

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCR 2021 0007

TRENT CHENHALL

Applicant

v

THE QUEEN

Respondent

JUDGES: PRIEST, KAYE and T FORREST JJA
WHERE HELD: MELBOURNE
DATE OF HEARING: 7 June 2021
DATE OF JUDGMENT: 18 June 2021
MEDIUM NEUTRAL CITATION: [2021] VSCA 175
JUDGMENT APPEALED FROM: [2020] VCC 2078 (Judge Ryan)

CRIMINAL LAW – Appeal – Appeal against sentence – Transmitting indecent communications to a person under 16 years – Using carriage service to cause child pornography offences to be transmitted to self – Possessing child abuse material – Failing to comply with reporting obligations under the *Sex Offenders Registration Act 2004* – Applicant sentenced as serious offender – Whether sentencing judge failed to give sufficient utilitarian value to guilty plea during COVID-19 pandemic – Resentenced to 5 years’ imprisonment with non-parole period of 3 years and 6 months – *Criminal Code* (Cth) ss 474.19(1), 474.27A(1), *Crimes Act 1958* s 51G(1), *Sex Offenders Registration Act 2004* s 46(1A); *R v De Leeuw* [2015] NSWCCA 183 applied – Application for leave to appeal granted – Appeal allowed.

APPEARANCES:

For the Applicant:

Counsel

Ms C Dwyer with Ms C
Marcs

Solicitors

Markotich Lawyers

For the Respondent:

Ms K Breckweg

Ms A Pavleka, Solicitor for
Public Prosecutions (Cth)

PRIEST JA
 KAYE JA
 T FORREST JA:

1 On 1 December 2020 the applicant pleaded guilty in the County Court to two state and three Commonwealth charges. At the time of offending he was 29 to 30 years of age. On 17 December 2020 he was sentenced as follows:

Charge	Offence	Maximum Penalty	Sentence	Commencement/ Cumulation
1	Transmit indecent communications to a person under 16 years of age: <i>Criminal Code (Cth) s 474.27A(1)</i>	7 years' imprisonment	2 years 6 months' imprisonment	17 December 2021 (6 months prior to expiration of State NPP)
2	Fail to comply with reporting obligations: <i>Sex Offenders Registration Act 2004 (Vic) s 46(1A)</i>	5 years' imprisonment	12 months' imprisonment	17 June 2022 (6 months cumulation on charge 5)
3	Use carriage service to cause child pornography material to be transmitted to himself: <i>Criminal Code (Cth) s 474.19(1)</i>	15 years' imprisonment	2 years 6 months' imprisonment	17 June 2023 (6 months prior to expiration of sentence on charge 1)
4	Use carriage service to transmit child pornography material: <i>Criminal Code (Cth) s 474.19(1)</i>	15 years' imprisonment	12 months' imprisonment	17 June 2025 (6 months prior to expiration of sentence on charge 3)
5	Possess child abuse material: <i>Crimes Act 1958</i>	10 years' imprisonment	2 years' imprisonment	17 December 2020

	(Vic) s 51G(1)		
Total effective sentence (State):	2 years and 6 months' imprisonment	17/12/20-17/6/23	
Non-parole period:	18 months	17/12/20-17/6/22	
Total effective sentence (Cth):	4 years and 6 months' imprisonment	17/12/21-17/6/26	
Non-parole period:	3 years	17/12/21-17/12/24	
Total effective sentence (State and Cth):	5 years and 6 months' imprisonment	17/12/20-17/6/26	
Non-parole period:	4 years	17/12/20-17/12/24	
Pre-sentence detention:	16 days		
6AAA declaration:	8 years' imprisonment/non-parole period of 6 years		
Other orders:	Sentenced as a serious sexual offender on charge 5 Declared as registrable for life pursuant to the <i>Sex Offenders Registration Act 2004</i> (Vic)		

2 The applicant seeks leave to appeal on the following grounds:

- Ground 1: The sentencing judge erred in finding that there was no greater utilitarian benefit in the Applicant's plea due to the court backlog caused by the Covid-19 pandemic.
- Ground 2: The sentencing judge erred in imposing a disproportionate sentence on Charge 5.
- Ground 3: The individual sentences on Charges 2, 3, 4 and 5 are manifestly excessive, as are the total effective sentence and non-parole period in all the circumstances of the case including the objective gravity of the charges, the punitive aspects of the residential rehabilitation program the Applicant undertook, the Applicant's commitment to and prospects for rehabilitation, his early plea of guilty and remorse.

Factual summary

3 The Summary of Prosecution Opening¹ tendered on the plea was an agreed summary. Whilst we would normally endeavour to summarise the factual background to offending conduct, that conduct in the present case is relatively complex. A complete appreciation of it cannot be conveyed in a brief summary and we shall set out relevant portions of the Summary of Prosecution Opening below.²

Background

1. The [applicant] is Trent CHENHALL, born 8 July 1989. During the period of offending he resided at Unit G1/90-92 Middleborough Road, Blackburn South, Victoria and was unemployed. The [applicant] has no dependants.
2. An investigation into the [applicant] was initiated following receipt of a report from *Kik*, an online communication platform which involves peer-to-peer and group messaging, to the Australian Federal Police (AFP). The report indicated that an Australian with the username '*trent8889*' had engaged in sexualized chat with a 15-year-old female profile. AFP referred the matter to Victoria Police for further investigation.
3. Enquiries revealed the email address attached to the *Kik* profile '*trent889*' was trent.chenhall@gmail.com. This same email address was provided by the [applicant] during his Registered Sex Offender Initial interview on 13 June 2017. The recovery email address for the Gmail account was mark.chenhall@sonoco.com, an email address in the [applicant's] father's name. The username *trent889* was previously recorded as being the [applicant's] 'OASIS' username during his annual SORA interview in 2018.

[Applicant] subject of an order under the *Sex Offenders Registration Act 2004 (Vic)*

4. On 2 June 2017 at the Magistrates' Court of Victoria in Melbourne, the [applicant] was convicted of an offence against s 474.27A(1) of the *Criminal Code 1995* (use a carriage service to transmit indecent communications to a person under 16 years of age) which resulted in him being a registrable offender pursuant to the *Sex Offenders Registration Act 2004 (Vic)* (SORA). The registration commenced on 2 November 2017, for a period of 8 years, and required the Offender to report to Victoria Police.
5. As a registrable offender under SORA, the [applicant] was required to notify Victoria Police of any relevant changes to his circumstances, including:
 - (a) Any contact he has had with a child, and details of that child include age, residential address and telephone number, or location where the

1 Exhibit A on the plea.

2 Footnotes omitted.

contact occurs, with that contact to be notified to Victoria Police within one day of that contact occurring;

- (b) Any email addresses used by the [applicant], with that change to be notified to Victoria Police within seven days of that change occurring; and
- (c) Any internet user names, instant messaging user names, chat room user names, or other use name or identity used or intended to be used by the [applicant] through the Internet or other electronic communication service, with that change to be notified to Victoria Police within seven days of that change occurring.
- (d) Any change in his personal details, including phone number, with that change to be notified to Victoria Police within seven days of that change occurring.

Search Warrant

- 6. At or about 6.45am on 2 August 2019, officers attended at the [applicant's] residence in Blackburn South and executed a search warrant pursuant to s 465 of the *Crimes Act 1958*.
- 7. Upon entry to the premises, DSC Stocker asked the offender "Do you know have any idea what this might be about?" to which the [applicant] replied, "Yes, same as last time."
- 8. A number of items relevant to the investigation were seized to allow for further examination of the items, namely, two Apple iPhones, a Hewlett Packard laptop and five USB storage devices.
- 9. During the course of the search warrant, the [applicant] admitted to DSC Stocker that there was sexually explicit material of girls under the age of 16 located on his mobile phones.

