EDITORIAL NOTE: CHANGES MADETO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF VICTIMS AND DEFENDANT(S) PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011. SEE para[30].

IN THE DISTRICT COURT
AT NELSONNELSON

CRI-2017-042-001852
[2018] NZDC 2034

NEW ZEALAND POLICE
Prosecutor

v

[CHRISTOPHER CARTER]
Defendant

Hearing:	7 February 2018
Appearances:	Sergeant M Payne for the Prosecutor R A Harrison for the Defendant
Judgment:	7 February 2018

NOTES OF JUDGE S M HARROP ON SENTENCING

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[1] [Christopher Carter], you are [age deleted] and you are here for sentence today on a total of seven charges to which you pleaded guilty after I gave you a sentence indication on 11 December last year, which was to the effect that if you did plead guilty promptly then an end sentence of around 15 months' imprisonment would be imposed on these charges, concurrently, but that home detention would, if recommended by Probation in the pre-sentence report, be imposed instead. So that would be for a period of seven to eight months.

[2] The pre-sentence report does indeed recommend home detention and I am going to impose that sentence consistent with my indication and of course you relied on that in pleading guilty.

[3] The charges, first of all in relation to victim A, she was a girl aged [age under 16 deleted] at the relevant times, there is a charge of intentionally making an intimate visual recording of her on [date deleted] 2016. That carries three years' imprisonment. The same charge relating to a similar incident on [date deleted] 2016 and another one covering a period in 2017. Then finally, in relation to her, there is possession of an objectionable publication. That is a charge which carries 10 years' imprisonment under the Films, Videos, and Publications Classification Act 1993, s 131A(1). That is a representative charge and it relates to a series of six images which were "doctored" if I can put it that way, so as to superimpose her head on other images and including the superimposition of your erect penis on her face and on the body of another person whose image had been obtained presumably from the Internet.

[4] Then as to victim B, she at the time was aged [age over 30 deleted]. [Details deleted] she is present in Court and has read her victim impact statement today. That again involves a gross breach of trust and privacy. The charges in respect of her, although as to their maximum penalty, in theory less serious than the last charge that I mentioned are in my view clearly more serious in fact and they are indecent assaults on her. Each of those carries seven years' imprisonment and is a three strikes offence and you were given the warning about that when you pleaded guilty. Finally, intentionally making an intimate visual recording of her. That carrying three years as I have already mentioned in relation to the other victim.

[5] The facts in a little more detail. In relation to victim A, you took videos of her in the bathroom or getting into the shower naked at the time. It included obtaining an app for your cellphone which allowed it to record video images while appearing to be turned off. So clearly there was some effort and planning and an attempt to disguise the offending and some sophistication involved. You then used presumably photo-shopping or some other computer programme to achieve the superimposition.

[6] It is important to record, as Mr Harrison has been at pains to point out, that there is no suggestion that these images have been shared with anybody else, there is certainly no evidence of posting on the Internet for example. No distribution of those images, and while that is certainly the absence of an aggravating feature it is of limited consolation to both of these victims because they know that you have had intimate images of them which you have been able to access for private gratification as many times and as often as you wanted to. There is clearly a gross invasion of privacy, breach of trust and as I say a degree of effort and sophistication involved.

[7] As to victim B, she was unconscious in the early hours of the morning on [date deleted] and you partially undressed her as to her lower clothing and took some very intimate photographs of her. Then the indecent assaults occurred because you forced her legs apart in order to improve the image you were obtaining. You also placed your erect penis over her and possibly touching her face, it is not clear.

[8] Suffice to say, that is a shocking and gross invasion of her privacy, she has spoken eloquently in her victim impact statement about it and it is entirely understandable that she feels as she does. I do not need to go into it in more detail than that.

[9] She was not aware of course of that at the time, but she became aware of it when the police told her about it and understandably she was extremely distressed and very, very angry as she says. It is not surprising she has had trouble processing the impact of this, [details deleted].

[10] Her reaction is entirely understandable and the consequences for her are clearly significant and ongoing. She describes you, and it is hard to disagree, as a sick and perverted individual, but she recognises that you need help and hopes you get it for your family's sake.

