NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA131/2020
[2021] NZCA 258

BETWEEN	LOTU TALATOFI Appellant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing:	17 May 2021
Court:	Cooper, Simon France and Edwards JJ
Counsel:	H G de Groot and T W R Lynskey for Appellant B C L Charmley for Respondent
Judgment:	21 June 2021 at 3 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The extended supervision order made by the District Court on 31 January 2020 is set aside.

REASONS OF THE COURT

(Given by Edwards J)

[1] Mr Talatofi has 127 convictions spanning 31 years. Five of those convictions are for indecent assault committed in 1989, 1992, 2009, and 2014/2015. The remaining convictions are for non-compliance, violence (including domestic violence), and property-related offending.

[2] On 31 January 2020, Judge Bouchier imposed an extended supervision order (ESO) on Mr Talatofi for a five-year term.[1] Mr Talatofi appeals that ESO on the basis that:

(a) the evidence fell short of showing a pervasive pattern of serious sexual offending as required by s 107I(2)(a) of the Parole Act 2002 (the Act);

(b) the mandatory requirements in s 107IAA of the Act were not met such that it could not be said there was a high risk that Mr Talatofi would commit a relevant sexual offence in the future;

(c) the five-year term was excessive; and

(d) Mr Talatofi was not present for a substantial part of the hearing which contravened s 107G(4) of the Act and the minimum standards of criminal procedure guaranteed by s 25(a) and (e) of the New Zealand Bill of Rights Act 1990.

Statutory regime

[3] The ESO regime is set out in pt 1A of the Act. An offender who has been sentenced to imprisonment for a relevant sexual or violent offence, and who has not ceased to be subject to that sentence or release conditions, is eligible for an ESO.[2] The order may be made by the sentencing court for a term not exceeding 10 years on the application of the Chief Executive of the Department of Corrections.[3]

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1 *R v Talatofi* [2020] NZDC 1607 [District Court judgment].
2 Parole Act 2002, s 107C.
3 Sections 107F and 107I(4).

[4] The purpose of an ESO is "to protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing serious sexual or violent offences".[4] A court may make an ESO if it is satisfied that:

(a) the offender has, or has had, a pervasive pattern of serious sexual or violent offending (s 107I(2)(a)); and

(b) with regard to the factors set out in s 107IAA of the Act, there is a high risk the offender will in future commit a relevant sexual offence and/or a very high risk that the offender will in future commit a relevant violent offence (s 107I(2)(b)).

[5] Section 107IAA(1) of the Act provides:

> **107IAA Matters court must be satisfied of when assessing risk**
>
> (1) A court may determine that there is a high risk that an eligible offender will commit a relevant sexual offence only if it is satisfied that the offender—
>
> (a) displays an intense drive, desire, or urge to commit a relevant sexual offence; and
>
> (b) has a predilection or proclivity for serious sexual offending; and
>
> (c) has limited self-regulatory capacity; and
>
> (d) displays either or both of the following:
>
> (i) a lack of acceptance of responsibility or remorse for past offending:
>
> (ii) an absence of understanding for or concern about the impact of his or her sexual offending on actual or potential victims.

[6] A "relevant sexual offence" is defined in s 107B(2) and includes indecent assault.

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4 Section 107I(1).

[7] An application for an ESO must be accompanied by a health assessor's report.[5] A health assessor may take into account conduct of the offender whether or not it was the subject of a charge or offence.[6] The court may receive and take into account any evidence or information that it thinks fit for the purposes of determining the application, whether or not admissible in a court of law.[7] If the statutory criteria are satisfied, the court retains a discretion whether or not to make an ESO.

Mr Talatofi's criminal history

[8] Mr Talatofi is now 55 years of age. His first conviction was for common assault in 1987, when he was 22 years old. Since then, he has amassed 126 other convictions. These primarily comprise violence, property and non-compliance offences. Included in this history are five convictions for sexual offending. It is these convictions which are at issue in this appeal.

[9] The first sexual offence was for an indecent act on a girl between 12 and 16 years of age. It arose out of an altercation outside a nightclub on 27 February 1989. Mr Talatofi was 23 years of age. There is little information about this conviction. Mr Talatofi maintains he was either attempting to take the complainant's necklace outside the nightclub or to pull her closer by it during an argument. The indecency appears to have arisen out of contact with the complainant's breast. Mr Talatofi was sentenced to 120 hours of community service for this offence.

