

Hayden Turnbull, you have pleaded guilty to two counts of indecent assault. The events which led to the charges occurred on 8 May 2015 when you were 19 and a student at a senior secondary college. The complainant was 18. You met her at school the previous year and you became friends. You socialised, spent time at each other's house and confided in each other. In early 2015 the complainant suffered from difficulties with her mental health and spent some time in hospital and on medication. On 7 May she came to your home. You socialised with her as usual, including smoking cannabis, and she discussed her mental health difficulties and problems she had with a previous relationship. You were not in a sexual relationship with her, but she stayed the night and in the early hours of the morning you lay on the bed together, fully clothed. Within your friendship group this was not uncommon behaviour. She went to sleep on her side as you lay behind her in a spoon shape. While she was asleep you unfastened her bra. She woke to you rubbing her breasts with your hands, which you continued to do for between one and three minutes. She did not respond and said or did nothing to indicate her consent. You then moved your hand into her underpants and rubbed the area at the top of her vagina for between five and ten minutes. Again the complainant said or did nothing to indicate her consent. After this conduct stopped she stayed on the bed but lay awake for the rest of the night. Nothing was said by either of you before she left later that morning. During that day you sent her a text message indicating your hope that the touching had not "made things weird" and referring to yourself as a dickhead. She did not respond and ceased all contact.

The matter was not reported to the police until August 2019, more than four years later. She told the police that you had said "is this ok?", but that she had not said anything to respond. She said that her words did not come out, and suggested that it may have been as a result of the cannabis she used or her medication. You were contacted in November 2019 and immediately agreed to be interviewed. You admitted what had occurred. You told the police that you were not sure why you acted as you did but that you had intentions to initiate a sexual relationship. You even went to so far as to find and tell the police about the text message you sent.

Your conduct amounted to crimes because the complainant did not consent to you sexually touching her. You did not take any steps at all to ascertain whether she did consent.

It is now more than seven years since these events occurred. You are aged 26. You came from a close family. You are in a long term relationship with a supportive partner and you assume a parental role for her two children. You demonstrated some minor behavioural problems when at secondary school but you have been in stable employment for almost six years and you are in the process of seeking a new job as a plant operator. You and your partner live on your combined income but there is not much money left over at the end of each fortnight. At the time of these offences you had no prior convictions. In the seven years since the offences you have committed no other offence of any nature.

The importance of ensuring consent, free agreement, to sexual touching or other sexual contact has been properly and increasingly emphasised within the Australian community over the last few years. The Tasmanian Criminal Code contains detailed definitions of what is free agreement as well as factors which limit the circumstances in which mistake as to consent is honest and reasonable. Those provisions were in place well before the time of these offences,

but quite independently of the legislation, it ought to be clear to everyone, young men in particular, that sexual contact without free agreement is unlawful. You were then a young person, but sufficiently mature to understand what was expected of you. Courts play a part in educating the public to understand the necessity to ensure consent before sexual touching. It is obvious that persons who are asleep cannot consent. Even when awake, there is no typical or normal response to non-consensual sexual activity. People may respond in different ways. For many reasons it is not unusual, as was the case for the complainant, for victims to simply freeze and find themselves unable to convey verbally or physically their unwillingness. The ability to freely agree may also be affected by intoxication through drugs or alcohol or by the effects of poor mental health or mental illness. It is all too easy for young persons, through ill judgment, lack of thought or other human frailty, to disregard or be indifferent to such important matters. Offences of this nature can have a very serious and long term psychological impact, especially on those who may be vulnerable to such effects because of fragile mental health. That was something you knew about. In this case the complainant has described, in her victim impact statement, profound impact on her relationships, education, and her physical and emotional general wellbeing. I think it is likely that there are other considerations at play, but your conduct is a contributing factor.

The factors I have just discussed must also be balanced against the level of criminality involved in a particular case and the well-recognised principle that a young person without prior convictions should not be sentenced to imprisonment unless no other sentence is appropriate. Every sexual assault is serious. However I have concluded that these crimes do not require imposition of a term of imprisonment. You are to be sentenced as a 19 year old. It is not a case in which you acted knowing that the complainant did not consent. In my assessment these offences were contributed to by ill-considered and immature decision-making associated with your youth and sexual naivety. To some extent the weight of those considerations is reduced by the need to deter other young persons from offences of this nature, but not such as to require imprisonment. Your admissions at the time and plea of guilty once charged spared the complainant from the further trauma of a trial. I am satisfied that you are sorry for what you did and wish to make amends. Without more, convictions for crimes like this will have an impact on you. A significant number of community service hours is the appropriate sentence. The performance of community service will be an impingement on your liberty and also carry the obligation to complete such rehabilitation programs as may be thought necessary.

The risk of re-offending is not only relevant to the need for a sentence to address protection of the public and the need for personal deterrence, but also to whether an order is to be made under the *Community Protection (Offender Reporting) Act 2005*. The requirements of the legislation are stringent and require the making of a reporting order unless I am satisfied that you do not pose a risk of committing a reportable offence in the future. In the course of the preparation of the pre-sentence report a sex offender assessment tool was administered by the author. You are assessed as at average risk of another sexual offence. However a clinical psychologist, Dr Grant Blake, also undertook extensive assessment of the risk you pose of future sexual offending. He concluded, for the reasons he expressed in his lengthy report, that there are very good reasons to consider this to be an isolated incident, that you pose an extremely low risk of sexual recidivism and that there are strong protective factors which further reduce the likelihood of re-offending. There is some difference between what you told Dr Blake about the offending and the facts upon which I am to sentence, but I am not persuaded that they should lead me to doubt or give less weight to Dr Blake's opinion. I am

satisfied that you do not pose a risk of committing a reportable offence in the future in any real sense and I will not make an order.

Hayden Turnbull, you are convicted on both counts. I make a community corrections order for a period of two years from today. I impose a special conditions that you must, within the operational period of the order satisfactorily perform 105 hours of community service, as directed by a probation officer or a supervisor, and you must attend educational and other programs as directed by a probation officer. The other conditions which the law imposes on that order include that you must report to a probation officer at the offices of Community Corrections in Hobart on or before 5.00 pm on Thursday 7 July 2022, you must, during the operational period of the order, report to a probation officer as required by the probation officer, you must comply with the reasonable and lawful directions of a probation officer or a supervisor, you must not leave, or remain outside, Tasmania without the permission of a probation officer and you must, during the operational period of the order, give notice to a probation officer of any change of address or employment before, or within 2 working days after, the change. If you breach any of those conditions you may be brought back to court and re-sentenced.