NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF THE COMPLAINANT PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA691/2022
[2023] NZCA 227

BETWEEN	SHAUN KENNETH BANNAN Appellant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing: 20 March 2023

Court: Brown, Lang and Palmer JJ

Counsel: R E Webby for Appellant
N J Wynne for Respondent

Judgment: 13 June 2023 at 10.00 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Palmer J)

Summary

[1] Mr Shaun Bannan, aged 44, has been convicted of, and sentenced for, offences relating to grooming young people, in Australia in 2006–2007 and in New Zealand in 2020, as well as possession of objectionable material in 2008. On 14 November 2022,

in the District Court at Manukau, Judge McGuire made an extended supervision order (ESO) against Mr Bannan for a term of five years.[1] Mr Bannan appeals on three grounds. We dismiss the appeal because Mr Bannan has had a pervasive pattern of serious sexual offending, he is at high risk of committing a relevant sexual offence in the future, and there was no error in setting the term of five years.

What happened?

"12-year-old Australian"

[2] Between August 2006 and February 2007, Mr Bannan was 29 years old and living with his parents in Auckland. During this time, Australian Police conducted a controlled operation in which a covert police officer assumed the identity of a 12-year-old girl in Brisbane, Australia, called "Isabella Stirling". Mr Bannan engaged in online chat engagements with "Isabella". He was reminded on a number of occasions that she was 12 and was provided with photographs of a girl who was clearly under 16. In his engagements, Mr Bannan told the child to masturbate and coached her in detail as to how to do so. He stated he wanted to live with her in a sexual relationship. He told her he had someone "keeping an eye on her".

[3] On 19 January 2008, Mr Bannan travelled to Brisbane, was questioned by Australian Police at the airport, and was arrested. Mr Bannan said he knew the child, he believed she was a minor, and he "probably" spoke to her about topics of a sexual nature. However, he stated he was addicted to methamphetamine at the time of the chats and his memory of the conversations was not good. He appears initially to have faced two charges. On 17 October 2008, Mr Bannan pleaded guilty to one charge of using a carriage service to procure persons under 16 years of age.[2] He was sentenced to imprisonment for two years and six months but was released in October 2008 on the basis of time served.

---

1 *Chief Executive of the Department of Corrections v Bannan* [2022] NZDC 22191 [District Court decision].

2 Criminal Code Act 1995 (Cth), s 474.26, carrying a maximum penalty of 15 years' imprisonment.

Objectionable material

[4] Mr Bannan's arrest in Australia triggered the execution of a search warrant at his home in Auckland. There, the police found over 190 videos, and over 2,900 images, of pre-pubescent children involved in sexual acts. On 22 December 2009, after his return to New Zealand, Mr Bannan was charged with 20 charges of possession of objectionable material under the Films, Videos, and Publications Classification Act 1993.[3] There were 10 "sample" charges in relation to videos and 10 in relation to images.

[5] Mr Bannan pleaded guilty to the charges. On 18 March 2010, he was sentenced in the District Court at Auckland by Judge Joyce QC to two years of intensive supervision.[4] Conditions included that he was: to undertake intensive treatment for his addiction through a specialist agency; not to possess computers or electronic equipment that could access the internet; to make available for checking and monitoring by a probation officer any computer or electronic equipment that was in his possession; and not to associate or have contact with any person under the age of 16 years.[5] Mr Bannan completed 197.5 hours of treatment with the SAFE programme and sessions with a private psychologist. His conditions ended in March 2012.

11-year-old New Zealander

[6] In March 2020, aged 41, Mr Bannan engaged with an 11-year-old girl in the Bay of Plenty by text and social media. He suggested inappropriate actions, such as oral sex, told her he loved her more than anything, that she was the most important thing in his life, and that he wanted to kidnap her. He elicited videos of her in various stages of undress and elicited messages with sexual content. He told her he wished he could drive down and pick her up and that he would carry her to bed. She asked if she could take her "blankie". On 15 March 2020, Mr Bannan left his home in Auckland and drove to a Bay of Plenty town to meet the girl. That afternoon the girl's mother discovered the conversations on the girl's phone and called the police. Around

---

3 Section 131A, each charge carrying, at the time, a maximum penalty of a fine of $50,000 or five years' imprisonment.

4 *R v Bannan* DC Auckland CRI-2009-004-26767, 18 March 2010 at [19].