Record of Interview (ROI)

- 10. At the conclusion of the search warrant, the [applicant] was conveyed to the Forest Hill Police Station where a ROI was conducted. During the ROI, the [applicant] made the following statements and admissions:
 - a. Under the SORA, he is obliged to report any change of circumstance including mobile phone number, change of address, travel interstate, change in appearance and change of vehicle etc;
 - b. He ceased reporting "things [he] should have" due to becoming frustrated with the process and drug use;
 - c. He had previously received a warning for not reporting the closing of an Oasis account;
 - d. He resigned from Mowjo's (former employer) at the start of July 2019 and has been unemployed since that time;
 - e. He is financially supported by his father;

- f. He was previously a heavy drug user of ice and cannabis – at one stage he was using a minimum of 2g of ice per week, now he uses a couple of points per week;
 - g. He has the *Kik* application on his phone, which he described as “a program where you can message people, send them files, documents or talk to them...”
 - h. He did not report his *Kik* profile at his most recent annual SORA interview because it “did not come to mind”;
 - i. He admitted to having “explicit material” on both of his phones (old and current) and provided the passcodes for same;
 - j. He agreed that there is material on the phones that “shouldn’t be there” and that the material is in the form of videos and photos;
 - k. He accessed the illegal material when he was on a “drug bender...very high on meth...on a meth binge”;
 - l. He last used his old phone a couple of weeks ago to view the illegal material saved on it;
 - m. He resides at the Blackburn South unit alone and is the only person that uses the phones in his possession;
 - n. He agreed that material of persons under 18, including pre-pubescent teenagers, can be found on his phone;
 - o. In relation to questioning around how he came to be in possession of child abuse material, he stated it ‘gets thrown to ya on Kik...Kik is fuckin’ evil man...Kik is fuckin’ bad...it’s an absolute free-for-all with that sort of shit.’
 - p. In response to a *Kik* chat being read back to him, which chat involved the [applicant] sending a video of a penis to someone he believed to be a 15 year old girl, he stated ‘It’s not ringing a bell but...I would have been under the influence big time...but it does sound like me, I mean, the evidence is there, it sounds like me, it happened last time as well’;
 - q. He is not on *Kik* often; and
 - r. He has been a *Kik* user for ‘at least a couple of years or a few years, when I got done last time...’
11. At the conclusion of the ROI, the [applicant] was formally charged with one count of possessing child exploitation material as a result of a video file located on his phone (refer charge 5).

Electronic analysis of devices seized

12. Subsequent analysis of the devices seized on 2 August 2019 revealed additional child abuse material on both of the Apple iPhones (refer charge 5).

13. Also located on the mobile phones were *Kik* conversations in which the offender had engaged in indecent communications with seventeen (17) persons he believed to be under 16 years of age (refer charges 1 and 3).
14. On one occasion, the [applicant] transmitted a child abuse image he had obtained from a particular victim, to a public *Kik* group chat (refer charge 4).
15. Further analysis of the [applicant's] electronic devices revealed the offender had not reported changes to his personal details, and therefore had breached his reporting obligations under the SORA (refer charge 2).

Charge 1 - Use carriage service to transmit indecent communications to persons believed to be under 16 years of age

16. Between 11 May 2019 and 1 August 2019, the [applicant] utilised the *Kik* application to communicate with the following seventeen (17) persons he believed to be under the age of 16:
 1. Amber Barber ('Ambie1300').
 2. Emily Esquivel ('EmilyEsquivel133213').
 3. Ben Dover ('bxtchesbebonkers').
 4. Badbaby.-Kai ('Daddieslittleslut._.')
 5. Justine-MyNameIsConfused ('Lazylightning23').
 6. Hana Green ('hanaxgeex').
 7. Jessica Judoka ('Tpaxhn').
 8. Ava The Girl ('BunnyhunnyNoah').
 9. Nicole Smith ('smellynicolesmith07').
 10. Kimberr420 ('#22').
 11. Karen Alsin ('abailsin14').
 12. Taco ('i_dakat').
 13. Jessica Valdes ('jessicaV696900').
 14. Faith Hey ('camo_cow').
 15. Isla Innocent Child ('Islafearon').
 16. Emily ('baby_shark_53').
 17. Ruby Omerod ('Ruby3423').
17. During these conversations, the [applicant] transmitted indecent communications to each of the victims. The communications generally involved the [applicant] sending photographs and/or videos of his erect

penis.

18. Relevant excerpts of the conversations with each of the victims are provided below:

	Kik User	Excerpts of Kik Conversation
1	Amber Barber (‘Ambie1300’)	<p>On 11 May 2019, the [applicant], via a public group chat named #13to14ppl which he had joined, proceeded to engage in a private chat with a person believed to be a 13-year-old female from the USA.</p> <p>Relevant excerpts: [Applicant] - “Hey...asl?” Amber Barber - “13 f USA you” [Applicant] - “Wow really...you are god damn gorgeous” <i>[Applicant] sends two photos of an erect penis.</i></p>
2	Emily Esquivel (‘EmilyEsquivel133213’)	<p>On 11 May 2019, the [applicant], via a public group chat named #13yrolld which he had joined, proceeded to engage in a private chat with a person believed to be a 13-year-old female.</p> <p>Relevant excerpts: [Applicant] - “Hey...asl?” “Wow are you really 13?” Emily Esquivel - “Yes I am hbu?” <i>[Applicant] sends a photo of an erect penis.</i></p>
3	Ben Dover (‘bxetchesbebonkers’)	<p>On 11 May 2019, the [applicant], via a public group chat named #13to14ppl which he had joined, proceeded to engage in a private chat with a person believed to be a 14-year-old female.</p> <p>Relevant excerpts: [Applicant] - “Hey...Asl?” Ben Dover - “14 female Earth” [Applicant] - “Wow really?? You are drop dead gorgeous...I have another question.” <i>[Applicant] sends a photo of an erect penis.</i> [Applicant] - “Do you like it??”</p>
4	Badbaby.-.Kai	On 11 May 2019, the [applicant], via a

	Kik User	Excerpts of Kik Conversation
	('Daddieslittleslut._')	<p>public group chat named #13to14ppl which he had joined, proceeded to engage in a private chat with a person believed to be a 13-year-old female from South Carolina, USA.</p> <p>Relevant excerpts:</p> <p>[Applicant] - "Hey...Asl?"</p> <p>Badbaby_Kai - "13 female sc"</p> <p>[Applicant] - "Wow really?? Have a photo??"</p> <p>Badbaby_Kai - "I'm confidential"</p> <p>[Applicant] - "Are you also daddy's little slut??" "I'm daddy"</p> <p>[Applicant] sends a photo of an erect penis.</p> <p>Badbaby_Kai - "Ewww...no you not daddy"</p> <p>[Applicant] - "What size are your tits babe??"</p> <p>[Applicant] sends another photo of an erect penis.</p>
5	Justine-MyNameIsConfused ('Lazylightning23')	<p>On 13 May 2019, the [applicant], via a public group chat named #14trad which he had joined, proceeded to engage in a private chat with a person believed to be a 14-year-old female from Missouri, USA.</p> <p>Relevant excerpts:</p> <p>[Applicant] - "Hey...Asl?"</p> <p>Justine - "14...Female...Missouri"</p> <p>[Applicant] sends photo of an erect penis.</p> <p>[Applicant] - "What size are your tits gorgeous??"</p> <p>... "I want you to suck on my huge cock"</p>
6	Hana Green ('hanaxgeex')	<p>On 17 May 2019, the [applicant], via a public group chat named #tinyteenbikinie which he had joined, proceeded to engage in a private chat with a person believed to be a 14-year-old female from the UK.</p> <p>Relevant excerpts:</p> <p>[Applicant] - "Hey babe...ASL?"</p>

	Kik User	Excerpts of Kik Conversation
		<p>Hana Green – “Hi, 14, f, UK you?”</p> <p>[Applicant] – “Ur really 14???”</p> <p>Hana Green – “Yeah why?”</p> <p><i>[Applicant] sends a photo of an erect penis.</i></p> <p>[Applicant] – “It’s 9 inches babe...you like it??”</p> <p><i>[Applicant] sends another a photo of an erect penis.</i></p> <p>[Applicant] – “What size are your tits babe?”</p> <p><i>[Applicant] sends another a photo of an erect penis.</i></p> <p>[Applicant] – “ Are you honestly 14 Babe?”</p>
7	Jessica Judoka (‘Tpaxhn’)	<p>On 4 June 2019, the [applicant], via a public group chat named #13to15yearzz which he had joined, proceeded to engage in a private chat with a person believed to be a 13-year-old female from Finland.</p> <p>Relevant excerpts:</p> <p>[Applicant] – “Hey...how are you? Asl?”</p> <p>Jessica Judoka – “My age (emoji) and I’m from Finland”</p> <p>[Applicant] – “How old are you really?”</p> <p>Jessica Judoka – “13”</p> <p>[Applicant] – “No way”</p> <p><i>[Applicant] sends a photo of an erect penis.</i></p>
8	Ava The Girl (‘BunnyhunnyNoah’)	<p>On 21 June 2019, the [applicant], via a public group chat named #11_12 which he had joined, proceeded to engage in a private chat with a person believed to be a 12-year-old female from Colorado Springs, USA.</p> <p>Relevant excerpts:</p> <p>[Applicant] – “Asl?”</p> <p>Ava – “12, Female, Colorado Springs?”</p> <p>[Applicant] – “Have a photo?”</p> <p><i>Ava sends photo of a female approximately</i></p>