[11] Victim A is still not aware of the offending and steps are being taken to ensure that she never learns of it, but you have heard something earlier today of the impact on the wider group of people that she comes from as to how that has affected them.

That has been significant, as you have heard in detail. I am not going to go into more detail for the reasons you are aware of.

[12] Having outlined the serious aspects of the offending, it is important to acknowledge things which are, while not mitigating factors, are at least the absence of aggravating factors. Clearly that includes, in relation to victim A, there has been no physical contact, no publication of the images, and because she is not aware of the offending, there are no consequences directly for her. That is by contrast with much child sex offending where there has been touching and the effects on the vulnerable victim are significant and often long-lasting.

[13] Now as to victim B, while you did not touch her genitalia and there was probably only brief contact between your penis and her face, and again no publication of the images. Again those are things which if present would have been seriously aggravating factors. I do not mean to underplay the seriousness of what did occur, but they are things that would have made the offending much worse.

[14] Both of these sets of offences involve, gross breach of trust, effort and some planning, though the extent of the latter is unclear. It is also aggravating that in relation to victim A there were several different occasions and it occurred over a period of time, it is a unclear as to when the images were actually captured, but the charge refers to a period of about two years. Of course, the overall situation is aggravated by the fact that we have a range of offending and two victims.

[15] As I observed at the sentence indication hearing, you clearly have a serious mental health issue in relation to sexual matters and this indeed has been highlighted by victim B today. The appropriate sentencing must involve a combination of purposes. First there has to be, of course, recognition of the seriousness of this, deterrence, holding you accountable and denouncing what you did. But, equally the Court must I think be realistic and recognise that this is a form of illness and that you need some help to address the underlying causes so that this never happens again.

[16] While you do have some criminal offences in your past, there is nothing at all of this type. So in that sense you are a first offender and entitled to be treated with a rehabilitative focus as a strong part of the sentence.

[17] Since the sentence indication hearing I have received helpful submissions from both Sergeant Payne and Mr Harrison on the question of whether you should be registered under the child sex offender legislation and I will come to that shortly, but I have also received a pre-sentence report which is a very important document in any sentencing and I think particularly in this one. I have to say it is about as positive a report as there could be in the circumstances, you are recorded as fully accepting responsibility for what you did, being genuinely remorseful, as wanting to do anything you can to help heal the damage you have done, but recognising realistically that you cannot undo what you have done and that it is very difficult to see what you could do to put matters right as far as the victims are concerned.

[18] I should also add that at the sentence indication hearing I was provided with confirmation that you are undergoing counselling and that is consistent with your being open to accepting responsibility and your acceptance that you have a problem that needs addressing. You did that without waiting for the Court to order it as part of a sentence, so you should have credit for that.

[19] Also, it appears that you, yourself, have in your past been a victim of some abuse of some kind. I do not have the details, but I have seen that the Accident Compensation Corporation has acknowledged a claim from you. As is often the case, people who offend in this way have been offended against themselves and are damaged in some way.

[20] The pre-sentence report also refers to the consequences of imposing home detention which is the appropriate sentence. Before this came to light you [employment details deleted] and you had to stop that once you were on a bail condition not to access the Internet and I think that will have been in place since about [date deleted] when you first appeared on these matters.

[21] So you have had about six months of not being able to access the Internet, that meant you could not carry on [employment details deleted] and that I observe is a significant penalty you have suffered already before the Court imposes any sentence, but in the meantime you had managed to obtain employment as a [occupation deleted] in [location deleted]. However the pre-sentence report says that you would likely lose that employment due to the difficulties they would have in verifying your whereabouts when you are [details of employment deleted.]

[22] As I observed to Mr Harrison, I think it would be far too great an adverse consequence for you if you were not able to work in either of those two jobs and I do not think it would assist your rehabilitation to be simply on home detention and unemployed. It is going to be far better for you to be working and resuming your former life, in a lawful way.

