NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT IN 1995 OFFENDING PROHIBITED BY SS 139 AND 139A OF THE CRIMINAL JUSTICE ACT 1985.

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT IN 2015 OFFENDING PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF ANY PERSONS UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA494/2023
[2024] NZCA 226

BETWEEN	PHILIP ERNEST SLOSS Appellant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing:	15 May 2024
Court:	Mallon, Lang and Moore JJ
Counsel:	A M S Williams and C A Twyman for Appellant K A White for Respondent
Judgment:	13 June 2024 at 12 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Lang J)

[1] On 25 August 2023, Judge Gilbert granted an application by the Chief Executive of the Department of Corrections (the Chief Executive) for an extended supervision order (ESO) in respect of the appellant, Mr Sloss.[1] The Judge imposed the order for a period of five years because of the future risk that he assessed Mr Sloss of posing to the sexual safety of children.

[2] Mr Sloss appeals against the Judge's decision. He contends there was no jurisdiction for the Judge to make an ESO because the Chief Executive was unable to establish one of the threshold requirements for the making of such an order. The court may only make an ESO where it is satisfied that the offender has a pervasive pattern of serious sexual offending. Mr Sloss contends that his history of sexual offending did not establish this essential element.

Mr Sloss's offending history

[3] Mr Sloss has now sustained three sets of convictions for offending of a sexual nature. They range from 1995 to 2020.

The 1995 offending

[4] In April 1995, Mr Sloss was babysitting the seven-year-old daughter of a friend. Whilst she was sleeping, Mr Sloss entered her bedroom and removed her blankets. He then rubbed her genital area over the top of her underwear. The victim yelled out and told him to leave the room. She then telephoned her grandmother, who arrived a short time later.

[5] In October 1995, Mr Sloss was convicted on a charge of indecently assaulting a girl under 12 years of age. He was subsequently sentenced to 12 months' imprisonment.[2] Mr Sloss was 29 years of age at the time of this offending.

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1 *Chief Executive of Department of Corrections v Sloss* [2023] NZDC 17838 [judgment under appeal].

2 *R v Sloss* DC Nelson T21/95, 6 September 1995 [1995 offending sentencing notes].

The 2015 offending

[6] In 2015, when he was 49 years of age, Mr Sloss was boarding with a female friend. She had five children living with her ranging in age between five and 17 years.

[7] Late one evening, Mr Sloss went into a bedroom where his friend's seven-year-old daughter was sleeping. He closed the door and went over to the victim's bed. A few minutes later the victim's mother began looking round the house to see where Mr Sloss had gone. When she opened the door of her daughter's bedroom, she found Mr Sloss kneeling beside the bed with his face in the vicinity of her daughter's groin. He had lifted up her bedding before doing so.

[8] This incident resulted in Mr Sloss being convicted on a charge of doing an indecent act upon a girl under 12 years of age. On 28 June 2017, Mr Sloss received a sentence of one year and ten months' imprisonment for this offending.[3] It also resulted in him being placed on the Child Sex Offender Register (the Register).

The 2020 offending

[9] During 2020, Mr Sloss was investigated for breaching his prison release conditions and breaching his obligations under the Register. The investigation revealed that he had been using social media platforms for nine months in contravention of his prison release conditions. During this period, he had been contacting the 13-year-old sister of the victim of the 2015 offending.

[10] In June 2020, the police seized Mr Sloss's cellphone. When they extracted data from the cellphone, they found approximately 150 images involving child sexual exploitation. The Judge in the decision under appeal classified the images by reference to three categories (Categories A, B and C) outlined in the sentencing guidelines published by the United Kingdom's Sentencing Council.[4] Most of the images fell within Category C, which relates primarily to sexualised posing. However, 37 images fell within Category B, which applies to non-penetrative sexual acts with children.

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3 *R v Sloss* [2017] NZDC 14052 [2015 offending sentencing notes].

4 Judgment under appeal, above n 1, at [14]. See Sentencing Council of England and Wales *Sexual Offences: Definitive Guideline* (1 April 2014) at 76.

Nine images fell within Category A, which applies to images depicting penetrative sexual acts with children. On one occasion Mr Sloss had sent a file containing several objectionable images to another person.

