Nigel. At a camp run by the club, the defendant took Nigel into a dormitory room, put him on a bed, and while tickling him and holding him down, he put his hand down Nigel's trousers and masturbated him. Inappropriate physical contact continued after this, sometimes in the presence of Thomas. Later, the boys were staying with the defendant before going on a trip to Maria Island. During the evening the defendant gave both boys alcohol and showed them adult pornography. He masturbated himself in front of them and encouraged them to masturbate themselves, and to use a hand held a massage device, but they declined. Afterwards when Thomas had had a shower, the defendant walked into the bathroom naked and rubbed his erect penis against Thomas' buttocks. He continued despite resistance from Thomas, and ejaculated. Later, the defendant went to where Nigel was, grabbed him, put his hands down Nigel's pants and masturbated him. Thomas saw this and shouted at him to stop, but he did not. After the trip, the boys

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revealed the conduct to their father who wrote to the authorities responsible for the club. Police were contacted in late 1992. Thomas made a formal statement and the defendant was spoken to by police in 1992 but, for some reason, was not formally interviewed and police took no action. The defendant continued working at a number of schools in and around Hobart. Later, in 2004 he obtained certificates in fitness and athletics coaching, and in 2006, when 55 years old, he established a health and fitness centre. At this time the defendant was married to a woman who had sons from a former relationship. One of them played football with a local club. He had a friend and club-mate of about the same age, Kane, who is the complainant in the next count of indecent assault. Kane's family knew the defendant well. Also at about this time the defendant had an office and a gymnasium built onto his home. He made it available to some of the young boys in the area to help in their training. He told Kane about what he could do in order to build fitness and strength by going to the gym. At the end of 2007, when he was 13, Kane started going to the defendant's gym on a regular basis with his parents' permission. During the first session, as part of a purported assessment of strength and posture, the defendant asked him to take his clothes off so that he could weigh and measure him. Kane kept his underwear on and the defendant took some photos, stating that they were to monitor progress. Kane normally went with some of his friends, and went about two to three times a week. Weighing, measuring and photographing were part of the routine. On one occasion, Kane was told to take off his underpants, which he did, and he was photographed naked. Some months on Kane went to the gym alone. He complained of a sore ankle. The defendant told him to strip off completely. When on the massage table, the defendant rubbed massage oil on the top parts of Kane's legs and into his groin. The charged conduct happened when the defendant then used a vibrating massager on Kane's groin and testicles for about 10 minutes, causing Kane to get an erection. Kane felt very uncomfortable and did not know what to do. The rubbing over his groin and testicles continued for some time, during which the defendant was looking at Kane's erect penis. Kane complained to his father when he went home, and was told that if it happened again the defendant would be spoken to, but Kane did not return.

The next two counts of indecent assault involve two other friends of the defendant's stepsons, Dean and Simon. Dean began playing football with the club in 2008 when he was 13. He started going to the defendant's gym and went through a similar process to Kane. But it was on the first occasion that Dean was asked to strip naked and lie on the massage table. The defendant massaged his groin area and used a vibrating massager. This went on for about 10 to 15 minutes. Dean involuntarily got an erection and it was obvious to him that the defendant was sexually aroused by this response. Dean later returned to the gym. The charged incident was not isolated in that later massages were given in a similar way, although Dean refused to remove his underpants. He stopped going after about a month. Simon's experiences are similar. He started going to the gym in 2007 when he was about 13 and continued going until about the end of 2009. The defendant took photographs of him in his underpants. When the defendant massaged him, he would remove Simon's underpants. Often Simon would get an involuntary erection. On one particular occasion, the subject of this charge, the defendant took hold of Simon's penis and stroked it with his fingers, commenting that he, Simon, was getting a bit excited. Although not the subject of charges, I am told that these boys were not the only ones who were massaged in an inappropriate way. At least one other has reported such conduct in the same period. The boys who went to the gym during these years were uncomfortable and embarrassed about the massaging and touching. Although they mentioned their discomfort amongst themselves, most of them did not make any significant complaint to their parents. Each found excuses not to go to the gym any more. In part the failure to complain came about because of their friendship with the defendant's stepsons.