[23] As the report writer observes, if you were allowed to access the Internet you could resume your former [employment details deleted] and it is noted, and I accept that, Internet misuse has not been a feature of your offending. There has been some discussion about that today as you have heard. What I propose to do is to permit access to the Internet, but on a couple of strict conditions which are that your browsing history on whatever device you may be have used is able to be accessed by your probation officer and that it will be a condition of your sentence that you not delete your history. I think that is a reasonable balance.

[24] I am sure you will be aware generally that having been involved in this offending your "card" has somewhat been "marked" and any improper use of the Internet is likely to be detected by the authorities one way or another from this point forward and you would understand that if there is any further offending in relation to the Internet, given the background of this, it would almost certainly result in your being sent to prison. So there are significant incentives for you to comply with the sentence.

[25] I am going to impose a sentence of seven and a half months' home detention on the conditions that are set out in the pre-sentence report. That will be served at

[address deleted], but the special condition number 3 is deleted and replaced with one which says:

> While you are permitted to access the Internet for lawful purposes, you are to permit your probation officer to review your browsing history on any device or PC at any time. Further, it will be a condition of your sentence that you not delete your browsing history.

[26] The special conditions will otherwise apply and I emphasise that they do involve some significant restrictions on your activities. You are not to, for example, enter [location deleted], with the detail provided in the condition. You are not to access or use or have in your possession any device capable of taking images. You are not to associate with any of the victims without prior written approval of a probation officer. You are not to associate or otherwise have contact with any person under the age of 18 years, except in the presence of and under the supervision of an approved informed adult. That means a person who has been given prior approval in writing by a probation officer as being suitable.

[27] Importantly, you are also to attend a psychological assessment with a departmental psychologist as directed by your probation officer and you are to complete any treatment and/or counselling as recommended by the assessment to the satisfaction of the probation officer.

[28] Those conditions will also apply, and so will standard post-detention conditions, until six months after the detention end date. You will have noted in the pre-sentence report there is an additional condition which is to apply after the home detention per se finishes, and that is that you are to reside at [address deleted] and not stay away from that address without the prior written approval of the probation officer.

[29] So you are being quite significantly constrained. You have been constrained by bail conditions for about six months now and for the next 13 and a half months you are going to be under those strict conditions that I have mentioned.

[30] I am going to suppress your name as I indicated at the sentence indication. I repeat that this is not to protect you, but solely to protect the victims and anyone associated with them. Obviously they have suffered significant consequences already

and I do not want to risk adding to them in any way by your name being published and people in the community putting two and two together as it were. All of the victims' names are also suppressed, all their contact details and any relationship they had with you is also suppressed.

[31] I am also going to make an order for destruction of all copies of the images that were involved in these charges, once the appeal period has expired. I include in that the ones that are on the file, but obviously if there were an appeal against this sentence the Court on appeal would need to see what was involved. So, that will all take effect once the appeal period has expired.

[32] Now to what is a very substantial issue in itself. That is the question of whether I should make an order that you be registered under the child sex offender legislation. You are eligible to be placed on the child sex offender register because of your conviction in relation to victim A, under s 131A of the Films, Videos, and Publications Classification Act, the possession of those objectionable doctored images, if I can call them that. The legislation includes three classes of offending, Classes 1, 2 and 3 and Class 1 is the least serious and this offence falls within Class 1.

[33] I have read, not only the helpful submissions from both sides, but numerous Court authorities about this. Although it is relatively new legislation, there are a number of High Court cases that have commented on it. I have also read a Court of Appeal case called *Bell v R*[1] which includes some brief comment on the issue. The High Court decisions are *Johnston v Police*[2], *Bird v Police*[3], *Fowler v R*[4], *Goose*[5] *and Escott*[6]. I have read various District Court decisions as well.

[34] I am not going to go through each of those, it would take a long time to do so and I am very conscious that in the end, while statements of principle from other cases are of value, the particular facts are what govern the decision I have to make. I have to make an assessment of the risk that you pose to the safety of children and general

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[1] *Bell v R* [2017] NZCA 90
[2] *Johnston v Police* [2017] NZHC 1718
[3] *Bird v Police* [2017] NZHC 1296
[4] *Fowler v R* [2017] NZHC 1892
[5] *Goose v Police* [2017] NZHC 2453
[6] *Escott v R* [2017] NZHC 2853

observations in other cases are not going to assist me with that. However, I want to record that I have read all of those judgments and the comments made by the learned Judges.