	Kik User	Excerpts of Kik Conversation
		<p>12-14 years old.</p> <p>[Applicant] - "Any more photos?"</p> <p><i>Ava sends photo depicting same female with a bunny ears filter applied.</i></p> <p>[Applicant] - "God damn hot... Any more???"</p> <p><i>Ava sends two photos depicting same female (face only).</i></p> <p>[Applicant] - "Send a pic so I know it's really you?"</p> <p><i>Ava sends a further photo of the face of the same female.</i></p> <p><i>[Applicant] sends video of his erect penis - during the video he is observed banging his penis multiple times against a benchtop and can be heard saying "Pumping massive for you right now Ashleigh...Ohhh fuck!"</i></p> <p>[Applicant] - "Did you get the video I sent?? Live cam to cam babe?"</p> <p>Ava - "I can't im with my brother"</p> <p>[Applicant] - "What size are your tits?"</p> <p>Ava - "XL...now I have to go"</p> <p>[Applicant] - "I want to fuck you and your sister" "My cock is massive right now" "Any other photos of you babe???"</p>
9	Nicole Smith (‘smellynicolesmith07’)	<p>On 21 June 2019, the [applicant], via a public group chat named #11to14teen which he had joined, proceeded to engage in a private chat with a person believed to be a 10-year-old female from the UK.</p> <p>Relevant excerpts:</p> <p>[Applicant] - "Hey...asl?"</p> <p>Nicole Smith - "10 f uk"</p> <p>[Applicant] - "No way...really???"</p> <p>You're god damn gorgeous" "have you any other photos?"</p> <p><i>Nicole Smith sends photo of two females approximately 9-11 years old.</i></p> <p>[Applicant] - "So cute, any more???"</p>

	Kik User	Excerpts of Kik Conversation
		<p><i>Nicole Smith sends photo of same female laying on a couch.</i></p> <p><i>[Applicant] sends a video of his erect penis to Nicole – during the video he is observed banging his erect penis against a benchtop and can be heard groaning and saying “Pumping massive for you right now Ashleigh...ohhh fuck!”</i></p> <p>Nicole Smith – “It’s big lol...hehe how old r u”</p> <p>Applicant – “I’m 29...and my cock is 9 inches”</p> <p><i>Applicant sends another video of his erect penis to Nicole – during the video he is observed squeezing his penis against a benchtop and can be heard groaning and saying “I need to blow this fucken huge load”</i></p> <p>Nicole Smith – “And your ok I’m 10?”</p> <p>Applicant – “Yea...I love it”</p>
10	Kimberr420 (‘#22’)	<p>On 21 June 2019, the [applicant] engaged in a private chat with a person believed to be a 13-year-old female.</p> <p>Relevant excerpts:</p> <p>[Applicant] – “You’re damn gorgeous...how old are you??”</p> <p>Kimber420 – “Old enough”</p> <p>[Applicant] – “Lol...how old??”</p> <p>Kimber420 – “13”</p> <p>[Applicant] – “Really?? Fuck”</p> <p><i>[Applicant] sends a video of his erect penis to Kimber420 – during the video he is observed banging his erect penis against a benchtop and can be heard groaning and saying “Pumping massive for you right now Ashleigh...ohhh fuck!”</i></p> <p>[Applicant] – “Help my cock explode gorgeous” “Have a photo??”</p> <p>Kimber420 – “No”</p> <p>[Applicant] – “Question...what size are your tits???”</p> <p><i>Kimber420 sends a photograph of a female holding up her top and exposing her breasts (unable to determine age of female from</i></p>

	Kik User	Excerpts of Kik Conversation
		<p><i>photo</i>).</p> <p>[Applicant] - "How do I know that's really you???" "Guess where I want to blow this huge load..."</p>
11	Karen Alsin (‘abailsin14’)	<p>On 21 June 2019, the offender, via a public group chat named #12._.20 which he had joined, proceeded to engage in a private chat with a person believed to be a 15-year-old female.</p> <p>Relevant excerpts:</p> <p>[Applicant] - "Hey...Asl?"</p> <p>Karen Alsin - "14...u?"</p> <p><i>[Applicant] sends a photo of himself topless to Aslin.</i></p> <p>[Applicant] - "Guess babe"</p> <p>Karen Alsin - "Sorry like girls"</p> <p><i>[Applicant] sends a video of his erect penis to Aslin - during the video he is observed banging his erect penis against a benchtop and can be heard groaning and saying "Pumping massive for you right now Ashleigh...ohhh fuck!"</i></p> <p>Karen Aslin - "mm tell me u age"</p> <p>[Applicant] - "29"</p>
12	Taco (‘i_dakat’)	<p>Between 21 June and 1 August 2019, the [applicant] engaged in a private chat with a person believed to be a 12-year-old female.</p> <p>Relevant excerpts from 21 June 2019:</p> <p>[Applicant] - "How old are you???"</p> <p>Taco - "How old is too young for u?"</p> <p>[Applicant] - "Never too young"</p> <p>Taco - "I'm 12"</p> <p>[Applicant] - Get fucked...yummm...have any more photos...besides your profile photo"</p> <p><i>Taco sends a picture of a female aged approximately 12 years old purporting to be herself.</i></p> <p>[Applicant] - "Cuuute...what size are your tits babe???" "Have you got a photo of you in your bra or something</p>

Kik User	Excerpts of Kik Conversation
	<p>gorgeous??"</p> <p>Taco - "I have a pic with no shirt or bra lol"</p> <p>[Applicant] - "Okay...show me cutie"</p> <p><i>Taco sends a photo of a female exposing her breasts.</i></p> <p><i>The [applicant] requests live camera feed to confirm Taco is who she claims to be.</i></p> <p><i>[Applicant] sends around 8 photos of his erect penis / masturbating.</i></p> <p>[Applicant] - "Any more photos babe" "Show me what ur wearing baby girl??" "Show me babe...please?"</p> <p><i>Taco sends a photo of a female wearing a black dress purporting to be herself.</i></p> <p>[Applicant] - "That's fkn hot. Take another babe??? Take one of your tits and I'll take one of whatever you want in return" <i>Taco sends another photo of a female exposing her breasts.</i></p> <p>[Applicant] - "Live photo of ur tits baby girl???" "One more live photo and I'll write ur name on my massive hard cock for you...and make a video for you"</p> <p><i>[Applicant] continues to request photos from Taco.</i></p> <p>[Applicant] - "One more photo pleeeeeeease baby girl??"</p> <p><i>Taco sends a photo of a naked female inserting a finger into her exposed vagina purporting to be herself.</i></p> <p>[Applicant] - "Live photo I mean baby girl"</p> <p>[Applicant] - "wake up for me babe...photo baby girl"</p> <p>Taco - "Pussy or boobs?"</p> <p>[Applicant] - "Boobs babe" <i>Taco sends another picture of a female exposing her breasts purporting to be herself.</i></p> <p><i>[Applicant] continues to request photos of Taco's breasts.</i></p> <p>[Applicant] - "Squeeze your tits and say 'suck my tits Trent'"</p>

	Kik User	Excerpts of Kik Conversation
		<p>Taco – “My fam would hear”</p> <p>[Applicant] – “Then just squeeze your perfect tits baby girl”</p> <p><i>Taco sends three photos of a female touching her exposed breasts and sticking her tongue out as instructed by the [applicant].</i></p> <p><i>[Applicant] requests a further video of Taco exposing her breasts.</i></p> <p>Taco – “R u sure this is the last one?”</p> <p>[Applicant] – “If you make it hot enough to make my monster cock blow”</p> <p><i>Taco sends a video of a female squeezing her exposed breasts together with her forearms.</i></p> <p>[Applicant] – “So close to the perfect video to make me blowww...just need that mouth open a lot wider with your hot tongue out”</p> <p>Taco – “I can’t do anymore”</p> <p>[Applicant] – “I’m BEGGING you baby girl”</p> <p><i>Taco sends a photo of a naked female holding her breasts with her mouth open and tongue sticking out.</i></p> <p>[Applicant] – “Need those perfect tits pushed together tight my little girl”</p> <p><i>Taco sends another photo of a naked female, breasts exposed with mouth open and tongue sticking out.</i></p> <p>[Applicant] – “That will be the fucking PERFECT video if u made perfect tits pop out of that top! Do it and my cumshot video is all yours my hot tiny girl!”</p> <p><i>Taco sends a photo of a female, tongue sticking out and breasts exposed.</i></p>
13	Jessica Valdes (‘jessicaV696900’)	On 26 June 2019, the [applicant], via a public group chat named #12abd13yearsonly which he had joined, proceeded to engage in a private chat with a person believed to be a 15-year-old female.