In 2011, when the defendant was about 60, he completed a certification course for massage therapy and enrolled in a diploma course but did not complete it. Between 2011 and 2013 the defendant sexually assaulted three more boys who went to his gym as part of their personal training. The subject of the second count of maintaining a sexual relationship is Hayden. Hayden's parents knew the defendant and had been to his house. In 2011, the defendant told Hayden that he was trying to get a diploma in massage and needed a boy with good muscle definition for training purposes. He asked Hayden if he would volunteer, but told him that he would be paid. Hayden asked his parents and they agreed. After a few massages, the defendant began focussing on Hayden's groin area, giving Hayden involuntary erections. On the next visit, the defendant told Hayden that his underpants were impeding the ability to massage properly and asked him to take them off which he did. On an occasion shortly afterwards, when Hayden got an erection, the defendant started masturbating him, and asked him whether it was good. Hayden did not respond and the defendant desisted after a while. Things escalated from there. From 2011 until January 2012, Hayden went to the defendant's gym a little in excess of 30 times. The defendant's conduct included the following:

- he masturbated Hayden and performed oral sex on him on many occasions;
- he used the massage device on Hayden's genital area and the shaft of his penis on some occasions;
- on some occasions he showed Hayden pictures of naked males;

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- he took a photograph of Hayden when he was naked and with an erection purportedly for assessment purposes, which conduct is the subject of the separate count of producing child exploitation material;
- on a number of occasions, he grabbed Hayden's hands and put them on his penis to masturbate him, or masturbated Hayden;
- one occasion on which there was reciprocal oral sex, the defendant ejaculated in Hayden's mouth;
- on one occasion, he applied oil around Hayden's anus and rubbed his penis against it;
- on another occasion, after using oil on the area, he inserted his penis into Hayden's anus, and then asked Hayden to penetrate his anus, this being the first time Hayden had had sexual intercourse;
- on one occasion he showed Hayden multiple graphic images of adults and young people, mostly boys, engaged in sexual activity which he discussed with Hayden.

During this time, the defendant gave Hayden small gifts. On some visits after sexual contact and the massage had ended the defendant gave Hayden alcohol. Hayden stopped going in January 2012 because he was injured, and it gave him an excuse not to go. Before that, he wanted the personal training which was actually provided, but did not enjoy the sexual activity. During this time, it had been arranged that Hayden would have a personal training session followed by a massage instead of being paid for the massage. In January 2013, Hayden suffered a knee injury. His parents encouraged him to see the defendant. From February 2013 until March 2013 Hayden again went to the gym about 10 times for treatment on his knee. During those visits the following happened. The defendant massaged Hayden's groin area and masturbated him before performing oral sex on him. Some form of sexual assault happened on almost all occasions. During a number of visits the defendant became more forceful. On one occasion, the defendant unsuccessfully attempted to have anal sexual intercourse; on other occasions the defendant would pull down Hayden's trousers and underwear and perform oral sex on him. If Hayden resisted, the defendant would become assertive and continue, despite Hayden's protests. On another occasion, the defendant masturbated Hayden's penis, performed oral sex on him, massaged oil around his buttocks, and inserted two fingers into his anus while masturbating him. This continued for a time. When Hayden got up he noticed the defendant was masturbating himself. That weekend Hayden's parents, having noticed a change of mood, and bouts of depression, asked him about his wellbeing. He then revealed some of what had been happening.

The next count of indecent involves Justin, a friend of Hayden's. He, too, played football and also became involved in going to the defendant's gym for the purposes of training. The defendant had contacted him via Facebook asking whether he wanted to attend his gym, and encouraging Justin to engage in personal training. He offered him free massages. On the first visit, when on the massage table as part of the suggested assessment process, Justin was told to take off his underpants. The defendant touched his genitals and slid his hand between his testicles and anus and pushed his finger into his testicles. This touching appeared to go on for some time. Afterwards the defendant told Justin about various aspects of the program he was intending to develop. He made inappropriate comments about Justin's penis and testicles. Justin did not go back, and the defendant sent him many messages encouraging his return. The last count of indecent assault involved Matthew who, at the time, was nearly 13. His family was closely connected to the football club and the defendant contacted him via Facebook. He encouraged Matthew to start going to the gym. On the third visit Matthew went with a friend. He was offered a massage for a sore shoulder, and then Matthew was offered a massage. He massaged his stomach area and moved towards his groin. The defendant then told Matthew that he needed to look at his pubic hair and measure the length of his penis to determine the stage of puberty he was in. He took a photograph of him while he was only wearing his underpants. He held his testicles and manipulated his penis. Matthew felt extremely uncomfortable and embarrassed. When he got home he told his father about what had happened, and his father said that he did not want him to go back.