[35] The next point to mention is that had you been sent to prison on that qualifying offence, then you would automatically have been placed on the register, but because the sentence is other than imprisonment, this is a matter of discretion for me. The police submit that you should go on the register and Mr Harrison submits that you should not.

[36] The Court's power to make an order depends first on being satisfied that you pose a risk to the lives and sexual safety of one or more particular children or children generally. So that is the threshold; the cases make it clear that if I find that you reach that threshold, then I still have a discretion as to whether or not the order should be made in all the circumstances. So it is a two-stage process.

[37] Section 9(3) of the Act requires the Court in assessing the presence and extent of such a risk to consider nine matters, but they include at the end, the ability to take into account other matters thought relevant. I will discuss this further, but I will say at the outset that I do consider that the "catch all" provision, means that I may properly consider the overall offending that I am dealing with today, even though only one of the seven charges triggers the legislation.

[38] That said, I consider I have to be careful and only consider the other charges and the facts to which they relate to the extent that they inform the assessment of your risk as a child sex offender. It is important to note that if that charge under s 131A had not been before the Court, then none of the other offending would have even raised the possibility of registration, even if you had been sent to prison the other charges. You simply could not have been placed on the register.

[39] Before I go further, I note that there is no professional assessment before me of the level of risk that you present and so I am not in the best position to assess the risk. I have to do the best I can on the basic information I have got which includes the facts of the case, the nature of the charges, the impacts on the victims and the

submissions that have been made, but also the pre-sentence report. It is important to record again at the outset that you are assessed by the probation officer as being at a low likelihood of reoffending. Now with all respect to the probation officer, I am sure that could not be described as a specialist or expert opinion, but nevertheless it is an opinion formed by a probation report writer preparing an important report and taking into account everything that they knew, including having interviewed you. So I place weight on that, as I must.

[40] I should also say, and the police have rightly reminded me about this, that although it is only one charge which triggers this legislation, it is a representative charge, so it involves a number of occasions and up to six images that we are talking about. So, it is not as though it is one-off thing, it occurred more than once and it occurred over a period of time.

[41] In brief, the police submission is that when you look at the whole picture here, there are grave concerns about your state of mind in relation to sexual matters, your ability to undertake this range of offending, the number of times it occurred, the fact there are two victims, both contact and non-contact offending and highlighting the lengths you went to, to achieve what you did. So, the police submission is that you have demonstrated a propensity to offend in the same way in the future and that you should be on the register.

[42] Mr Harrison has said the opposite result should follow. He has emphasised that this must be seen as at the lower end of the scale of offending in relation to children. It does not involve any physical contact, it does not involve a victim who knows about the incident and therefore there are no adverse consequences for her, although that is certainly not the case with others in her life.

[43] He also highlights the fact that if this was a case where you had accessed pornographic images from the Internet and distributed them in combination with the images that we are talking about here, then he says realistically that he would be hard-pressed to argue that there should not be registration. So he accepts that, in a serious case, but he says this is not one, that non-contact child sex offending could justify the making of a registration order.

[44] He submits overall that this is not a case where you have demonstrated a risk to children that you might be targeting online and that this was non-contact offending and to the extent that the other offending is relevant, it does not significantly add to the risk which he says is low. He has helpfully referred me to two of the judgments which I had already read, *Johnston* and *Bird.* In both cases, there was no registration, but there was physical contact involved.

[45] Mr Harrison also highlights what the Courts have said, that this registration system is really designed for child sex offenders who are clearly at a serious risk of reoffending and who need to be monitored. He has highlighted the significant and onerous consequences of registration. I do not need to go through those, but I can readily accept that submission, as other Courts have. There is a very onerous initial reporting provision and then there is an obligation to report any changes in your life, any travel plans and so on. It goes on for eight years, so as Mr Harrison says it is really akin to an extended supervision order which is applied to serious offenders.