5 At [20]–[24].

6.30 pm, Mr Bannan was arrested in the town. In the car, the police found condoms and a length of purple rope.

[7] The victim impact statements by the girl's parents say that the emotional impact on the family has been devastating. It has impacted on all of them and particularly on their daughter's self-esteem and innocence.

[8] Mr Bannan pleaded guilty to a charge of travelling to meet a young person following sexual grooming.[6] On 16 June 2020, in the District Court at Tauranga, Judge Ingram sentenced Mr Bannan to 18 months' imprisonment and observed the legal consequences of the conviction would be significant.[7] Mr Bannan was registered on the Child Sex Offender Register. He was released in December 2020.

Interim Supervision Order

[9] Some nine months after Mr Bannan's release, towards the end of the period in which Mr Bannan remained subject to post-release conditions, the Department of Corrections applied for an interim supervision order (ISO) under s 107FA of the Parole Act 2002 (the Act). The application was heard and granted by consent on 21 February 2022.[8] The conditions of the ISO were the standard conditions under s 107JA of the Act and the following special conditions:[9]

> (a) not to possess, consume or use any alcohol or drugs not prescribed to Mr Bannan;
>
> (b) to attend a psychological assessment with a department psychologist as directed by a probation officer and complete any treatment and/or counselling as recommended by the assessment to the satisfaction of a probation officer;
>
> (c) to disclose to a probation officer, at the earliest opportunity, details of any intimate relationship Mr Bannan commences, resumes or terminates;
>
> (d) not to possess nor use any device capable of accessing the Internet, unless Mr Bannan is under the direct supervision of an adult approved

---

6 Crimes Act 1961, s 131B, carrying a maximum penalty of seven years' imprisonment.
7 *R v Bannan* [2020] NZDC 11213 at [7].
8 *R v Bannan* DC Manukau CRI-2020-079-135, 21 February 2022 (Minute of Judge McIlraith) at [5].
9 At [13].

in writing by a probation officer or unless he has the prior written approval of a probation officer;

(e) to undertake and complete appropriate assessment, treatment or counselling as directed by and to the satisfaction of a probation officer;

(f) to attend an assessment for an alcohol and drug programme as directed by a probation officer, to attend and complete any counselling, treatment or programme as recommended by the assessment as directed by and to the satisfaction of a probation officer;

(g) upon request, to make available to a probation officer or his or her agent any electronic device capable of accessing the Internet that is used by Mr Bannan or in his possession or control for the purpose of monitoring his use of that device;

(h) to reside at an address as directed by a probation officer and not to move from that address without prior written approval of a probation officer; and

(i) to attend an assessment for the SAFE programme as directed by a probation officer, to attend and complete any counselling, treatment or programme as recommended by the assessment as directed by and to the satisfaction of a probation officer.

Law relevant to ESOs in general

[10] Part 1A of the Act empowers a court to make an ESO in respect of an offender who has been sentenced to imprisonment for a relevant sexual offence and has not ceased to be subject to release conditions.[10] Section 107I provides, relevantly:

> **107I Sentencing court may make extended supervision order**
>
> (1) The purpose of an extended supervision order 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.
>
> (2) A sentencing court may make an extended supervision order if, following the hearing of an application made under section 107F, the court is satisfied, having considered the matters addressed in the health assessor's report as set out in section 107F(2A), that—
>
> (a) the offender has, or has had, a pervasive pattern of serious sexual … offending; and
>
> (b) either … of the following apply:

[10] Parole Act 2002, s 107C(1).

(i) there is a high risk that the offender will in future commit a relevant sexual offence:

…

(4) Every extended supervision order must state the term of the order, which may not exceed 10 years.

(5) The term of the order must be the minimum period required for the purposes of the safety of the community in light of—

(a) the level of risk posed by the offender; and

(b) the seriousness of the harm that might be caused to victims; and

(c) the likely duration of the risk.

[11] In *Chief Executive of the Department of Corrections v Alinizi*, this Court set out a three-step process for determining whether an ESO should be made:[11]

(i) the Court must determine whether the offender has, or has had, a pervasive pattern of serious sexual or violent offending;

(ii) the Court must make specific findings as to whether the offender meets the qualifying criteria set out in s 107IAA; and

(iii) if those criteria are met the Court must make a determination about the risk of the offender committing a relevant sexual or violent offence.