[11] This investigation led to Mr Sloss being convicted on three charges of possessing objectionable publications and knowingly making or copying an objectionable publication. He was also convicted on two charges of failing to comply with his reporting obligations under the Register. On 24 March 2021, Mr Sloss was sentenced to two years and one month's imprisonment on the charges relating to the objectionable publications.[5] On 17 September 2021 he received a cumulative sentence of seven months' imprisonment on the charges of failing to comply with his reporting obligations under the Register.[6]

The statutory regime

[12] Section 107I of the Parole Act 2002 (the Act) empowers a sentencing court to impose an ESO in certain circumstances. The purpose of such an order is to protect members of the community from persons who pose a real and ongoing risk of committing further serious sexual or violent offending after being released from prison.[7] An offender who has been sentenced to imprisonment for a relevant sexual offence, and who is still subject to that sentence or release conditions, is eligible for the imposition of an ESO.[8] An ESO may be imposed for a period of up to 10 years on the application of the Chief Executive.[9]

[13] Jurisdiction exists to make an ESO where the court is satisfied:

(a) that the offender has, or has had, a pervasive pattern of serious sexual offending;[10] and

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5 *R v Sloss* [2021] NZDC 5351 [2020 objectionable publication sentencing notes].
6 *R v Sloss* [2021] NZDC 18550 [2020 reporting obligation sentencing notes].
7 Parole Act 2002, s 107I(1).
8 Sections 107B, 107C(1)(a)(i) and 107C(a)(ii).
9 Section 107I(4).
10 Section 107I(2)(a).

(b) there is a high risk that the offender will in future commit a relevant sexual offence or a very high risk that the offender will in future commit a relevant violent offence.[11]

[14] The court may only determine there is a high risk that an eligible offender will commit a relevant sexual offence where it is satisfied that the offender:[12]

(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; and/or

(ii) an absence of understanding for or concern about the impact of his or her sexual offending on actual or potential victims.

[15] In considering these issues, the court is required to take into account the matters contained in a report provided by a health assessor.[13] In addition, the court may receive and take into account any evidence or information if it thinks it fit for the purpose of determining the application, whether or not it is admissible in a court of law.[14]

[16] Every ESO must state the term for which the order will remain in duration, which may not exceed 10 years.[15] The term of the order must be the minimum period required for the purposes of the safety of the community in light of the level of risk

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11 Section 107I(2)(b).
12 Section 107IAA(1).
13 Sections 107I(2) and 107F(2A).
14 Section 107H(2).
15 Section 107I(4).

posed by the offender, the seriousness of the harm that might be caused to victims and the likely duration of the risk.[16]

[17] In making an ESO, the court must explain the reasons why such an order is being made, including the basis on which the court has found the statutory test to be satisfied.[17]

[18] The court retains a discretion as to whether to make an ESO even if it is satisfied the statutory criteria have been established. However, it would be exceptional not to make an order once the criteria have been established given that the threshold is high and the statutory focus of the legislation is on public safety.[18]

[19] An ESO imposes significant obligations on the recipient and also limits that person's autonomy of movement and association.[19] This is despite the fact that by the time an ESO is made the offender will generally already have served the sentence imposed by the court.

[20] In *Chisnall v Attorney-General,* this Court held that an ESO constitutes a second penalty.[20] It places a limitation on the right under s 26(2) of the New Zealand Bill of Rights Act 1990 not to be punished twice for the same offence. For this reason, there needs to be strong justification for the imposition of an ESO.[21] The court is required to balance the right not to be subject to a second penalty against the need to protect the public from offenders who pose a high, or very high, risk of committing further serious sexual or violent offences.

The appeal

[21] Mr Sloss accepts that his offending in 1995 and 2015 constitutes serious sexual offending for the purposes of s 107I. The sole challenge that he raises on the appeal

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16 Section 107I(5).
17 *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at [56]–[57]; and *Paniora v Chief Executive of the Department of Corrections* [2018] NZCA 607 at [21].
18 *Taakimoeaka v Chief Executive of the Department of Corrections* [2021] NZCA 467 at [41].
19 *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [4], [33]–[37] and [223].
20 At [145].
21 At [190]. See also *Wilson v Chief Executive of the Department of Corrections* [2022] NZCA 289 at [19]–[20].

is to the Judge's finding that he has, or has had, a pervasive pattern of serious sexual offending. Mr Sloss does not accept that his criminal history establishes a pattern of serious sexual offending. Nor does he accept that, even if such a pattern is established, it was pervasive.