[46] I have reflected carefully on these matters and I note, as I have already mentioned, that this is an unusual case because what might be seen as the least serious offence of the group, the creation and possession of the objectionable images of the unknowing victim, which were doctored by you, that is the only one which is directly relevant. It is the one, albeit a representative one, that triggers the registration issue. None of the others would, even if a prison sentence was imposed.

[47] While, for example, the offending against victim B which relates to an adult woman in her early thirties is arguably more serious than that against victim A, that would not lead to registration at all.

[48] The first thing that I have to consider is the seriousness of the offending and here I am talking about the qualifying offence. I accept that offensive though undoubtedly is, and it certainly had consequences as you have heard, it is very much at the lower end of the scale for child sex offending. It does not involve physical contact. The victim does not know about the offending and so there have been no consequences for her, unlike many cases the Court deals with. I do not ignore or underestimate the consequences there have been for those in her life who do know

about it, but by comparison with cases where there has been actual touching and where there have been clearly adverse victim consequences, obviously this is less serious.

[49] This is not only in Class 1, the least serious class, but in my view it is clearly at the least serious end of Class 1. So, that factor, and it is an important one, although no one of these factors is said to be more important than any other, points away from registration or at least against a determination that you pose a risk to the lives and sexual safety of children. The more serious the offending, obviously the greater the risk.

[50] The next factor is the time that has elapsed since the offences occurred. They are relatively recent in this case and so that tends to suggest that any relevant risk remains current as opposed to that which might arise from historical offending many years ago.

[51] Your age. You are [age deleted] now and so this occurred approximately when you were [ages deleted] , but both your age now and age at the time I think are relatively neutral. You are able to call into your credit the many years before this offending without relevant concerning conduct. There are no earlier convictions at all of a relevant kind.

[52] The next consideration is the age of Victim A at the time. The one we are talking about here was [age deleted]. That is obviously concerning, but by definition this relates to child offending, that the issue would not arise if the s 131 charge related to someone older than 16. She is not far off being at an age where it would not have been an offence that is relevant for present purposes. I think it can probably be said in general terms that the offending would have carried greater concern if the child was younger, but I do not place much weight on that.

[53] The difference in age between you, [over 30 years], obviously there is concern associated with that discrepancy, but because the victim does not know about what happened it is not a case of the application of direct power imbalance where touching resulted from the imposition of pressure or a particular relationship, cultivated or otherwise.

[54] The next consideration is the written assessment of your risk. I have already talked about that : I do not have a psychological report, but I do have the pre-sentence report which describes the risk as low.

[55] As to submissions from the victims, I do not have anything directly on this issue from them.

[56] The next point is whether any other submission or evidence relating to the risk posed by you to children is relevant and it is here that I note that this is wider than information just relating to the qualifying offence. This is where I think I can properly take into account all of the offending, but as I say it can only be relevant to the extent that it informs the risk to children that you present.

[57] There are certainly grounds for concern, as the police rightly highlight. In the absence of expert evidence though providing a link between what you did in the non-qualifying offences and the risk of child sex offending in future, it is really difficult for me to assess. There are certainly concerns. There is a propensity to take advantage of vulnerable victims for your sexual gratification, albeit (largely) vicariously rather than by direct touching. The indecent assault did not involve touching genitals or breasts although I do not overlook the touching of your penis on victim B's face.

[58] But, the overall picture is of somebody with a depraved or perverted state of mind manifested in a range of ways and a willingness to go to some trouble to achieve the capturing and storing of images for sexual gratification. I think inevitably that must carry with it some risk to the sexual safety of children, but it is very difficult for me to say how much of a risk of actual sexual conduct contact with children that there is. This is not to say that non-contact child sex offending is not important or sufficient, in certain cases it may be.

[59] Also, in the context of discussing these subs (i) and (j) I think I have to take into account your absence of relevant previous convictions, your attitude, your remorse, your willingness to address the underlying issues. I think rehabilitation is a very real prospect here based on the information that I have.