[12] This Court in *Chief Executive of the Department of Corrections v Coleman*, held:[12]

> On its face, an ESO limits the right to freedom of association and the right to freedom of movement under ss 17 and 18(1) of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act). Section 3(a) of that Act means a court may only make an ESO in a particular case if it does so consistently with the Act. So those limits must be reasonable and demonstrably justified in a free and democratic society in a particular case. The decision-making exercise is fact-specific and evaluative.

[13] A Full Court of this Court in *Chisnall v Attorney-General* held that ESOs should be properly regarded as a second penalty engaging the right not to be punished for an offence again under the New Zealand Bill of Rights Act 1990 (Bill of Rights).[13]

---

11 *Chief Executive of the Department of Corrections v Alinizi* [2016] NZCA 468 at [13].
12 *Chief Executive of the Department of Corrections v Coleman* [2021] NZCA 528 at [17].
13 *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [145].

The judgment has been appealed to the Supreme Court.[14] Counsel for both parties accept that there needs to be "strong justification" for an ESO if the statutory criteria are met.[15]

Decision under appeal

[14] On 20 October 2022, the ESO application filed by Corrections was heard. Corrections obtained two reports from a registered clinical psychologist, Ms Angela Curtis-Clark. Mr Bannan's counsel obtained a report by another registered clinical psychologist, Dr Jon Nuth. Both psychologists were available for cross-examination at the District Court hearing of the ESO application.

[15] On 14 November 2022, Judge McGuire concluded that the criteria for imposing an ESO were satisfied and that an ESO would be appropriate in Mr Bannan's case.[16] The Judge made an ESO for five years on the same conditions as the ISO.[17] We address aspects of the judgment in more detail when addressing Mr Bannan's three grounds of appeal in turn.

[16] An appeal against a decision to impose an ESO is treated as an appeal against sentence.[18] Under s 250(2) of the Criminal Procedure Act 2011, this Court must allow the appeal if it is satisfied there was a material error in the decision under appeal and a different decision should have been made.

Issue 1: Is there a pervasive pattern of serious sexual offending?

Relevant law

[17] In *Holland v Chief Executive of the Department of Corrections*, this Court held an arbitrary distinction should not be drawn between contact and non-contact offences for the purposes of assessing whether there is a pervasive pattern of serious sexual

---

14 *Attorney-General v Chisnall* [2022] NZSC 77.
15 *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 at [31].
16 District Court decision, above n 1, at [130].
17 At [131].
18 Parole Act, s 107R(2); and *Wilson v Chief Executive of the Department of Corrections* [2022] NZCA 289 at [33].

offending.[19] In *Kiddell v Chief Executive of the Department of Corrections*, this Court stated: 20

> [21] Fourth, the terms "pervasive pattern" and "serious sexual offending" and "high risk" indicate that the assessment requires judgments of quality and degree. The decision-making exercise is fact-specific and evaluative.
>
> [22] Fifth, the term "serious sexual offending" in s 107I(2)(a) is not a term of art but should be given its ordinary meaning. It is not confined to relevant sexual offences listed in s 107B(2).[21] The adjective "serious" should also be given its natural meaning, viewed against the statutory purpose of protecting the community from those who pose a real and ongoing risk of sexual offending.[22] The relevant sexual offences listed in s 107B(2) are capable of being "serious" but are not exhaustive.[23]
>
> [23] Sixth, a pervasive pattern is one that is sufficiently characteristic of the offender to serve as a predictor of future conduct.[24] We make several points about this:
>
> (a) In ordinary usage, to be pervasive is to be present throughout.[25] The adjective is here used in connection with the behaviour of a person, and the legislation also identifies certain relevant traits or characteristics: an intense drive to commit relevant sexual offences, a predilection for serious sexual offending, limited self-regulatory capacity and an absence of responsibility or an absence of understanding of victim impact.[26] It is for these reasons that we have defined a pervasive pattern simply, as a pattern that is characteristic of the offender.
>
> (b) The pattern must be sufficiently pervasive to serve as a predictor of future conduct; we adopt that purposive standard because the pattern determines whether the offender is susceptible to an ESO.
>
> (c) In ordinary usage "pattern" connotes regularity but a pattern may take any form or sequence. A pattern that includes relevant but less serious conduct may be found pervasive.[27]
>
> [24] Seventh, when considering whether the offender presents a high risk of committing relevant sexual offences in future, the court will take into account anything that may exacerbate or mitigate risk, such as community

---

19 *Holland v Chief Executive of the Department of Corrections* [2016] NZCA 504 [*Holland* (CA)] at [48].