[10] In 1992, Mr Talatofi was convicted of two charges of indecently assaulting a female under 12 years of age. This offending involved touching the genital areas of two young girls through their underpants and under their clothing. Both girls were the daughters of a woman Mr Talatofi had met the night before at a pub, and he was helping them to shower while their mother was at work. He was sentenced to concurrent terms of three years' imprisonment with standard release conditions on each charge.

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5 Section 107F(2).
6 Section 107F(3).
7 Section 107H(2).

[11] The next incident giving rise to an indecent assault occurred 17 years later, on 17 April 2009. Mr Talatofi was 43 years old. He had amassed 90 further convictions in the intervening period, but none were for sexual offending. This incident involved Mr Talatofi being arrested and handcuffed for public intoxication. He pushed his hands backwards into the crotch of a female **[redacted]**. Mr Talatofi was convicted of indecently assaulting a female over 16 years of age. He was sentenced to 10 months' imprisonment with special release conditions for this offending.

[12] The fifth conviction is also for indecently assaulting a female over 16 years of age. This was a representative charge and related to two separate incidents on 14 December 2014 and 4 January 2015. The complainant was the 18-year-old daughter of Mr Talatofi's partner at the time.

[13] On the first occasion, Mr Talatofi and the complainant were asleep in the same room. She woke at about 6.00 am to find the Mr Talatofi touching her breast with one hand while he appeared to be masturbating. He pulled the complainant's top and bra up and started sucking her breasts. He then straddled her and tried to put his hand down her shorts. The complainant pushed him off and he fell to her side. He then kissed her, putting his tongue in her mouth. She bit his tongue and managed to push him off, leaving the room.

[14] The second occasion occurred at around 3.00 am in the morning. The complainant was in her bedroom asleep and woke to find Mr Talatofi touching her waist. He was on the bed next to her and pulling her closer towards him. He tried to remove the blanket wrapped around her while saying things like "let me come into your blanket", "I love you", "you're beautiful", and "I really like your body". Mr Talatofi had his leg over the complainant making it hard for her to move. She told him to go away, and screamed out for her mother, who came to the door and witnessed what was happening.

[15] Mr Talatofi pleaded guilty to this offending. He was sentenced to two years' imprisonment and given a stage-1 warning.[8]

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8 *R v Talatofi* [2016] NZDC 18072; and Sentencing Act 2002, s 86B.

[16] The application for an ESO was filed in November 2018, while Mr Talatofi was subject to release conditions.

[17] On 3 April 2019, an interim supervision order was imposed on Mr Talatofi. At that time, Mr Talatofi faced charges of assault with intent to injure, threatening to kill, and attempting to pervert the course of justice, all in relation to his partner. The allegations in respect of the first two charges arose out of events on 2 April 2019. Mr Talatofi and his partner were arguing about an alleged infidelity. He slapped her to the right side of her face, punched her two or three times with closed fists, used a guitar to strike her three times over the head and body causing her to fall to the ground, and then punched and kicked her in the head. During this attack, Mr Talatofi told the complainant, "I'll kill you, you know I will kill you".

[18] The attempting to pervert the course of justice charge arose out of phone calls Mr Talatofi made to his partner between April and November 2019 from prison. In these calls he asked his partner whether she had withdrawn her statement regarding the assault, encouraged her to lie to the police about the assault, and told her to say nothing about the contact between them. Mr Talatofi also challenged his partner's fidelity during the course of these calls, and asserted possession of her genitals. Mr Talatofi pleaded guilty to these three charges and was sentenced to three years' imprisonment.[9]

Personal circumstances

[19] Mr Talatofi was born in Samoa and moved to New Zealand when he was 19 years old. He told the health assessors that his upbringing was characterised by physical violence meted out by his father, and incidents of sexual abuse by another family member when he was a young boy.

[20] Fighting at school led to Mr Talatofi being excluded on multiple occasions and he reportedly left school at age 12. He has worked as a machine operator and fruit packer, but has been unemployed more recently.

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9 *R v Talatofi* [2020] NZDC 10695.

[21] Mr Talatofi has 11 children from three significant long-term romantic relationships. One of his daughters described him as a caring and loving man when sober, but aggressive, violent, and mean when drinking. That history has left him without any family support. It appears he has had periods of transience, and has been unable to retain supported accommodation provided for him.

[22] Alcohol has been a chronic and long-term problem for Mr Talatofi. It is a feature of his sexual offending, with Mr Talatofi being either intoxicated or recovering from the effects of excessive alcohol consumption at the time he committed each of the sexual offences. His drinking has led to a liver problem, and he is also suffering from gout and the effects of multiple head injuries.