[22] Mr Sloss accepts, however, that the Judge was entitled to impose an ESO if he was correct to find a pervasive pattern of serious offending had been established.

Was the Judge correct to find that Mr Sloss has, or has had, a pervasive pattern of serious sexual offending?

Relevant principles

[23] Useful guidance on what may constitute a pervasive pattern of serious sexual offending is to be found in previous decisions of this Court. In *Chakwizira v Chief Executive of the Department of Corrections* the Court recently observed:[22]

> [38] This Court's decision in *Kiddell v Chief Executive of the Department of Corrections* provides some useful guidance, saying that, while the word "pattern" ordinarily connotes regularity, a pattern may take any form or sequence. A pattern that includes relevant but less serious conduct may be found pervasive. To be pervasive is to be present throughout and in this context is concerned with the offender's behaviour. Therefore, a pervasive pattern is a pattern that is sufficiently characteristic of the offender to serve as a predictor of future conduct.
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> [39] It is possible, as noted by the High Court in *Ihimaera*, that in some circumstances, a small number of sexual offences may form a pattern, and even a pervasive pattern, but in other circumstances, two incidents, even if they disclose some type of pattern, will not be sufficient to meet the pervasive pattern threshold. What is required is an evaluation of the facts in the particular case.

[24] We also derive assistance from the manner in which the courts have applied these principles.

[25] In *Chakwizira*, the appellant had engaged in a consensual sexual relationship with a 14-year-old female when he was 17 years of age. He was convicted on a charge of having sexual contact with a person aged between 12 and 16 years.

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[22] *Chakwizira v Chief Executive of the Department of Corrections* [2023] NZCA 307 (footnotes omitted).

[26] A few weeks later, and whilst he was subject to an order prohibiting him from having contact with the complainant, the appellant met her again. On this occasion he told her that she owed him oral sex for getting him in trouble. He also told her he had posted unfavourable comments about her on his Facebook page. He said he would remove these if she performed oral sex on him. The complainant complied with this request and the appellant subsequently removed the comments from his Facebook page. This incident resulted in the appellant being convicted on a second charge of engaging in sexual conduct with a person between the age of 12 and 16 years.

[27] Three days after being sentenced on these charges, and despite the continued existence of the non-association order, the appellant and the complainant were in contact over Facebook and arranged to meet again. On this occasion, the appellant digitally penetrated the complainant and they also had consensual sexual intercourse. However, at some stage the complainant made it clear she was not consenting. At this point, the appellant straddled her chest and put his penis in her mouth. The complainant received bruising and scratches as a result of this incident and subsequently disclosed it to the police. This incident resulted in the appellant being convicted on two further charges of engaging in sexual conduct with a person aged between 12 and 16 years.

[28] Some five years later, in May 2019, the appellant became intoxicated and entered a property where he believed a party was in progress. The party had finished and the occupants, who were not known to the appellant, were all in bed. The appellant let himself into the house through an unlocked door and met the victim's 12-year-old brother. The victim's brother told the appellant that his nine-year-old sister was sleeping in a nearby bedroom. The appellant entered the bedroom and got into the victim's bed. He then held the victim under the blankets and attempted to pull her pants down. The victim woke to find the appellant kissing her on the lips whilst attempting to take off her pyjama pants. This incident resulted in the appellant being convicted on two charges of doing an indecent act on a girl under 12 years of age.

[29] This Court held that there was no pervasive pattern of sexual offending in the appellant's history because the index offending was not sufficiently similar to the

earlier offending to establish a pattern.[23] This is not surprising because the offending against the first complainant occurred in circumstances where the appellant engaged in consensual sexual activity with her or extorted her consent to sexual activity by making threats. The offending that led to the Chief Executive applying for an ESO was quite different in nature because it involved a random sexual attack at night on a much younger victim whom he did not know.