[60] When I stand back and consider all of this I am not satisfied that you pose a *sufficient* risk, and I emphasise the word "sufficient", to the lives or sexual safety of one or more children or children generally.

[61] On one level, of course, the fact that you have committed that offence under s 131A means that you present *a* risk, but it is clear to me from the way the legislation is set out and the way that it has been interpreted by the High Court, that it is not just a case of assessing whether *a* risk is present, but whether it is a *sufficient* risk to warrant registration and the consequences which that has, which are onerous. I am not satisfied that position is reached.

[62] If I am wrong about that conclusion I would then have had to consider whether in my discretion I should order registration, so I will do that. Even if a sufficient risk is present, registration does not necessarily follow.

[63] I would not be prepared to direct registration in these circumstances. I think the key considerations in this area are the seriousness of the qualifying offence, which I have put at a low level, and the evidence of risk of further offending which is also put at a low level by the probation report writer. Both of those point against registration.

[64] Also, as the High Court has emphasised, in this area it is a balancing exercise and the Court has to take into account the fairly Draconian consequences of registration. They are punitive, they go on for eight years and they involve initial and ongoing reporting obligations and quite significant penalties for people who do not comply with those obligations or who misreport anything.

[65] As Ellis J put it in the *Bird* case, "*The Act authorises the ongoing intrusion into all aspects of an offender's private life for the duration of the registration period."* I take into account as part of the discretion I would exercise if I had reached this stage, and I have mentioned this already, that you have had six months of restrictive bail conditions, you are going to have 13 and a half months of restrictive home detention-related conditions and one of those bail conditions lead to the loss of your [employment details deleted]. So, there have been already serious consequences and

protective steps taken, and to be taken, to protect against further offending from this point forward, without the additional protections that registration would provide.

[66] There has been no suggestion of further offending since this came to light. There has been no suggestion of breach of bail and as I have already said to you, the authorities will have "your card marked" and you can expect any further offending or suggestion of improper use of the Internet is very likely to be detected. As I have already said to you, if there are further charges of a similar nature to these, then prison is almost inevitable.

[67] When I weigh everything up, if there is any risk to children, I think it is a low one on the information that I have and I do not consider that the punitive aspects of registration are warranted. To put it another, and relevant, way, I do not consider that such risk as there is will likely be mitigated by the reporting obligations.

[68] I have not overlooked what Simon France J in the *Goose* case, His Honour noted that because home detention may only be imposed where imprisonment is otherwise considered appropriate and in effect therefore imprisonment is commuted down to home detention as I have done, His Honour said in effect that registration ought to be seen as the usual result because of course if it was imprisonment it would automatically occur.

[69] But I respectfully agree with what Thomas J said in *Escott* case about this, that in the end Parliament has authorised judges to exercise a discretion, against the statutory criteria, to assess the risk of whether or not an offender is a sufficient risk to children. Whether or not you are close to imprisonment is not determinative of that. In any event the end sentence I came to of 15 months' imprisonment is well below the two-year level at which home detention must be considered. Importantly if you were just being sentenced on the s 131A charge in isolation, the sentence would not have been imprisonment.

[70] Overall, I have noted too that of the cases that I have read, for example, *Bird, Johnston* and *Fowler* in the High Court, they arguably all involve more serious child sex offending than you have committed and yet they were not cases where registration

was thought warranted. So I think it would be inconsistent with the approach the High Court has taken if I were to direct registration in a case like this.

[71] I do not want to be seen as underplaying or undervaluing the effects of non-contact child sex offending. It is clearly serious and you have heard today some of the reasons why. But here it is important as Mr Harrison has said, to emphasise that because you did not using the Internet to obtain and distribute the images, this is certainly in a different category from many that come before the Court.

[72] As you can tell, I have given thorough and anxious consideration to the competing submissions on this issue and I have come to the clear view that it is not appropriate to direct that you be registered under the Child Protection (Child Sex Offender Government Agency Registration) Act 2016. I therefore decline to do so.

S M Harrop
District Court Judge