	Kik User	Excerpts of Kik Conversation
		<p>Relevant excerpts:</p> <p>[Applicant] - "Hey...Asl?"</p> <p>Jessica Valdes - "15/f"</p> <p>[Applicant] - "Have a photo?"</p> <p>Jessica Valdes - "I don't show"</p> <p>[Applicant] - "Why?"</p> <p>Jessica Valdes - "Because I don't want to"</p> <p><i>[Applicant] sends a photo of an erect penis.</i></p> <p>Jessica Valdes - " I never said I wanted to see that...I want vids of young girls"</p> <p>[Applicant] - "Same"</p> <p>Jessica Valdes - "Ok why r u messaging me"</p>
14	Faith Hey (‘camo_cow’)	<p>On 26 June 2019, the [applicant], via a public group chat named #12to16gurlssonly which he had joined, proceeded to engage in a private chat with a person believed to be a 14-year-old female.</p> <p>Relevant excerpts:</p> <p>[Applicant] - "Hey...Asl?" " Are you really 14?"</p> <p>Faith Hey - "Yeah"</p> <p>[Applicant] - "I have a question hun...what size are your tits?? They look fkn perfect"</p> <p>Faith Hey - "32 d"</p> <p><i>[Applicant] sends a photo of an erect penis.</i></p> <p>[Applicant] - "you like?"</p> <p>Faith Hey - "What is it"</p> <p><i>[Applicant] sends video of his erect penis to Faith - during the video he is observed rubbing his erect penis against a benchtop.</i></p>
15	Isla Innocent Child (‘Islafearon’)	<p>On 6 July 2019, the [applicant], via a public group chat named #12to20onlygirls which he had joined, proceeded to engage in a private chat with a person believed to be a 13-year-old female.</p> <p>Relevant excerpts:</p>

	Kik User	Excerpts of Kik Conversation
		<p>[Applicant] - "Hey...Asl?"</p> <p>Isla - "13...live pic of you...please"</p> <p>[Applicant] - "Wow...really?? You're 13??" "What size are your tits babe???"</p> <p><i>[Applicant] sends a video of his erect penis - during the video he is observed rubbing his erect penis against a benchtop whilst saying "Hot little 12-year-old!"</i></p>
16	Emily (‘baby_shark_53’)	<p>On 20 July 2019, the [applicant], via a public group chat named #12abd13yearsonly which he had joined, proceeded to engage in a private chat with a person believed to be a 14-year-old female.</p> <p>Relevant excerpts:</p> <p>[Applicant] - "Hey...how are you?...asl?"</p> <p>Emily - "14/f/earth"</p> <p>[Applicant] - "Really? 14?? You're god damn hot for a 14 year old"</p> <p><i>[Applicant] sends a video of his erect penis to Emily - during the video he can be heard saying "I need to blow this huge load!"</i></p>
17	Ruby Omerod (‘Ruby3423’)	<p>Between 20 July 2019 and 1 August 2019, the offender, via a public group chat named #12-16girl which he had joined, proceeded to engage in a private chat with a person believed to be a 13-year-old female.</p> <p>Relevant excerpts:</p> <p>[Applicant] - "Hey...Asl?"</p> <p>Ruby Omerod - "13"</p> <p>[Applicant] "No fkn way...it's so hard to believe you're only 13"</p> <p>Ruby Omerod - "How old are u"</p> <p><i>[Applicant] sends picture of himself topless.</i></p> <p>[Applicant] - "19" "What cup size are you tits hun??" "Are they big??"</p> <p><i>[Applicant] sends a photo of an erect penis.</i></p> <p>[Applicant] - "Its nine inches by the way" "Live cam to cam" "Do you have</p>

	Kik User	Excerpts of Kik Conversation
		<p>any more photos of you hun?"</p> <p>Ruby Omerod - "No"</p> <p><i>[Applicant] sends another photo of an erect penis.</i></p> <p>[Applicant] - "My pumping cock likes you too" "Any photos of you at all?? I have more if you do"</p> <p><i>Ruby sends a series of pictures of a female aged approximately 13 years old purporting to be herself.</i></p> <p>[Applicant] - "Omg? You are sooo fucking hot" "Any more gorgeous"</p> <p>Ruby - "No"</p> <p>[Applicant] - "My turn to send a photo? What sort of photo do you want babe?"</p> <p>Ruby - "Anything"</p> <p>[Applicant] - "tell me what sort of photo to take for you sexy"</p> <p><i>[Applicant] sends video of his erect penis - during the video he is observed rubbing his erect penis against a benchtop whilst saying "Pump it down your throat baby girl!"</i></p> <p>Ruby - "Wyd"</p> <p>[Applicant] - "Honestly...pumping my huge cock...trying so fkn hard to blow" "Ill show"</p> <p>Ruby - "Cant call...I'm on facetime with friend"</p> <p>[Applicant] - "What you wearing right now forgeous" (sic)</p> <p>Ruby - "Nothing just some shorts"</p> <p>[Applicant] - "That's all?? No Top???" "Bra or no bra?"</p> <p>Ruby - "No bra"</p> <p>[Applicant] - "Omfggg my cock is sooo fkn huge right now...show me what you're wearing? Show me pleeeeeease?"</p> <p>[Applicant] - "Every time I look at your photos...my cock honestly gets bigger...its pumping over you right now" "Have any more photos of you</p>

	Kik User	Excerpts of Kik Conversation
		<p>pretty?"</p> <p>[Applicant] - "Want a present babe?"</p> <p><i>[Applicant] sends another photo of him holding his erect penis.</i></p> <p>[Applicant] - "Wish you were here right now though...what are you wearing right now??"</p> <p>Ruby - "Shorts and top"</p> <p>[Applicant] - "What short (sic) of top?"</p> <p><i>Ruby sends e a stock photo of white and black top.</i></p> <p>[Applicant] - "What does it look like on you babe...show" "What else are u wearing with that top" <i>Ruby sends stock photo of black knee-high boots.</i></p> <p>[Applicant] - "anything else? What other clothes are you wearing atm?"</p> <p>"Any other clothes? No bra? What type of bra???"</p> <p><i>Ruby sends stock photo of red bra.</i></p> <p>[Applicant] - "Fuck...Are your tits popping out of that bra gorgeous?? I bet your tits are really easy to get to with what you're wearing right now" "How many guys have been lucky enough to suck on your tits babe??" "Would you want your tits sucked on babe??" "I bet you secretly want someone to squeeze and suck on your yummy tits"</p> <p>[Applicant] - "wait before you go babe...I have a present for you babe" "Do I get a present in return??"</p> <p><i>[Applicant] sends a video of his erect penis with a mobile phone in the background, on the mobile phone was a photo that Ruby had sent to the [applicant]. The [applicant] can be heard saying "look how massive you get my cock Ruby!"</i></p> <p><i>[Applicant] sends another photo of his penis, this time however, the name 'Ruby' is written on it.</i></p>

Charge 2 - Fail to comply with SORA reporting obligations

19. As previously noted, the [applicant] was a registrable offender pursuant to the SORA, which required him to report to Victoria Police on various

matters for a period of 8 years commencing 2 June 2017.

20. The [applicant] failed to report the following internet usernames as at 18 May 2019 and 24 June 2019, respectively:

a. *Trent Allawi / badboy8889* (Platform: *Kik*)

b. *pressuretodiamonds* (Platform: *Oasis*)

21. A *Victorian Sex Offenders Certificate Concerning Evidence* detailing information received by the [applicant] was obtained on 29 January 2020. The certificate confirmed the [applicant] had not reported the above usernames, within 7 days, as required.

22. The [applicant] was unable to provide a reasonable excuse for failing do so.

Charge 3 – Use carriage service to cause child pornography material to be transmitted to self

23. On 21 June 2019, during a conversation between the [applicant] and *Kik* user, Taco ('i_dakat'), the [applicant] requested Taco send him sexually explicit photographs and videos of herself. The requests of Taco are interspersed with the [applicant] sending explicit images and videos of himself, namely, two images of this erect penis and two videos of him masturbating to photos of Taco.

24. At Item 12 of the table (see pp. 11-12), the relevant excerpts of the conversation are set out.

25. Throughout the course of the conversation, the [applicant] received:

a. 5 images depicting a female, approximately 12 years of age, in various clothing (not classified as child pornography);

b. 9 images of the same female exposing her breasts (CAT 1);

c. 1 image of the same female inserting a finger into her exposed vagina (CAT 2); and

d. 1 video file of the same female exposing her breasts (CAT 1).

Charge 4 – Use carriage service to transmit child abuse material

26. On 21 June 2019, the [applicant] joined a public group chat on *Kik* entitled '#13YrOldClub'. The group chat involved 49 users, including the [applicant].

27. The offender sent an image to the group, which he had obtained during a conversation with *Kik* user Taco ('i_dakat') (refer charge 3). The image depicted a female, approximately aged 12 years of age, exposing her breasts (Cat 1).