20 *Kiddell v Chief Executive of the Department of Corrections* [2019] NZCA 171.

21 *Holland v Chief Executive of the Department of Corrections* [2017] NZSC 161, [2018] 1 NZLR 771 [*Holland* (SC)] at [13]−[14].

22 *Holland* (CA), above n 19, at [44]; and *Holland* (SC), above n 21, at [13].

23 *Holland* (CA), above n 19, at [43].

24 This standard is similar but not identical to that adopted in *Chief Executive of the Department of Corrections v Ihimaera* [2017] NZHC 2228 at [46].

25 See Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2008).

26 These are used in s 107IAA, which is concerned with risk of future offending, but as explained at [19] a past or present pattern of serious sexual offending may evidence the same characteristics.

27 *Chief Executive of the Department of Corrections v Popata* [2017] NZHC 2343 at [33].

support and the offender's response to any treatment that has been undertaken. These considerations are also relevant to the term of an ESO, as noted below.

[25] Eighth, the court must be "satisfied" that the criteria in s 107I(2) and s 107IAA have been established. There is no onus or standard of proof; rather, the court must make up its mind on the evidence.[28]

…

[27] Finally, an ESO engages [Bill of Rights Act]-protected rights. This Court has previously held that the ESO regime creates a retrospective double penalty, so contravening s 26 of the [Bill of Rights Act], but nonetheless must be given effect under s 4 of that Act.[29] The Supreme Court has recognised that the Parole Act's statutory purpose requires that courts not be denied clearly relevant information when deciding whether an offender is eligible under s 107I for an ESO.[30] But when deciding whether to make an ESO, and for how long, courts must recognise that the order may impinge substantially upon the offender's freedom of movement and association. These rights must be borne in mind when deciding both whether the offender has or had the necessary pervasive pattern of serious sexual offending and whether the offender presents a high risk of future serious relevant offending.

[18] In *Coleman*, this Court stated the approach in *Kiddell* had recently been applied in two cases:[31]

(a) In *Talatofi v Chief Executive of the Department of Corrections,* this Court held that two incidents of serious sexual offending in 1992 and 2014/2015 did not constitute a pattern that was pervasive.[32] They were not characteristic of Mr Talatofi such that they served as a predictor of future conduct.[33] The Court held that less serious offending in 1989, in which the sexual component could have been incidental, and in 2009 which was primarily violent, were not part of the pattern.[34]

(b) In *Taakimoeaka v Chief Executive of the Department of Corrections,* this Court held that there was a unifying theme or pattern in two serious episodes of offending (by rape, unlawful sexual connection and attempted unlawful sexual connection in 2005 and by unlawful sexual connection, assault with intent to commit rape and indecent assault in 2013) sufficiently pervasive to serve as a predictor of Mr Taakimoeaka's future conduct.[35] It rejected the submission that

---

28 *Holland* (CA), above n 19, at [12] citing *R v White (David)* [1988] 1 NZLR 264 (CA) at 268; *R v Leitch* [1998] 1 NZLR 420 (CA) at 428; and *Chief Executive of the Department of Corrections v McIntosh* HC Christchurch CRI-2004-409-162, 8 December 2004 at [20]–[21].

29 *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA). This remains the position following the Supreme Court decision in *Holland* (SC), above n 21, at [18].

30 *Holland* (SC), above n 21, at [19].

31 *Chief Executive of the Department of Corrections v Coleman*, above n 12, at [16].

32 *Talatofi v Chief Executive of the Department of Corrections* [2021] NZCA 258 at [40]–[41].

33 At [40].

34 At [36].

35 *Taakimoeaka v Chief Executive of the Department of Corrections* [2021] NZCA 467 at [29].

two incidents were not sufficient to establish the requisite predilection or proclivity.[36] And it held:[37]

> Where a person has committed serious sexual offending and is at high risk of committing further such offending, it would have to be a rare case where the standard terms of an ESO crafted by Parliament to protect the community from that risk would be regarded by the court as having no utility.