[23] As to treatment, Mr Talatofi has previously attended anger management sessions but did not complete the programme. In 2017, he was seen by a Department of Corrections psychologist but refused to discuss his sexual offending. More recently, Mr Talatofi has completed courses on issues such as relationships, self-esteem, mental health, dealing with impulsivity and cravings, critical thinking skills, and Pasifika identity. He has not participated in any treatment programmes for sexual offending.

[24] In a letter addressed to the Judge, Mr Talatofi expressed deep regret for his actions towards all his victims and the impact of his offending on them. He said that he took full responsibility for his own actions and was deeply ashamed of what he had done. Being in prison had given him time to reflect, and he considered he was at a turning point in his life but with a long journey ahead.

The health assessors' opinions

[25] Dr Hamish Bartle and Mr Jim van Rensburg were engaged by the Department of Corrections and defence respectively to give health assessor opinions in accordance with the Act. Dr Bartle delivered reports on 9 May 2018 and 30 May 2019, and Mr van Rensburg issued a report on 8 July 2019. They appeared and were cross-examined at the hearing.

[26] Both health assessors agreed that Mr Talatofi had a "well above average" risk, which is the highest risk band, for future sexual offending.

[27] There was some divergence between them on the question of whether there was a pervasive pattern of serious sexual offending. Dr Bartle was of the view that there was a pervasive pattern despite the sexual offences comprising a small minority of Mr Talatofi's criminal history. In his view, it was not unusual for someone who has both violent and sexual offending to re-offend violently more than they re-offend sexually. Dr Bartle saw a connection between Mr Talatofi's family violence convictions and the sexual offending.

[28] Mr van Rensburg, on the other hand, expressed some difficulty in finding a pattern in Mr Talatofi's sexual offences, noting that the only common denominators appeared to be intoxication and impulsive opportunism. He considered the first (involving the necklace outside the nightclub) and third (the assault **[redacted]**) incidents to have stronger violent than sexual undertones. The third incident also had an anti-authoritarian motive, consistent with many of Mr Talatofi's prior convictions.

[29] As to the s 107IAA factors, Dr Bartle initially reported that there was mixed evidence of an intense drive, desire or urge to commit a relevant sexual offence.[10] However, in oral evidence, he expressed the view that there was an intense drive at the time of the offending. On that basis, he considered the criterion met. Mr van Rensburg agreed with Dr Bartle that there was mixed evidence regarding an intense drive, desire or urge, but concluded that there was insufficient evidence to meet this requirement of the Act.

[30] The experts also differed in their assessment of Mr Talatofi's predilection or proclivity for serious sexual offending.[11] Dr Bartle considered this criterion met; Mr van Rensburg considered there was a lack of evidence to show either a predilection or proclivity.

[31] The experts agreed that Mr Talatofi had not demonstrated self-regulatory control, and the evidence regarding remorse and responsibility was inconclusive.[12] Dr Bartle considered that to the extent there was remorse and responsibility, it was

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10 Parole Act, s 107IAA(1)(a).
11 Section 107IAA(1)(b).
12 Section 107IAA(1)(c) and (d).

insufficient for Mr Talatofi to make the necessary behavioural changes to mitigate risk. On that basis, he considered this s 107IAA criteria met.

A pervasive pattern of serious sexual offending?

[32] The Judge was satisfied that Mr Talatofi had a pervasive pattern of serious sexual offending.[13] She held that indecent assault was a serious sexual offence, and factors such as the ages of the children, and the fact they were children of intimate partners, also made that offending serious.[14]

[33] Mr de Groot, counsel for Mr Talatofi, challenges this finding on the grounds that neither the 1989 nor the 2009 convictions can properly be regarded as "serious", and convictions for serious sexual offending arising from two incidents spanning 25 years cannot be described as a "pervasive pattern".

[34] We start with an assessment of the seriousness of the sexual offending. Mr de Groot properly accepts that the 1992 and 2014/2015 convictions involved serious sexual offending. The 1992 offending involved young children. The 2014/2015 offending involved intrusive and persistent unwanted sexual contact against a young adult.