Hayden's parents contacted police in April 2013. It became clear that there was a real possibility that other young males had been sexually assaulted. A full investigation was undertaken. On 25 April 2013 the defendant's home was searched. Some USB devices were found and a hard drive. Child exploitation material was discovered. One of the devices contained the photograph of Hayden posing naked in the office area. A hard drive contained images of Kane, Simon, Hayden and one of Hayden's friends. They were located close to pictures of other young males, most of whom were posing in a non-sexual way. A total of 2,935 images and one movie were found. Police carried out an assessment of this material using the CETS scale which is a variation of the well known Oliver scale. 2,645 images were level 1 – images of posing or emphasis on genital areas but not depicting sexual activity. 169 images were level 2 – non-penetrative sexual activity between children or solo masturbation by a child, 5 images were category 3 – non-penetrative sexual activity between adults and children – 95 images were level 4 – penetrative sexual activity between children or between adults and children, 3 images of category 5 – sadism, bestiality or humiliation, and 18 images of level 6 – anime cartoons, comics and drawings depicting children engaged in sexual poses or activity. The content of the images revealed two major themes, one of 8 to

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12 year old boys posing naked, the other of 12 to 15 year old boys posing naked or engaged in sexual activity with each other. There was evidence of organisation into sub-folders. One folder was entitled with Hayden's name and contained the single image to which I have referred. The defendant was interviewed on 3 May 2013. He explained his involvement in therapeutic, relaxation and remedial massage. He said that as a general rule he conducted an assessment of the young males for whom he was developing training programs. He told police he would never ask them to remove their underwear. He admitted that Hayden was a person who was part of the massage training. He claimed that on one occasion when Hayden was asked to remove his clothing, he surprised the defendant by removing everything so that he was naked. He thought that was funny so he took the photograph. He explained what was described as the Tanner rating system which was a means not used much in Australia, of determining biological aging by examining pubic and hair growth patterns. He accepted that it was not part of his professional qualification and that it was an intrusive process. Further, as to Hayden, he specifically suggested that Hayden wanted money, and claimed that false allegations were being made after he refused to pay Hayden extra money for massages. He also claimed that Hayden had been using drugs, and suggested that he wanted more money for that purpose. He denied inappropriate contact with Matthew and suggested Hayden and Matthew were colluding to make false allegations against him. The Tanner system is a means of identifying physical development in children and adolescents based on primary and secondary sex characteristics. Expert opinion is that it is only used in rare cases where there is a hormonal difficulty and should always be done under medical supervision with informed consent. The Australian College of Massage has confirmed that members do not use the system, and is not aware of it being taught within the scope of remedial massage therapy. Trainees are also taught not to use massage techniques or hand held devices around the groin area, or in any way do anything that might cause an involuntary erection.

I have victims impact statements from Stephen, Nigel and Thomas, Hayden, Hayden's mother, Justin's father, Matthew and Matthew's parents. I also have a psychologist's report in relation to Hayden. Stephen and Hayden read their statements to the court. It is not necessary to refer to any of this in any detail. Plainly, those complainants have suffered significant emotional impact and continue to experience serious difficulties. In broad terms, the defendant's conduct has damaged their lives and the way they view people and relationships. I do not overlook the others, but will deal specifically with Stephen and Hayden. Stephen was bullied at school for his association with the defendant. His time at school was very miserable. He felt isolated and afraid, and this continued for quite a while. He feels very wronged as having been treated in that way during his impressionable years. He is conscious of the breach of trust involved. Hayden says his life has changed completely. He has made three suicide attempts. He continues to suffer from anger, nightmares and a loss of focus. His schooling has been badly affected. The psychological report shows a diagnosis of post-traumatic stress disorder due to severe emotional trauma. He will require ongoing and significant support to help him through it all.