[30] In *Chief Executive of the Department of Corrections v Ihimaera,* the respondent had been convicted following two incidents involving sexual offending.[24] The first occurred at a party when the respondent was 18 years of age. Whilst intoxicated, he had consensual sex with a 14-year-old female. Approximately four years later, the respondent lay down next to a 10-year-old female whilst she was sleeping and began rubbing his hand over her genital area. He also pulled down her pants and squeezed her buttocks. Katz J declined to impose an ESO on the basis that the two incidents of offending in that case did not disclose a pervasive pattern of serious sexual offending by the appellant. Katz J observed:

> [50] I accept that two instances of offending may be sufficient to meet the "pervasive" requirement in some cases, particularly where the offending is at the very serious end of the spectrum (for example, rape offending) and the pattern that has been identified is very strong… In other cases, however, two incidents of offending, even if they disclose some type of pattern, will not be sufficient to meet the "pervasive pattern" threshold, because the pattern that can be identified is insufficiently developed, prevalent, widespread or ubiquitous. I consider that to be the case here. …

[31] The two sets of offending in *Ihimaera* were again quite different in nature. The first involved consensual activity with an underage female whilst the second involved engaging in sexual activity with a young victim who was asleep when the activity occurred. It is therefore not surprising that this Court found there was no pervasive pattern of serious offending.

[32] We consider the factual situation in the present case has some similarity to that in *Bannan v Chief Executive of the Department of Corrections.*[25] In *Bannan*, the appellant engaged in sexualised online chat conversations with a 12-year-old girl

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23 At [41]–[45].
24 *Chief Executive of the Department of Corrections v Ihimaera* [2019] NZHC 19.
25 *Bannan v Chief Executive of the Department of Corrections* [2023] NZCA 227.

during 2006 and 2007 whilst he was in Australia. This resulted in him being convicted and imprisoned in Australia on one charge of using a carriage service to procure persons under 16 years of age.

[33] In 2009, after returning to New Zealand, the appellant was convicted on 20 charges of being in possession of objectionable material. Eleven years later, in 2020, the appellant made contact with an 11-year-old girl on the internet and groomed her in a sexual way. He then travelled to the area where the victim lived after arranging to meet her there. His plans to meet with her were thwarted after the victim's mother discovered the appellant's communications with her daughter and contacted the police. When the police arrested the appellant, they found condoms and a length of purple rope in his vehicle. This led to the appellant being convicted on one charge of meeting a young person following sexual grooming.

[34] In dismissing the appeal against the imposition of an ESO this Court confirmed that, for the purposes of s 107I, a pattern does not need to be regular and may take any form or sequence.[26] Although the offending in that case constituted grooming conduct rather than physical contact, the Court observed that the only reason that it did not result in physical contact was through good fortune.[27] The Court held that the offending constituted a sufficiently pervasive pattern to satisfy the criteria for the imposition of an ESO.[28]

[35] We also draw assistance from *Holland v Chief Executive of the Department of Corrections.*[29] In that case, the appellant had been convicted in 1988 on charges of engaging in sexual intercourse and attempted sexual intercourse with a female under 16 years of age. Then, in 1996 and 1999, he was convicted on three charges of importing objectionable material. These comprised sexualised photographs of children. In 2007, the appellant was again convicted on a charge of importing objectionable material in the form of sexualised photographs of young girls.

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26 At [24].
27 At [26].
28 At [27].
29 *Holland v Chief Executive of the Department of Corrections* [2016] NZCA 504.

[36] The Chief Executive applied for an ESO after the appellant was sent to prison in 2012 on charges of doing an indecent act on a child under 12 years of age and being in possession of objectionable material. This Court held that the appellant's history was sufficient to constitute a pattern of serious sexual offending.[30] This was despite the fact that the appellant had not been convicted on charges involving sexual activity with a young person for a period of 24 years.

The Judge's decision

[37] The Judge considered there was a pervasive pattern of serious sexual offending for the following reasons:[31]

> [40] In determining whether there is a pervasive pattern evidenced in the previous serious sexual offending, I consider that the focus should be on underlying similarities, not differences. This mirrors the standard approach to propensity evidence under s 43 [of the] Evidence Act. And it makes sense because, as the cases I have noted above make clear, the task is to identify common characteristics prevalent in the offending that provide a predictor of future conduct.
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> [41] Here, the common characteristic is a long-standing, hard-wired attraction to pre-pubescent female children. Whilst I acknowledge the differences in how that attraction has expressed itself in Mr Sloss's offending, it is that common deviant characteristic which has underpinned all of [his] sexual crimes. And it is that characteristic that is predictive of future such conduct, whether that be manifested in contact or non-contact sexual offending against girls.