[35] However, the other two offences fall into a different category. As stated by the Supreme Court, "sexual offending" is to be interpreted by reference to its ordinary meaning and in light of the ESO regime as a whole.[15] The word "serious" means "important, grave; having (potentially) important, esp undesired, consequences; giving cause for concern; of significant degree or amount, worthy of consideration".[16] Given that the imposition of an ESO poses significant intrusions into freedom of movement and association, it is only a pattern of offending at the higher end of the spectrum that will be relevant.[17]

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13 District Court judgment, above n 1, at [72].
14 At [71].
15 *Holland v Chief Executive of the Department of Corrections* [2017] NZSC 161, [2018] 1 NZLR 771 at [13].
16 See *Holland v Chief Executive of the Department of Corrections* [2016] NZCA 504 at [44], quoting *The New Shorter Oxford English Dictionary* (4th ed, Clarendon Press, Oxford, 1993) at 2785.
17 At [45].

[36] We do not consider the 1989 and 2009 incidents meet the definition of "serious sexual offending". The limited information about the first incident suggests that the sexual component to the offending could have been incidental rather than the main driver of what occurred. The 2009 incident **[redacted]** was characterised by both health assessors as primarily violent in nature. Mr van Rensburg considered this offending to have a strong anti-authoritarian motive. We agree.

[37] In reaching that conclusion we have had regard to the entirety of Mr Talatofi's offending history, and six unproven charges for sexual offending alleged to have occurred between 1994 and 2015, referred to in Dr Bartle's report. We are cognisant of Dr Bartle's opinion that there is a link between Mr Talatofi's violent offending against intimate partners and his sexual offending. That link can be seen in Mr Talatofi's display of sexual jealousy and his assertion of ownership of his partner's genitals made in the prison phone calls. However, such a link does not transform the indecent assaults into something more serious. This is not a case where individual offences appear more serious when considered with the benefit of hindsight or in light of a defendant's criminal history as a whole.

[38] Similarly, the unproven charges referred to in Dr Bartle's report do not add gravity to the sexual offending. Four of the six charges were withdrawn or discharged, and Mr Talatofi was found not guilty on the remaining two charges. Three of the charges withdrawn relate to the same 2014/2015 incidents. These charges, like the sexual offences for which Mr Talatofi was convicted, span over some 20 years. There is nothing in this unproven history which casts the indecent assaults in a different light, or which impacts on the overall assessment of the gravity of Mr Talatofi's sexual offending.

[39] The next issue is whether there is a pattern of serious sexual offending. For present purposes, we accept three convictions for serious sexual offending arising from two incidents can constitute a pattern. The real question, however, is whether that pattern is "pervasive".

[40] We agree with Mr de Groot that the evidence falls short of the pervasive requirement. The sexual offences span a 25-year period, with a gap of 17 years

between the second and third incidents, and a gap of 22 years between the serious sexual offences. That does not form a pattern that permeates or spreads across Mr Talatofi's background.[18] Nor can it be said that these convictions are characteristic of Mr Talatofi such that they serve as a predictor of future conduct.[19] Mr Talatofi's criminal history is primarily characterised by non-compliance and anti-authoritarian type offending, alongside some violent and property-related offending. The five sexual offending convictions are a small part of his overall offending history.

[41] In sum, we consider the evidence falls short of showing Mr Talatofi has, or has had, a pervasive pattern of serious sexual offending under s 107I(2)(a) of the Act and the Judge erred in finding this mandatory criterion met. The appeal is allowed on this ground.

Other grounds of appeal

[42] It is unnecessary for us to address the other grounds of appeal, however, we wish to say something about the absence of Mr Talatofi for a period during the hearing. Section 107G(4) of the Act provides that an offender must be present at the hearing of the application and may be represented by counsel. That mandatory requirement reflects the serious nature of the order that might be made.

[43] Mr Talatofi was reliant on prison services bringing him to Court. Through no fault of his own, he was not brought to Court in the morning. The hearing was re-scheduled to take place at 2.15 pm and that was when Mr Talatofi was brought to Court. However, for reasons unknown to us, the hearing commenced just after 11.45 am, meaning that Mr Talatofi was not present for Dr Bartle's evidence-in-chief or cross-examination. That was evidence that the Judge ultimately relied on in making the ESO in this case. The Judge may have been influenced by the fact that it appears counsel did not object to the hearing commencing, but on the information before us, we consider the hearing should not have gone ahead without Mr Talatofi being present, and there was a breach of s 107G(4) of the Act.

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18 Compare *W (CA716/2018) v Chief Executive of the Department of Corrections* [2019] NZCA 460 at [24].

19 *Kiddell v Chief Executive of the Department of Corrections* [2019] NZCA 171 at [23].

Result

[44] The appeal is allowed.

[45] The extended supervision order made by the District Court on 31 January 2020 is set aside.

Solicitors:
Crown Law Office, Wellington for Respondent