Charge 5 – Possession of Child Abuse Material

28. Examination of the two mobile phones seized on 2 August 2019 revealed

child exploitation material in the form of videos and images. A manual categorisation, in accordance with the Automated Child Exploitation Material (CEM) Categorisation Scheme, indicated:

Category 1 CAM	Depictions of children – no sexual activity	35
Category 2 CAM	Solo masturbation by a child or sex acts between children	15
Category 3 CAM	Non-penetrative sexual activity between children and adults	6
Category 4 CAM	Penetrative sexual activity between children and adults	2
Category 5 CAM	Sadism/Bestiality/Child Abuse	-
Category 6 CAM	Animated or virtual CAM	-
		Total: 58

29. The following videos and photos are representative samples of the child abuse material located on the [applicant's] mobile phones:

- Video and photo files of a female (*Kik* user – Taco), approximately 12 years of age, exposing her breasts (CAT 1).
- A 2 minute video file depicting a naked female, approximately 14 years of age, washing her body in the shower (CAT 1).
- Photographs depicting females aged between 10 and 14 years of age, naked and in various poses exposing their breasts and genitals (CAT 1).
- A 1 minute and 45 second video file depicting a female, aged between 7 and 9 years old, with her legs open. The child spits saliva onto her genital region before inserting an object into her vagina. The child continues to spit on her genitals before smacking and rubbing herself on the surface of her vagina and inserting her finger into her vagina (CAT 2).
- A 59 second video file that depicts a naked female, aged approximately 13 years old, performing a solo sex [act] with a sex toy (CAT 2).
- A 56 second video file that depicts female and male children, approximately 12 to 13 years old, engaging in a sexual act where the boy is observed kissing the girls exposed breasts (CAT 2).
- A 1 minute and 40 second video file that depicts a naked female, approximately 13 years old, performing a solo sex act, masturbating with a hairbrush into her vagina (CAT 2).
- A 57 second video file depicting two females, aged between 9 and

12 years old. One of the children is almost entirely naked. During the video, the children are kissing each other, whilst one child masturbates the other. One of the children then performs a sex act on the other child (CAT 3).

- A 59 second video file depicting a female, approximately 8 years old, in a bedroom. The female child is shown lying on bed looking upwards. An adult erect penis enters the frame and the child engages in fellatio. The origin of the file was determined to be South America. (CAT 4).

Procedural considerations

4 On 2 June 2017, at the Melbourne Magistrates' Court, the applicant was convicted of using a carriage service to transmit indecent communications to a person under 16 years of age.³ He was convicted and fined \$2,500. This is a class 2 offence under sch 2 of the *Sex Offenders Registration Act 2004* ('SORA').⁴ He was registered as a sex offender pursuant to that Act for a period of eight years and was required to report to Victoria Police.

5 As a result of pleading guilty to four class 2 offences in the County Court on 1 December 2020, the applicant will be required to comply with the reporting obligations set out by the *SORA* for the remainder of his life.⁵

6 Charges 3, 4 and 5 are Serious Offender provisions, and sexual offences within the meaning of the *Sentencing Act 1991* pt 2A – Serious Offenders ('*Sentencing Act*').⁶ Thus, upon conviction and sentence to a term of imprisonment on both charges 3 and 4, the applicant fell to be sentenced as a serious sexual offender in relation to charge 5.

The plea hearing

7 A brief chronological table was provided to the Court outlining significant

³ Contrary to *Criminal Code* (Cth) s 474.27A(1).

⁴ *SORA* sch 2 item 28A(vii).

⁵ *SORA* s 34(1)(c)(iii).

⁶ The offences the subject of charges 3 and 4 are specified in the *Sentencing Act* sch 1 cl 1(df)(ii). The offence the subject of charge 5 is specified in sch 1 cl 1(a)(xvihc).

events in the applicant's life. In short, it set out that the applicant was born in 1989 and had two older sisters. He completed Year 12 in 2007, which was a difficult year for him, including bullying at school, the death of his grandfather and the breakdown of his parents' marriage. He commenced using methamphetamine during this time. After leaving school, the applicant began landscaping work, having worked in a nursery since he was 14, and continued in this work until shortly before his arrest in July 2019. In 2008 the applicant was also diagnosed with depression.

8 In 2014 the applicant began taking prescribed Zoloft and managed to abstain from illicit drugs for nine months before relapsing. In November 2015 he committed his first offence of using a carriage service to transmit indecent communications to a person under 16. He was convicted, fined \$2,500 and placed on the Sex Offenders Register for eight years in June 2017. This offending was apparently treated as an effect of the applicant's drug addiction, and, having already undergone about six months' treatment for his drug addiction in a residential rehabilitation facility in the interim between the offending and his conviction, he again engaged in drug addiction treatment but no sex offender-specific treatment.

9 In 2018, the applicant recommenced using drugs. The present offending took place between May and August 2019. The applicant was initially arrested and charged with a single offence of possessing child abuse material (charge 5) in August 2019, and was subsequently charged with the balance of the charges in December 2019. He entered a plea of guilty at a committal mention in June 2020. In August 2019, he had again entered a residential drug treatment facility, receiving intensive counselling and psychotherapy for over 14 months. It was not until April 2020 that the applicant received any treatment specific to his offending behaviours, commencing a sex offender treatment program with Mr Burrows, psychologist.

10 Written submissions were tendered. In that document, the applicant's counsel emphasised the following:

- It was submitted on the applicant’s behalf that his offending stemmed from longstanding personality deficits and disordered sexual adjustment, exacerbated by denial, gross drug abuse and deviant sexual fantasies.
- The applicant had commenced and made significant steps into a sex offenders treatment program. He had attended 20 sessions with Mr Burrows, psychologist, and participated in all set exercises. He had developed some insight, remorse and shame. He was committed to his rehabilitation.
- He had sought treatment and medication to manage his depression. He had spent over 14 months in residential rehabilitation. The conditions of this treatment program were onerous and the principles in *Akoka v The Queen*⁷ were invoked.
- His 2015 offending was treated as if precipitated by drug addiction and he received no sex offender-specific treatment. Over the previous year he had received this treatment and those close to him considered that he had benefited from it.
- He had pleaded guilty at the earliest opportunity. The COVID-19 pandemic was relevant in two ways:
 - (a) there was an unprecedented utilitarian benefit; and
 - (b) there was an increased risk of custodial hardship.
- It was acknowledged that the offending was ‘by its nature’ grave. In relation to charge 5 the applicant contended that there was a relatively low number of images/videos and that the majority fell into the lowest category of seriousness.
- It was also acknowledged that the applicant knew that he would be imprisoned for a number of years.

11 In the plea hearing itself, a number of documents were tendered, including

⁷ [2017] VSCA 214, [95]–[115] (Warren CJ, Kyrou and Redlich JJA) (*‘Akoka’*).

psychological reports from Patrick Newton and Geoffrey Burrows. A report from ReFocus⁸ was tendered along with letters of reference from the applicant's father and stepmother and others. In substance the applicant reiterated and expanded orally upon the written submissions referred to above. Additionally, the applicant, through his counsel, stated that he was taking Concerta (a slow-release Ritalin) for ADHD and Sertraline for depression.

12 The applicant's father, a senior business development manager, was called as a witness. He set out various difficulties that the applicant had confronted in his childhood and adolescence, including his parents' divorce and the disintegration of his comfortable middle-class existence. His son had always appeared to be polite, hardworking, kind and reliable. He detailed the steps he had undertaken, both in 2017 and 2019, in an endeavour to effect treatment for the applicant, including, in 2019, 14 months in ReFocus rehabilitation facility. That facility was primarily directed towards addressing drug addiction and imposed rigid protocols and routines. During COVID-19 times (from March 2020 to October 2020) the 'transitional house' in which the applicant was living was in total lockdown. The applicant was also engaged in a sex offender treatment program with Mr Burrows. In October 2019 the applicant was admitted to Alfred Hospital following an episode of self-harm. The applicant's father said that his son was 'ashamed' and 'embarrassed' and 'committed to getting better'. The applicant returned home in late October 2019. His father stated that the applicant took pride in his progress and could see a future for himself after prison. When the applicant is released he will receive financial assistance and employment assistance from his father.

13 The applicant submitted that he ought receive a sentencing benefit for the 14-month residential program referred to above, and referred again to *Akoka*.⁹

14 The applicant then referred to the two professional reports of Mr Burrows¹⁰

⁸ The residential rehabilitation provider.

⁹ *Akoka* [2017] VSCA 214, [95]-[115] (Warren CJ, Kyrou and Redlich JJA).

¹⁰ Dated 18 November 2020.

and Mr Newton.¹¹ It is convenient to summarise briefly the conclusions of both authors.

- Both reports identified a link between the applicant's deep-seated issues with intimacy and trouble forming and sustaining mature interpersonal relationships, his substance abuse and his offending behaviour.
- Mr Newton assessed the likely success of the applicant's offence-specific treatment as 'equivocal', given that he had demonstrated limited insight or self-awareness, continued to experience deviant sexual fantasy, had limited coping skills and, despite treatment, remained 'prone to resort to hypersexuality as a means of relieving stress'.
- Mr Newton also reported, however, that the applicant had expressed remorse and shame, and an understanding that he had caused harm to the victims of his offending. Mr Burrows also reported that the applicant had begun to gain insight into his offending behaviour and its impact.
- Both reports emphasised that the applicant would require extensive sex offender-specific treatment if he were to avoid repeating the offending behaviour. Both psychologists reported that the applicant had engaged positively and cooperatively with treatment to date.
- Mr Newton assessed the applicant as being in the 'high risk' category for risk of reoffending, after applying two assessment metrics.¹² This assessment meant his risk of recidivism was 'significantly higher than that typically posed by sex offenders undergoing sentence'.