The defendant is now 65. As is not uncommon in cases such as this, he has no recorded history of offending. I have a psychological report from Mr Minehan dated 21 September 2015. There is little of relevance in his background which has not already been referred to. He seems to have had a relatively stable upbringing. There was an incident of sexual abuse in the form of fondling his genitals done by a teacher when the defendant was about 11. This seems to have some relationship, according to Mr Minehan, with the defendant's offending patterns and sexual issues. It is apparent that through his teenage years and into his adult life, the defendant has struggled with his sexual identity. He described himself to Mr Minehan as heterosexual, bordering on asexual, saying that he is not interested in homosexual relationships. He said that his relationships with women had been in the main, with one exception, platonic. He maintained to Mr Minehan that he did not obtain sexual gratification from his conduct with the young boys. He suggested that he was not capable of functioning sexually due to depression medication which he had been taking for some years. At the same time, Mr Minehan noted that the most prominent concerning aspects when discussing the offending were the "offence based cognitive distortion beliefs" the defendant expressed. Mr Minehan says that the defendant appeared to find it difficult to acknowledge the level of wrongdoing and the harm he may have caused. He made statements relating to the offending being consensual, that he did not physically hurt anybody, and that the boys kept coming back, believing that this indicated a willingness to participate. Mr Minehan says that this form of distorted thinking is very common amongst this group of offenders, and is a primary factor in facilitating, justifying and perpetuating offending behaviour. Mr Minehan's assessment of risk indicates that there are a number of treatment and risk management requirements. He strongly recommends that the defendant take part in the sex offender treatment program within the prison, and says that it would be prudent to do further risk assessments at the stage of any release from prison or consideration of parole. Ongoing psychological assistance in the community is recommended. During the assessment the defendant expressed a willingness to participate in treatment rehabilitation, reporting that his sexual issues and the offending had been a dark shadow in his life. In Mr Minehan's view, his motivation appears high, but some effort and persistence will be needed in relation to challenging his offence-based beliefs. If the defendant properly engages with treatment, and with ongoing

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support, the future risk is said to be relatively low. On behalf of the defendant, it is put that the offending falls into three segments. The first relates to the count involving Stephen. The next is the time period involving Nigel and Thomas in early 1990s, with the third involving the remaining complainants in the period from 2007 to 2013. It is said that each is isolated in time from the other, and that the first two segments do not involve extensive time periods. Overall, the time period is long but there has been intermittent offending. Those observations are valid. Emphasis was placed on the guilty pleas. It is accepted that pleas of guilty in sexual cases entitle the offender to a significant discount, but what is significant will vary from case to case. The pleas vindicate the complainants and relieve them of the rigours of the trial process. However, in this case the pleas came on the morning the trial was due to start, and the complainants had gone through the process of preparation. Nonetheless some credit will be given for those pleas. I am told that the defendant's pleas of guilty are based on a desire to make a public acknowledgement of his wrongdoing and to indicate that he accepts responsibility for what he has done. Counsel frankly put that it may have taken some time, but he now well recognises his culpability, both morally and legally. I am told that he now also well recognises his need for help.

There are eight counts of indecent assault involving seven youths. The two counts of maintaining a sexual relationship relate to different youths, and in different degrees to identifiable occasions of sexual offending in the context of courses of sexual abuse. Those counts of maintaining a sexual relationship, particularly the second, have within them, serious sexual crimes such as rapes, and include an instance of reciprocated anal sexual intercourse, an instance of anal penetration of the defendant, an instance of digital anal penetration, and multiple acts of oral rape and masturbation to ejaculation. Additionally, the evils of the possession of child exploitation material are well documented. It creates a market for such material and furthers the exploitation of the children depicted. Much of the material in this case is at the lower end of the scale of seriousness, but nothing is known of the circumstances of the young people depicted.

Mr Harington, your offending essentially took place in three periods across four decades, most prominently in the period 2008 to 2013. The young men from and about whom I heard in victim impact statements, have been, to varying degrees, significantly affected by your wrongdoing, and in many cases, their families have also suffered. No doubt the other young men found these things difficult to deal with. In each case a breach of trust was involved. Your conduct was predatory. Mostly, you sought out the boys and fostered their trust and friendship. In many cases you were friendly with the families. Generally, your conduct was brazen; that seems more so in the recent period. It was also corrupting. On the occasions of some offending, you gave the boys alcohol and showed them pornography. In the later period, you took and kept photographs of some of them; one photograph of one complainant qualifies as child exploitation material. Your acknowledgment of the level of wrongdoing came late and, it appears, a little begrudgingly. You took away from the complainants their normal adolescent development and in some cases caused lasting harm. Overall, your conduct needs to be completely condemned. I will sentence with respect to the indictment as a whole.

On the whole of the indictment, you are sentenced to 7 years' imprisonment to commence on 1 September 2015, and I order that you not be eligible for parole until you have served one half of that sentence. I order that your name be placed on the register under the Community Protection (Offender Reporting) Act 2005 and that you comply with the obligations under that Act for 20 years following your release.

17 March 2017

Court of Criminal Appeal: Director of Public Prosecutions v Harington [2017] TASCCA 4

- 1 Appeal allowed.
- 2 Sentence imposed by Porter J on 8 October 2015 quashed.
- 3 In lieu, respondent to serve 12 years' imprisonment with a non-parole period of seven years