[19] This Court in *Coleman* said, of the offending there:[38]

> We consider the 2011 and 2014 offending was plainly serious. Together, that offending points towards a pattern of Mr Coleman forcing himself on young women in order to have sex irrespective of their objections. The fact that his subsequent offending and other similar behaviour was interrupted, and did not reach as serious an outcome, does not detract from its consistency with the serious nature of the 2011 and 2014 offending. Rather, it reinforces the pattern of Mr Coleman's serious offending in those cases. We consider Mr Coleman has a pervasive pattern of serious sexual offending and is plainly at high risk of committing serious sexual offending in future.

Decision under appeal

[20] The Judge referred to the legislation and case law regarding "pervasive pattern" and "serious sexual offending".[39] He held Mr Bannan's grooming offending, in both Australia and New Zealand, was continuous, intensive, and "serious" in terms of the ordinary meaning of the word.[40] The goal of Mr Bannan in respect of both sets of offending was a sexual relationship with a pubescent or pre-pubescent girl.[41] The Judge observed it was "pure good fortune" that the police were able to intervene before Mr Bannan's latest offending escalated any further.[42] The Judge concluded that Mr Bannan has had a pervasive pattern of serious sexual offending.[43]

Submissions

[21] Ms Webby, for Mr Bannan, submits the Court erred in this finding. The Australian offence being committed on 30 August 2006 indicates he only

---

36 At [35].
37 At [41].
38 *Chief Executive of the Department of Corrections v Coleman*, above n 12, at [2].
39 District Court decision, above n 1, at [111]–[112].
40 At [113]–[114].
41 At [113] and [122].
42 At [122].
43 At [114].

offended during the earlier part of the operation and there is no indication there was ongoing discussion with "Isabella". The Australian offending and possession of objectionable publications were intertwined as the conviction triggered the search warrant. The material circumstances are the same and the nature of the objectionable material is similar to the conversations he was having with "Isabella". There were 12 years between that and the 2020 offending and, for seven of those years, Mr Bannan was in the community without supervision. There is no regular pattern of offending and no pattern that pervades his life, similar to *Talatofi.* The offending is insufficiently "serious" to justify an ESO, compared with offending such as that in *Taakimoeka.* Ms Webby submits non-contact offences are not determinative and care needs to be taken not to elevate the fact the victim was a child, which is inherent in the charge.

[22] Ms Wynne, for Corrections, submits this Court has recognised that while a pattern connotes regularity, it may take any form or sequence. The circumstances of the previous offending amount to serious sexual offending given the victims were children. The pattern was repeated in the recent offending. The nature and degree of Mr Bannan's messages, and the impact on the victim, shows the offending is sufficiently serious.

Is there a pervasive pattern of serious sexual offending?

[23] We do not consider any weight can be placed on the suggestion that the Australian offence was committed on the discrete date of 30 August 2006. It is correct that the New Zealand "Overseas Conviction History" records the "offence date" as 30 August 2006. But the Queensland Police Service Court Brief states that the charge relates to the period between noon 8 September 2006 and midnight on 8 February 2007. The facts summarised there for "charge 2 of 2" are "as per charge one", which states that Mr Bannan chatted with the 12-year-old alias "on a number of occasions", spoke to the child about topics of a sexual nature "on a regular basis", and told her to masturbate "[d]uring several online chats". The verdict and judgment record of the Supreme Court of Queensland states the date of the offence was between 30 August 2006 and 25 October 2006. There is no good basis to infer that Mr Bannan "only" offended during the earlier part of the police operation (which does not matter anyway) or that he had no ongoing discussion with "Isabella".

[24] Neither can anything be drawn from the objectionable publication offending being discovered through the offending against "Isabella". How offences are detected does not affect them constituting a pattern. In fact, the similar nature of the objectionable material and the offending against "Isabella" helps constitute a pattern, which is confirmed by their similarity with the 2020 offending. A pattern does not have to be "regular". As this Court stated in *Kiddell*, a pattern may take any form or sequence.[44]