15 It was accepted by counsel for the applicant that sexual dysfunction lay at the

¹¹ Dated 19 November 2020.

¹² The STATIC-99R, which assessed the likelihood of reoffending based on historical risk factors, and the Risk for Sexual Violence Protocol ('RSVP'), which takes into account historical, dynamic and personal factors.

heart of his offending, and that his coexistent alcohol and drug addictions must be addressed as well if his prospects for rehabilitation are to be less guarded. The applicant's counsel adverted to Mr Newton's assessment of the 'high-risk range' of reoffending, accepted this assessment was in a document that had been tendered by her,¹³ and submitted that it was preferable to place this material before the Court, in effect 'warts and all', in order that the Court be assisted by it, rather than leave it 'in the bin' (as she was entitled to do) and not refer to it. We consider this approach refreshingly candid and, ultimately, of assistance to both the Court and the applicant's cause.

16 Counsel for the applicant also addressed the current sentencing practices.

17 The judge seemed to accept in discussion that some of the counterparties in the transmission of child pornography may not have been actually under 16, although the applicant, at the time, believed all counterparties were under 16. Some of these counterparties may have been 'like-minded perverts'.

18 Counsel also referred to the applicant's ready cooperation with police in making full admissions, and expanded upon the argument that the utilitarian benefit that normally accompanies early pleas of guilty was enhanced by COVID-19 conditions: the lockdown of prisons and the state of court lists. The judge thought this illogical in circumstances where that plea was inevitable. We shall return to this aspect in our consideration of ground 1.

19 The applicant's prospects for rehabilitation were, it was submitted, 'better than guarded' given his family support and commitment to change.

20 The prosecutor also provided written submissions to the Court and supplemented these with oral submissions. The prosecutor submitted that, whatever the real age of the recipient of the pornographic communications, the applicant had inquired of their age, sex and location and, having been assured they

¹³ Exhibit 2 on the plea.

were females under the age of 16, proceeded to interact with them. It was elemental to the applicant's plea that he believed they were under 16. The judge accepted this. The prosecutor accepted that, whilst there was impressive commitment to change and the plea material was 'probably some of the best in existence for matters such as this', without that commitment his prospects for rehabilitation must still be guarded. The applicant had been assessed by his own psychologist as being at a high risk of reoffending.

21 The prosecutor also submitted, with some prompting from the bench, that protection of the community was a relevant sentencing aspect, given Mr Newton's 'high-risk' assessment of the likelihood of reoffending.

22 The prosecutor then tendered and relied upon her written submissions. In short, the prosecutor contended:

- On the Commonwealth offences (charges 1, 3 and 4), a term of imprisonment requiring the imposition of a non-parole period was the appropriate sentence.
- On the State offences (charges 2 and 5), a term of imprisonment was the only appropriate sentence.
- In imposing sentences of terms of imprisonment on both the federal and State offences, the Court had to impose a separate term of imprisonment with a non-parole period or recognisance release period for the federal offences and a separate term of imprisonment with a non-parole period for the State offences.
- The Court was directed to the relevant statutory sentencing provisions of pt 1B of the *Crimes Act 1914* (Cth) ('Commonwealth *Crimes Act*'), in particular the matters raised in ss 16A(2) of that part. The Court was also directed to s 5 of the *Sentencing Act* insofar as the State offences were concerned.
- The prosecutor referred to the principles summarised in *R v*

De Leeuw.¹⁴ We shall refer to these principles in our analysis of this application.¹⁵

- The primary sentencing consideration was general deterrence.
- There is an intrinsic harm caused by child pornography (and other sexual) offences, along with their prevalence and the difficulties of detection.
- Child pornography is pernicious and may promote a distorted view of reality in those who view it.
- Insofar as charge 1 was concerned, it was submitted that this was a rolled-up count where the applicant communicated with 17 individuals he believed to be under the age of 16. Each was an objectively serious event; the applicant believed all recipients to be aged between 10 and 15 years; he was deliberate in his communications and often sent an explicit image or video very early on in the conversation. In its rolled-up form, this was a serious example of offending under s 474.27A(1) of the *Criminal Code*.
- Insofar as charges 3 and 4 were concerned, the prosecutor reviewed the circumstances of the communications between the applicant and a person he believed to be a 12-year-old female, Taco. The prosecutor submitted in relation to charge 4 that the transmission of an image of a 12-year-old girl exposing her breasts to an unidentified number of people via a public internet forum was an aggravating feature, and the offending is intrinsically more harmful if distribution is widescale.
- Insofar as charges 2 and 5 were concerned, the prosecutor reviewed the circumstances of those offences but made no further submissions.
- On the applicant's plea of guilty, the prosecutor submitted that

¹⁴ [2015] NSWCCA 183, [72] (Johnson J) (*De Leeuw*).

¹⁵ See below [42].

it was necessary that the Court take into account a plea of guilty to a federal offence, including the timing of that plea and the degree of any benefit to the community, or to any witness to or any victim of the offence.¹⁶ It was also accepted that the plea may be relevant to a subjective assessment of remorse or contrition.¹⁷ It was conceded that the applicant's early plea of guilty held a utilitarian value and thus entitled him to a sentencing discount, and that the applicant had cooperated with police by making full admissions in his record of interview. While it was accepted that the plea of guilty demonstrated a willingness to facilitate the course of justice, it was submitted that it should also be noted that this was in the context of a strong Crown case.

- Further on the impact of the COVID-19 pandemic, the prosecutor accepted that the pandemic was causing additional stress and concern to prisoners and their families and that this would make the applicant's time in custody more onerous, but pointed to this Court's statement in *Brown v The Queen*¹⁸ that the extent that this should be taken into account, if at all, depended on the particular facts of each case.¹⁹ It was submitted that in the case of serious offending, such as that of the applicant, it may not loom large in the sentencing exercise.²⁰ It was further submitted that, at the time of the plea, COVID-19-related restrictions such as the suspension of family visitation were soon to be lifted, and other measures, such as the expansion of telephone and video call access, were already being taken to ease the burden of restrictions on prisoners.
- The prosecutor then referred to a table of comparative cases, annexed to the Crown's written submissions, and explained

¹⁶ See Commonwealth *Crimes Act* s 16A(2)(g).

¹⁷ Citing *Cameron v The Queen* (2002) 209 CLR 339, 343 [11] (Gaudron, Gummow and Callinan JJ).

¹⁸ [2020] VSCA 60.

¹⁹ *Ibid* [42], [48] (Priest and Weinberg JJA).

²⁰ Citing *DPP v Chen* [2020] VCC 385, [138]–[140] (Judge Cahill) and *R v Phan* [2020] QSC 95.

their relevance to the sentencing process in Commonwealth cases.²¹

Reasons for sentence

23 The judge reviewed the circumstances of offending with reference to the Summary of Prosecution Opening for the plea. He noted that the applicant made substantial admissions in his police interview. His Honour commented that the ‘conduct that founds charge 1 ... is simply perverted’.²²

24 The judge summarised the applicant’s personal circumstances in similar terms to those used by defence counsel at the plea hearing.²³ His Honour reviewed the applicant’s substance abuse, past engagement with ‘online pornography, sexual chat and similar activities’ as recounted to Mr Newton.²⁴ The judge accepted that the applicant met the DSM-5 criteria for severe methamphetamine-use disorder and severe cannabis-use disorder; both disorders were accepted to be currently in remission in a controlled environment.²⁵

25 The 14 months spent in inpatient drug rehabilitation were reviewed, and his Honour noted that the program was primarily directed to drug and alcohol abuse, with limited aspects directed to the offending conduct. The judge set out with apparent approval Mr Newton’s opinions that the applicant was an intelligent man with no evidence of any form of thought disorder or psychosis, that he was fully aware of the moral context of his actions and that he represented a ‘high risk of recidivism of offences of the kind to which [he had] pleaded guilty’.²⁶ The judge also reviewed Mr Burrows’ opinions and commented that the applicant presented as a

21 Referring to *R v Pham* (2015) 256 CLR 550, 556 [18], 557 [23] (French CJ, Keane and Nettle JJ) and *Wong v The Queen* (2001) 207 CLR 584, 591 [6] (Gleeson CJ).

22 *DPP v Chenhall* [2020] VCC 2078, [12] (Judge Ryan) (‘Reasons’).