Our assessment

[38] Ms White acknowledges on behalf of the Chief Executive that the Judge made two factual errors in his decision. First, when describing the 1995 offending the Judge stated that Mr Sloss had kissed the victim's legs.[32] The summary of facts does not refer to this occurring. Nor, following Mr Sloss's jury trial, do the sentencing notes for the offending.[33]

[39] Secondly, in describing the 2015 offending the Judge said that when the victim's mother opened the door of the bedroom, she found Mr Sloss kneeling beside

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30 At [56].
31 Judgment under appeal, above n 1.
32 At [10].
33 1995 offending sentencing notes, above n 2.

the bed and performing oral sex on the victim.[34] There was no reference in the summary of facts to Mr Sloss performing oral sex on the victim of this offending.[35] The victim's mother saw his head in the vicinity of her daughter's groin but there was no suggestion that he made physical contact with her.

[40] The Judge may have included this reference in his decision imposing the order because of information contained in a report prepared in August 2022 by Dr Fran Vertue, a clinical psychologist. She records that Mr Sloss told her that the 2015 offending occurred when he walked into the victim's bedroom and found her sitting on her bed with her genitals exposed under a short nightdress. He said he found this sexually arousing and walked over to her bed. He then lifted her nightdress and performed oral sex on the victim. Dr Vertue says that when she asked Mr Sloss whether the victim protested, he raised his eyebrows and smiled and shook his head.

[41] Regardless of the reliability of what Mr Sloss told the report writer, we do not view these errors by the Judge as being particularly material. The important similarity between the 1995 and 2015 offending is that each involved Mr Sloss going into the bedroom of a seven-year-old female and then engaging in activity that had sexual overtones. In each case the offending occurred at night when the victims were asleep in their bedrooms.

[42] We consider the fact that the 2015 offending had not progressed to the point where Mr Sloss had physical contact with the victim to be immaterial. That incident ended abruptly when the victim's mother entered the room. On the basis of the offending as described in the summary of facts, there can be no innocent explanation for conduct of that type.

[43] In both cases the offending also occurred in circumstances where Mr Sloss was staying at the address with the victim's mother and, at the time of the offending, was either the sole or a joint caregiver of the victim. In contrast to the position in

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34 Judgment under appeal, above n 1, at [12].

35 There was also no reference in the sentencing notes. See 2015 offending sentencing notes, above n 3.

Chakwizira and *Ihimaera,* Mr Sloss was a mature adult at the time he committed both the 1995 and 2015 offending.[36]

[44] A lengthy gap between instances of offending may often be sufficient to prevent the court from concluding that a pattern of offending has been shown to exist, or that such pattern as exists is not pervasive. However, we consider the similarities between both offences are indicative of a pattern of sexual offending despite the passage of time between the two events. They suggest that Mr Sloss has a deeply ingrained tendency to create or take advantage of opportunities to be alone with, and then sexually offend against, pre-pubescent females. Dr Vertue also makes the point that Mr Sloss's offending has not tapered off with advancing age as could normally be expected.

[45] The most recent offending is obviously different in nature to the 1995 and 2015 offending. It did not involve indecent acts perpetrated by Mr Sloss against young female victims. We therefore accept that, if Mr Sloss had not committed either the 1995 or the 2015 offences, it is possible that the Chief Executive would not have been able to establish the requisite pattern of sexual offending. However, the fact that Mr Sloss was in possession of objectionable publications depicting sexual activity involving young persons in 2020 reinforces the conclusion we draw from the 1995 and 2015 offending. It shows that he has continued to maintain a close interest in sexual activity involving young persons notwithstanding the fact that he has now served two terms of imprisonment for sexual offending against young females.

[46] Bearing in mind the need for strong justification for the imposition of an ESO, we are satisfied, essentially for the reasons given by the Judge, that the 1995 and 2015 offending demonstrates a pervasive pattern of offending.

Result

[47] The appeal is dismissed.

Solicitors:
Crown Solicitor, Christchurch for Respondent

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[36] *Chakwizira v Chief Executive of the Department of Corrections*, above n 22; and *Chief Executive of the Department of Corrections v Ihimaera*, above n 24.