[25] The question is whether the offending is sufficiently pervasive to serve as a predictor of future conduct. We are satisfied the pattern here is so pervasive. The fact Mr Bannan offended in 2020 in a such a similar way to his earlier offending, after a relatively lengthy period of time in the course of which he received extensive treatment during intensive supervision, reinforces the pervasiveness of his pattern. This is consistent with the opinions of both psychologists and is a point particularly made by Ms Curtis-Clark. Ms Curtis-Clark also concluded that Mr Bannan shows enduring sexual interest and sexual arousal to pre-pubescent and pubescent girls representing "a predilection and proclivity for sexual offending". This can be predictive of future behaviour and is therefore relevant to assessing whether there is a pervasive pattern. Dr Nuth concurred with Ms Curtis-Clark's finding. Mr Bannan's pattern is quite different from the lack of a pervasive pattern in *Talatofi*, where the offender's criminal history was primarily characterised by non-compliance and anti-authoritarian offending. Furthermore, the offending in *Talatofi* spanned a period longer than the period in this case by 10 years.[45]

[26] The offending, of grooming children with the intention of having sex with them, is clearly serious. The fact it did not result in contact was not Mr Bannan's doing. As the Judge said, it was pure good fortune Mr Bannan's offending in the Bay of Plenty did not escalate any further. This Court said in *Holland* that there is no basis on which to draw an arbitrary distinction between contact and non-contact offences.[46] It said in *Coleman* that the fact subsequent offending was interrupted, and did not reach as serious an outcome, did not detract from its consistency with the

---

44 *Kiddell v Chief Executive of the Department of Corrections*, above n 20, at [23(c)].
45 *Talatofi v Chief Executive of the Department of Corrections*, above n 32, at [40].
46 *Holland* (CA), above n 19, at [48].

serious nature of the earlier offending.[47] The considerable amount of objectionable material found on Mr Bannan's computer is also relevant. Ms Webby's argument about not putting too much focus on the victim being a child is not persuasive.

[27] We consider it is clear that Mr Bannan's offending was a sufficiently pervasive pattern of sufficiently serious offending to satisfy the criterion for an ESO. The appeal fails on this ground.

Issue 2: Is Mr Bannan at high risk of committing a relevant sexual offence?

Relevant law

[28] Section 107IAA states:

> **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.
>
> …

Decision under appeal

[29] In relation to s 107IAA(1)(d), the Judge stated:

> [120] As to (d), the focus is on whether or not Mr Bannan displays an absence of understanding for or concern about the impact of his sexual

---

[47] *Chief Executive of the Department of Corrections v Coleman*, above n 12, at [32].

offending on actual or potential victims. Ms Curtis-Clark says at para 37 of her 24 May 2021 report:

> Mr Bannan described his offending from the victims' and the victims' parents perspective, described the physical abuse CESM [Child Sexual Exploitation Material] victims likely experienced to gain their compliance and recognised his behaviour was unacceptable. However, he did not present with a deeper emotional understanding of the impact to his victims and their families may be long lasting, but his ongoing minimisation and justifications suggest that he has not fully internalised these effects.

> [121] This lack of understanding for or concern about the impact of his sexual offending on actual or potential victims is evidenced by the unrestrained way in which [Mr Bannan] went about grooming his potential victims for considerable periods of time in 2006- 2007 and again over several days "at all hours of the day" in 2020.

[30] On the basis of the psychologists' reports and all the other information relating to the offending, the Judge concluded that Mr Bannan was at high risk of committing a relevant sexual offence in the future.[48] He noted that from the time of his arrest in Brisbane through to completion of his intensive supervision sentence, Mr Bannan was absolutely aware of the seriousness of his offending.[49] Appropriate rehabilitation was available, and required, but the 2020 offending showed it was insufficient to ensure further serious sexual offending did not occur.[50] Furthermore, the Court had been told that Mr Bannan had been advised not to fully disclose his sexual thoughts to the psychologist, Mr Bannan's "safety plan" had gaps, and his response to significant rehabilitation efforts had been less than optimal.[51]

Submissions

[31] Ms Webby submits there was no actual sexual connection or physical offending and this was not at the more serious end of this type of offending. Her instructions are that his trip to Australia was connected to a job, not going to see "Isabella", and there were 16 months between the date of his offending and his travel to Australia. She accepts the first three criteria of s 107IAA(1) are supported by Dr Nuth's conclusions but submits it is not clear Mr Bannan meets the final required criterion.