23 See above [7]-[12].

24 Reasons [21].

25 Ibid [24].

26 Ibid [27]-[28].

'man with significant psychosexual issues'.²⁷

26 After summarising the written references tendered on the applicant's behalf and the evidence of his father, the judge then summarised the submissions made by defence counsel on the plea. His Honour stated, 'In the present circumstances, I can see no reason why, bearing in mind the history of this prosecution, that there is any greater utilitarian benefit flowing to you from your plea because it took place during the COVID-19 pandemic';²⁸ and, '[Counsel] acknowledged that the nature of your offending was grave.'²⁹

27 The judge set out the prosecution submissions on the plea³⁰ in summary and then stated:

- He regarded the applicant's prospects for rehabilitation as 'guarded'.³¹
- He would take into account that the sentence the applicant would serve would be subject to the COVID-19 restrictions that were imposed on all prisons.³²
- He would take into account the 14 months already spent in residential rehabilitation.³³
- The early plea entitled the applicant to a sentencing benefit, 'being that it is some evidence of [his] remorse and that it has utilitarian benefit'.³⁴
- The applicant had some insight into the consequences of his conduct for his victims, and had expressed a commitment to

²⁷ Ibid [30].

²⁸ Ibid [47].

²⁹ Ibid [49].

³⁰ See above [20]-[22].

³¹ Reasons [59].

³² Ibid [60].

³³ Ibid [61].

³⁴ Ibid [62].

rehabilitation.³⁵

- The applicant had been assessed as a high risk of reoffending and protection of the community was the principal purpose for sentencing him in respect of charge 5.³⁶
- The applicant had significant psychosexual issues and upon release would require intensive treatment. He was fortunate to have his father's support.³⁷
- The offending involved 'serious examples of offending of the kind' and his Honour considered him to be an appropriate vehicle for the application of the principles of both general and specific deterrence. Further, the applicant's conduct had to be publicly denounced and he had to be justly punished.³⁸
- Protection of the community 'must play a significant role in arriving at an appropriate sentence in [the applicant's] case'.³⁹

28 The judge's reasons are meticulous and a model of clarity.

This appeal

Ground 1 – Utilitarian benefit of plea of guilty in the pandemic

29 It will be recalled that the judge specifically rejected a submission that the usual utilitarian benefit available to an early pleader ought be enhanced in the context of the COVID-19 pandemic because the benefit to the criminal justice system was greater than in normal times – court lists had blown out, jury trials, if occurring at all, were occupying more resources and accused persons had little incentive to plead guilty if it meant incarceration in stringent COVID-safe conditions.

³⁵ Ibid.

³⁶ Ibid [63].

³⁷ Ibid [64].

³⁸ Ibid [65]-[66].

³⁹ Ibid [66].

30 It is apparent from the judge's reasons that he allowed the applicant a 'utilitarian benefit' for his early plea,⁴⁰ but did not accept the applicant's submission that an 'unprecedented utilitarian benefit' ought be allowed as a consequence of the impact of the pandemic.⁴¹ After referring to *R v McNamara*,⁴² *Director of Public Prosecutions v Bourke*⁴³ and *R v Nolan*,⁴⁴ all cases where an enhanced utilitarian benefit was allowed, the judge said:

In the present circumstances, I can see no reason why, bearing in mind the history of this prosecution, that there is any greater utilitarian benefit flowing to you from your plea because it took place during the COVID-19 pandemic.⁴⁵

31 Under this ground the applicant contended that at the time the applicant entered his plea, 26 June 2020, COVID-19 had crippled trial listings and was likely to continue doing so. Prisoners' conditions under lockdown were onerous, which resulted in a substantial disincentive for an accused person on bail to plead guilty to a charge that may result in imprisonment, and there was likely to be a trial backlog of years. Thus there was an increased utilitarian benefit, over and above its usual worth, that attached to this plea of guilty, and, more widely, to all pleas of guilty that were likely to attract a prison sentence. The applicant reminded this Court that the utilitarian value of a guilty plea must be measured objectively.⁴⁶

32 The respondent contended that the circumstances surrounding this plea of guilty were not such as to attract an enhanced utilitarian benefit. Settlement negotiations were entered into on 14 April 2020, in the early stages of the pandemic, and the matter proceeded uneventfully to plea on 26 June 2020. The Crown case was strong and there was no prospect of the applicant running a trial regardless of public

⁴⁰ Ibid [44].

⁴¹ Ibid [44]-[47].

⁴² [2020] VSC 705.

⁴³ [2020] VSC 130.

⁴⁴ [2020] VSC 416.

⁴⁵ Reasons [47].

⁴⁶ See, eg, *Phillips v The Queen* (2012) 37 VR 594, [36], [48]-[52] (Redlich JA and Curtain AJA), [93]-[95] (Harper JA).

health issues. The applicant was given the full benefit of his early plea and the utilitarian value that ordinarily accompanies that. That was sufficient in this case: ‘It cannot be the case, as the Applicant asserts, that there is an extra utilitarian benefit in every case where there is a plea of guilty during the COVID pandemic.’

33 This application was heard on 7 June 2021. On that day this Court, in an identically constituted bench, heard two other matters,⁴⁷ each with similar grounds of appeal to that under present consideration. In *Worboyes* we set out our reasons for concluding that where an accused person has made a plea of guilty during the COVID-19 pandemic, in certain cases that fact should be accepted as augmenting the utilitarian value of the plea, so that it should therefore be accorded additional weight as a mitigating circumstance.

34 Specifically, in *Worboyes*, the Court said:

For these reasons, we consider that – all other things being equal – a plea of guilty entered during the currency of the COVID-19 pandemic is worthy of greater weight in mitigation than a similar plea entered at a time when the community and the courts are not afflicted by the pandemic’s effects. A plea of guilty during the pandemic ordinarily should attract a more pronounced amelioration of sentence than at another time. Although a sentencing judge need not quantify the extent of any ‘discount’, he or she must ensure that the plea of guilty results in a perceptible amelioration of sentence.⁴⁸

35 In *Worboyes* the applicant’s counsel had not asked the sentencing judge to attribute greater weight to the plea of guilty given that it was entered during the pandemic, and the ground was thus rejected. In the present case, however, the sentencing judge was asked to do this and specifically declined to do so. In the circumstances of this case, we have concluded that the judge erred in so declining. The plea, entered during the pandemic, did its bit to ease the trial backlog, and the applicant, who was on bail, submitted himself to more onerous conditions than would otherwise have been the case. Further, had a greater utilitarian benefit been allowed, it would have provided some incentive to others in a similar position to this

⁴⁷ *Worboyes v The Queen* [2021] VSCA 169 (*‘Worboyes’*) and *Schaeffer v The Queen* [2021] VSCA 171.

⁴⁸ *Worboyes* [2021] VSCA 169, [39].

applicant to plead guilty, with the concomitant benefit to a justice system under great pressure.

36 We consider this to be a material error and the applicant has established ground 1. The sentencing discretion is thus reopened.

Ground 2

37 This ground alleges that the sentence of two years' imprisonment on charge 5 is disproportionately high given the relatively low number of images and videos in the applicant's possession. It will be recalled that the applicant possessed a total of 58 images: 35 were category 1;⁴⁹ 15 were category 2; six were category 3; and two were category 4. The applicant contended that a sentence of 20 per cent of the maximum penalty available (10 years) was disproportionate to the gravity of that offending. If the Court accepts that to be the case, the applicant contended that notwithstanding that he was to be sentenced as a serious sexual offender on charge 5, a disproportionate sentence under s 6D(b) of the *Sentencing Act* was unjustified in all the circumstances. It had not been sought by the prosecution, nor stated by the judge either during the plea hearing or in his Honour's sentence.

38 The respondent contended that the sentence was not disproportionate to the gravity of the offence, and the applicant's contention failed at this level.

39 In our view the sentence on charge 5 was not disproportionate to the gravity of the offence. The relevant material displayed children engaging in sexualised poses, exposing their breasts and genitals, engaging in solo masturbation and engaging in sexual activity with other children, and a video displayed a child fellating an adult male. The videos were not of fleeting duration and ranged from 57 seconds to 10 minutes. The child victims were aged from approximately eight years to 14 years. Further, the applicant was to be sentenced as a serious sexual offender on charge 5, which required that protection of the community be the principal

⁴⁹ See the extract of the Summary of Prosecution Opening at [2] for an explanation of these categories.

sentencing objective, as the judge noted. In these circumstances, notwithstanding the powerful material relied on in mitigation, a sentence of 20 per cent of the maximum penalty available cannot be said to be disproportionate. This ground must be rejected.

Ground 3

40 It is unnecessary to consider the manifest excess ground given that our conclusion under ground 1 has the effect of reopening the sentencing discretion.

Resentence

41 We regard the offending conduct concerning charge 1 as particularly serious. The concession made by the applicant's counsel that it involved 'grave offending' was sensibly made, given that it involved in a rolled-up charge the transmission to 17 recipients indecent communications generally including photographs and/or videos of the applicant's erect penis.⁵⁰ We agree with the judge's pithy summation of this conduct as 'simply perverted'.⁵¹

42 Charges 3, 4 and 5 involve the transmission of child pornography material. We have dealt with charge 5 under ground 2 and will say little more about it. The relevant sentencing principles for child pornography offences are well established. In the New South Wales Court of Criminal Appeal in *De Leeuw*, the accumulated jurisprudence was helpfully set out:⁵²

Appellate courts throughout Australia have consistently stated that the following propositions apply to sentencing for child pornography offences:

- (a) Unless exceptional circumstances exist, a sentence involving an immediate term of imprisonment is ordinarily warranted.⁵³

⁵⁰ Relevant excerpts of these communications can be found at para [18] of the Summary of Prosecution Opening extracted at [3] of these reasons.

⁵¹ Reasons [12].

⁵² *De Leeuw* [2015] NSWCCA 183, [72] (Johnson J).

⁵³ *R v Jongsmā* (2004) 150 A Crim R 386, 395 [14] ('*Jongsmā*'); *Hill v Western Australia* [2009] WASCA 4, [28]; *R v Booth* [2009] NSWCCA 89, [48] ('*Booth*'); *R v Sykes* [2009] QCA 267, [24]; *DPP v Groube* [2010] VSCA 150, [24]; *DPP (Cth) v D'Alessandro* (2010) 26 VR 477, 483-4 [21]

- (b) The objective seriousness of the offending is ordinarily determined by reference to the following factors:
- (i) the nature and content of the material, in particular the age of the children and the gravity of the sexual activity depicted;
 - (ii) the number of items or images possessed;
 - (iii) whether the material is for the purpose of sale or further distribution;
 - (iv) whether the offender will profit from the offence;
 - (v) in the case of possession or access of child pornography for personal use, the number of children depicted and thereby victimised;
 - (vi) the length of time for which the pornographic material was possessed.⁵⁴
- (c) General deterrence is the primary sentencing consideration for offending involving child pornography.⁵⁵
- ...
- (e) Offending involving child pornography occurs on an international level and is becoming increasingly prevalent with the advent of the Internet as a means of allowing people to access and obtain child pornography.⁵⁶
- (f) Offending involving child pornography is difficult to detect given the anonymity provided by the Internet.⁵⁷
- (g) The possession of child pornography material creates a market for the continued corruption and exploitation of children.⁵⁸
- (h) There is a paramount public interest objective in promoting the protection of children as the possession of child pornography is not a victimless crime – children are sexually abused in order to supply the

(*D'Alessandro*); *DPP (Cth) v Guest* [2014] VSCA 29, [23]–[24] (*'Guest'*); *DPP v Smith* [2010] VSCA 215, [23], [26]–[29].

⁵⁴ *Jongsma* (2004) 150 A Crim R 386, 400 [28]; *R v Gent* (2005) 162 A Crim R 29, 49 [99] (*'Gent'*); *D'Alessandro* (2010) 26 VR 477, 483–4 [21]; *Guest* [2014] VSCA 29, [25].

⁵⁵ *Assheton v The Queen* (2002) 132 A Crim R 237, 246–7 [35]–[36] (*'Assheton'*); *D'Alessandro* (2010) 26 VR 477, 483–4 [21]; *Edwards v The Queen* [2013] VSCA 188, [22]; *Guest* [2014] VSCA 29, [25]; *Heathcote (a pseudonym) v The Queen* [2014] VSCA 37, [40] (*'Heathcote'*); *DPP (Cth) v Zarb* [2014] VSCA 347, [34].

⁵⁶ *R v Jones* (1999) 108 A Crim R 50, 51 [2] (*'Jones'*); *Assheton* (2002) 132 A Crim R 237, 246–7 [35]–[36].

⁵⁷ *Mouscas v The Queen* [2008] NSWCCA 181, [31]; *Booth* [2009] NSWCCA 89, [29].

⁵⁸ *R v Coffey* (2003) 6 VR 543, 552 [30]; *R v Cook; Ex parte DPP (Cth)* [2004] QCA 469, [21]; *Jongsma* (2004) 150 A Crim R 386, 395 [14]; *Heathcote* [2014] VSCA 37, [40].

market.⁵⁹(i) The fact that an offender does not pay to access a child pornography website or was not involved in the distribution or sale of child pornography does not mitigate the offending.⁶⁰

43 These principles were cited with approval in *Director of Public Prosecutions (Cth) v Garside*.⁶¹

44 Applying these principles to the facts that underpin charges 3, 4 and 5 leads inevitably to the conclusion that these were relatively serious examples of offending involving child pornography, without trespassing near the ‘worst case’ type of offending. A substantial term of imprisonment is required to deter the applicant and others from similar offending and to reinforce the paramount public interest objective in promoting the protection of children. Naturally, denunciation of the applicant’s conduct must also be part of the sentencing calculus.

45 That said, encouraging the applicant’s rehabilitation remains relevant to this resentencing exercise, and indeed the long-term protection of the community from this applicant requires attention to this aspect. It cannot be gainsaid that the applicant has made apparently sincere and protracted efforts to rehabilitate, although this is far from complete, and he remains a ‘high risk of recidivism’.

46 We take into account the ‘quasi-custodial’ residential rehabilitation program to which the applicant submitted himself over a period of 14 months. In *Akoka*, the applicant had submitted himself whilst on bail to a 12-month residency at Odyssey House. The Court said:

Self-evidently, it is in the community’s interest that offenders – particularly young offenders with substance abuse problems – seek assistance from residential rehabilitation facilities and complete the rigorous treatment programs they offer. Offenders will be encouraged to seek residential treatment if it is understood that sentencing judges will acknowledge, and give credit for, the punitive nature of residency in such a facility. The extent of that credit will depend on the circumstances of each case, including the nature and severity of the restrictions to which an offender has been subject and the duration of the offender’s residency. Clearly, the period of residency

⁵⁹ *Jones* (1999) 108 A Crim R 50, 52 [9]; *D’Alessandro* (2010) 26 VR 477, 484 [23].

⁶⁰ *Coffey* (2003) 6 VR 543, 552 [30].

⁶¹ [2016] VSCA 74, [25] (Redlich and Beach JJA).

must post-date the commission of the offences for which the offender is being sentenced. Further, a period of residency cannot be doubly credited. Thus, where the offender is sentenced on different occasions for separate offences following a period of residency, credit for that period can be given on only one of those occasions.

The credit referred to ... above will, as with all other sentencing discounts, form part of the application of the instinctive synthesis without being numerically identified. However, as with other significant sentencing considerations, a sentencing judge should ordinarily explain how the punitive nature of residency at a rehabilitation facility has informed – in terms of the weight assigned to it – the instinctive synthesis.⁶²

47 Whilst the residential rehabilitation program was largely directed to the applicant’s drug dependency, treating that was an intrinsic part of his overall rehabilitation. We also take into account the professional opinions of Mr Newton and Mr Burrows,⁶³ and the fact that the applicant has received and continues to receive psychological treatment from Mr Burrows in a sex offender treatment program.

48 As part of our instinctive synthesis we also take into account sentencing practices, the applicant’s early plea of guilty made during the current COVID-19 pandemic and the onerous custodial conditions occasioned by the pandemic.

49 We propose to resentence the applicant as set out in the table below.

Charge	Offence	Maximum Penalty	Sentence	Commencement/ Cumulation
1	Transmit indecent communications to a person under 16 years of age: <i>Criminal Code (Cth)</i> s 474.27A(1)	7 years’ imprisonment	30 months’ imprisonment	Commences 3 months prior to expiration of State NPP (which is currently 18 June 2022)
2	Fail to comply with reporting obligations: <i>Sex Offenders</i>	5 years’ imprisonment	6 months’ imprisonment	2 months cumulation on sentence on charge 5

⁶² *Akoka* [2017] VSCA 214, [109]–[110] (Warren CJ, Kyrou and Redlich JJA).

⁶³ See above [14].

	<i>Registration Act 2004 (Vic) s 46(1A)</i>			
3	Use carriage service to cause child pornography material to be transmitted to himself: <i>Criminal Code (Cth) s 474.19(1)</i>	15 years' imprisonment	24 months' imprisonment	Commences 6 months prior to expiration of sentence on charge 1
4	Use carriage service to transmit child pornography material: <i>Criminal Code (Cth) s 474.19(1)</i>	15 years' imprisonment	9 months' imprisonment	Commences 6 months prior to expiration of sentence on charge 3
5	Possess child abuse material: <i>Crimes Act 1958 (Vic) s 51G(1)</i>	10 years' imprisonment	18 months' imprisonment	Base
Total effective sentence:		5 years' imprisonment		
Non-parole period:		3 years and 6 months		
Total effective sentence (State):		20 months' imprisonment		
Non-parole period:		12 months		
Total effective sentence (Cth):		4 years and 3 months' imprisonment		
Non-parole period:		2 years and 9 months		
Total effective sentence (State and Cth):		5 years' imprisonment		
Non-parole period:		3 years and 6 months		
Pre-sentence detention:		188 days		

6AAA declaration:	7 years and 3 months' imprisonment with a non-parole period of 4 and 9 months
Other orders:	Sentenced as a serious sexual offender on charge 5 Declared as registrable for life pursuant to the <i>Sex Offenders Registration Act 2004</i> (Vic)