---

48 District Court decision, above n 1, at [124].
49 At [125].
50 At [126].
51 At [127]–[129].

She submits Mr Bannan has shown shame and regret and stated his actions ruined the victim's life. That is supported by his early guilty plea, his letter to the Court, and his gains during treatment. Mr Bannan is not at high risk of committing a relevant sexual offence in future. The Court did not consider the statistical assistance of the psychologists, who assessed Mr Bannan as in the moderate/high range for static factors and moderate range for stable dynamic factors, and Dr Nuth's assessment that his risk as not low but not high. Mr Bannan was not given the opportunity to explain why he did not discuss his sexual thoughts with the psychologists and the weight accorded to gaps and late disclosure of his safety plan was misplaced because of interruption to his psychological sessions.

[32] Ms Wynne submits both experts assessed Mr Bannan as having an above average risk of offending and Ms Curtis-Clark noted his potential for emotional collapse, particularly in regard to his poor ability to cope with stress and his past history of alcohol and drug use. Mr Bannan minimised aspects of his offending. It was Mr Bannan's responsibility to alert the Judge if there were further aspects of the evidence he wanted to address.

Assessment of risk

[33] We found above that the lack of contact does not make a difference to the seriousness of this offending.[52] Ms Webby, on Mr Bannan's behalf, does not dispute that he displays an intense drive, desire or urge to commit a relevant sexual offence, has a predilection or proclivity for serious sexual offending, and has limited self-regulatory capacity. The fourth precondition for Mr Bannan being at high risk of committing a relevant sexual offence is whether he displays a lack of acceptance of responsibility or remorse for his past offending or an absence of understanding for, or concern about, the impact of his offending on actual or potential victims.

[34] Mr Bannan's letter to the Court talks mainly about himself — his history, background, and bullying. Towards the end of the letter, he says he recognises his actions were wrong and apologises. That is an expression of remorse. But we consider the Judge was correct to find that this precondition was satisfied on the basis of

---

[52] At [26] above.

Ms Curtis-Clark's report and the nature of his offending in 2006 to 2007 and in 2020. In addition to the paragraph the Judge quoted from Ms Curtis-Clark's report of 24 May 2021, her report of 27 July 2022 stated:

> While his self-report is noted and is not contested by contrary evidence from the last 18 months, the writer remains of the opinion that Mr Bannan has not fully accepted responsibility and remorse for his past offending. Of note, he has since acknowledged that he had a sexual attraction to girls, an attraction he stated he now no longer experiences. Overall, while Mr Bannan does express some remorse for his offending, his ongoing minimisation and justification of his offending demonstrates that he has not taken full responsibility for his offending.

[35] Under cross-examination, Ms Curtis-Clark acknowledged Mr Bannan showed some remorse but considered he minimised aspects of his offending.

[36] Dr Nuth's opinion is a weak basis for resisting the applicability of s 107IAA(1)(d). He considered that Mr Bannan's desistance from inappropriate pornography use was overshadowed by his exchanges with the victim. While Mr Nuth noted Mr Bannan's apparent compliance with his Police Case Worker and the fact he had curtailed his alcohol use, Mr Nuth considered it was a matter for the Court to decide whether that represented sufficient behavioural change in relation to remorse and understanding the impact of his offending on victims.

[37] More generally in relation to Mr Bannan's risk, the conclusion of Ms Curtis-Clark's first report was:

> He is assessed as Above Average risk of committing a further relevant sexual offence in the community. There is evidence that Mr Bannan does not demonstrate a consistent desire or drive to commit relevant sexual offences given he has had significant time periods in the community with no known offending. However, he has demonstrated a clear drive, desire and urge to offend at times of relationship stress, emotion dysregulation and sexual preoccupation. He has demonstrated a durability of sexual interest (predilection) and sexual arousal to prepubescent and pubescent girls spanning 20 years; which included a sustained period of CSEM offending over eight years (proclivity). Mr Bannan has limited self-regulation strategies to support self-management especially once his sexual urges become activated, has not evidenced full remorse or responsibility for his offending or demonstrated that he has fully internalised the impact to victims. He previously engaged in treatment (2012) but the treatment gains he initially made appear to have eroded over the long term. Mr Bannan is currently engaged in treatment, at best, on a superficial level. He presents with dynamic risk factors that reflect an Above Average risk, and that if his dynamic risk factors remain unaddressed, suggest that his risk will remain at an Above Average level over

> the longer term. Mr Bannan has demonstrated he is willing to manage his own risk and has appeared able to do this at times, however his offence pattern to date reflects lapses. At present there is little prospect of long term change that mitigates his risk of further offending if Mr Bannan were not to engage meaningfully in further offence-focused treatment. Therefore, risk reduction is likely to be more successful when supported by external monitoring and management of Mr Bannan's behaviour.

[38] In her second report of 27 July 2022, Ms Curtis-Clark considered the conclusions in her first report remained valid — that Mr Bannan has an "Above Average" risk of committing a further relevant sexual offence within 10 years of release, with stress being a particularly relevant factor. Overall, while she noted Mr Bannan had developed further insight into his risk factors and pathway to offending, and had begun to evidence "minor positive change", she stated:

> At present there is little prospect of long-term change that mitigates his risk of further offending if Mr Bannan were not to engage meaningfully in further offence-focused treatment. The opinion expressed by the writer in the previous report (24 May 2021) remains the same and Mr Bannan is considered at Above Average risk of further relevant sexual offending.

[39] Under cross-examination, Ms Curtis-Clark agreed Mr Bannan was not at high risk of re-offending all the time, but considered neither was he at low risk.

[40] Dr Nuth assessed Mr Bannan's risk, based on static factors, was in the "Moderate/High range (IVa – Above Average risk)", noting that was not necessarily a conservative estimate. He placed Mr Bannan "firmly within the upper end of the Moderate range" on a stable dynamic risk measure. He concurred with Ms Curtis-Clark's assessment that Mr Bannan's risk of re-offending is "Above Average", compared with sexual offender normative data within 10 years of release, and would be elevated in the context of: unsupervised access to children via the internet or in person; use of substances and alcohol; not being in a satisfying intimate relationship; and increased stress. He considered that Mr Bannan presents a moderate risk of future sexual offending — not a low risk but not high either.

[41] We consider the psychologists' reports, and the nature and context of Mr Bannan's offending, provided a sufficient basis for the Court to conclude that Mr Bannan was at high risk of committing a future relevant sexual offence. Mr Bannan's unconvincing statements of remorse do not alter that. Neither does his

guilty plea or his marginal improvement during treatment, which were taken into account by the Judge. While the interruption in his treatment may explain gaps in his safety plan, the Judge was still entitled to take those gaps into account.

[42] We do not consider the Judge erred in concluding that Mr Bannan satisfied each of the preconditions specified in s 107IAA and in determining there is a high risk that Mr Bannan will, in future, commit a relevant sexual offence. We have considered the extent to which Mr Bannan's rights and freedoms are impinged upon by the terms of the ESO and weighed this against the risk to public safety Mr Bannan poses. We agree that, in the circumstances of this case, there is a strong justification for an ESO to be made. The appeal fails on this ground.

Issue 3: Should the ESO have been for less than five years?

Decision under appeal

[43] In relation to the term of the ESO, the Judge stated:[53]

> The order will be for the minimum period provided for in the Parole Act, namely five years, reflecting the level of risk posed by the offender; the seriousness of the harm that might be caused to victims; and the likely duration of the risk.

Submissions

[44] Ms Webby submits any ESO should only have been ordered for four years and three months, given that he had already been on a nine-month ISO. There was no logical basis for a five-year term. Two years would have been the minimum required for the purposes of community safety. There was no consideration of why Mr Bannan should be penalised by nine months.

[45] Ms Wynne submits five years was appropriate to address the long-term risks Mr Bannan poses and the ESO was a justified limitation on his rights under s 26(2) of the Bill of Rights.

---

[53] District Court decision, above n 1, at [130].

Term of ESO

[46] The term of an ESO is required by s 107I of the Act not to exceed the minimum period required for the safety of the community, given the risk posed by Mr Bannan, the seriousness of the harm that might be caused to victims, and the likely duration of the risk. Setting the term involves the exercise of a broad discretion which is subject to "light-handed appellate control".[54] The Judge was well aware that Mr Bannan had been subject to an ISO, which imposed interim safeguards. His assessment was that an ESO should be imposed, for five years, prospectively. There is nothing to indicate that five years was manifestly excessive, that the nine-month ISO should have reduced it, or that the Judge erred in setting the term. The appeal fails on this ground.

Result

[47] The appeal is dismissed.

Solicitors:
Webby & Associates, Tauranga for Appellant
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent

---

[54] *McLennan v Chief Executive of the Department of Corrections* [2021] NZCA 629 at [29].