

AUSTRALIA / JUDGMENT

R v Tynas

[2026] NSWDC 342**COURT**

District Court

DECIDED

21 September 2026

BEFORE

Newlinds SC DCJ

CASE / FILE NUMBER

2025/00211099

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District Court**New South Wales****Medium Neutral Citation:** R v Tynas [2026] NSWDC 342**Hearing dates:** 9 September 2026**Date of orders:** 21 September 2026**Decision date:** 21 September 2026**Jurisdiction:** Criminal**Before:** Newlinds SC DCJ**Decision:** Effective aggregate sentence of 6 years and 6 months. [102]

Catchwords: CRIMINAL LAW — SENTENCING — Accessing and possessing child abuse material — Transmitting indecent material to a child under the age of 16 — Video streaming encounter with underage person — History of child sex offending — Fail to report per obligations under a Registerable Person Order — Guarded prospects of rehabilitation — Medium to high risk of reoffending — Registerable Persons Order for life

SENTENCING — PRE-RELEASE PERIOD — Approach to sentencing for a combination of Commonwealth and State offences

SENTENCING — NON-PAROLE/PRE-RELEASE — Sentence structure of by setting shorter fixed term State sentence to commence prior to commencement of longer aggregate sentence for Commonwealth offences

SENTENCING — PRE-RELEASE PERIOD — Appropriate to consider in a practical way the “effective aggregate” sentence for both the State and Commonwealth offending when determining an appropriate pre-release period for the Commonwealth offending in circumstances where as a matter of law there is no such “effective aggregate sentence”

SENTENCING — Disconformity between Commonwealth and State sentencing regimes causes practical difficulties and confusion

Legislation Cited:	Crimes Act 1914 (Cth) Pt IB; ss 16A; 16AAB; 16AAC; 17A; 19; 19AB; 19AJ; 23ZD Criminal Code Act 1995 (Cth) ss 474.22(1); 474.27A(1); 474.22A(1) Criminal Procedure Act 1986 (NSW) ss 166 Child Protection (Offenders Registration) Act 2000 (NSW) ss 3C; 16C; 17; 18 Crimes (Sentencing Procedure) Act 1999 (NSW) ss 3A; 5; 21A; 25D; 53A
Cases Cited:	DPP (Cth) v Garside [2016] VSCA 74 DPP v Swingler [2017] VSCA 305; (2017) 269 A Crim R 526 Hili v The Queen; Jones v The Queen [2010] HCA 45; (2010) 242 CLR 520 Johnson v The Queen (2004) 78 ALJR 616 Mill v The Queen (1988) 166 CLR 59 R v Blick [2024] NSWSC 569 R v Clarkson (2011) 32 VR 361 R v Coffey [2003] VSCA 155; (2003) 6 VR 543 R v Gent (2005) 162 A Crim R 29; [2005] NSWCCA 370 R v Holder (1983) 3 NSWLR 245 R v Hutchinson [2018] NSWCCA 152 R v MMK [2006] NSWCCA 272 Spartaco Fasciale v R [2010] VSCA 337 The King v McGregor [2026] HCA 3; (2026) 427 ALR 699 The State of Western Australia v Collier (2007) 178 A Crim R 310 Walker v The Queen [2008] NTCCA 7
Texts Cited:	Nil
Category:	Sentence
Parties:	Rex (Crown) Bernard Tynas (Offender)
Representation:	
Counsel:	P Dixon (Crown) R Rajalingam (Offender)
Solicitors:	CDPP (Crown) Australian Criminal Law Group (Offender)
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JUDGMENT

Introduction

On 22 July 2026, after a trial before me and a jury of 12, Bernard Anthony Tynas (‘the Offender’) was found guilty by the jury of the following offences for which he is now to be sentenced:

Count 1, use a carriage service to access child abuse material, contrary to s 474.22(1) Criminal Code Act 1995 (Cth) (‘Criminal Code’). This offence has a minimum penalty of 4 years imprisonment and a maximum term of 15 years imprisonment.

Count 2, use a carriage service to send indecent material to a person under 16 years of age, contrary to s 474.27A(1). This offence has a minimum penalty of 3 years imprisonment and a maximum term of 15 years imprisonment.

Count 3, possess child abuse material obtained using a carriage service, contrary to s 474.22A(1). This offence has a minimum penalty of 4 years imprisonment and a maximum term of 15 years imprisonment.

The Offender is also to be sentenced for the following related offence, which was transferred to the District Court in accordance with s 166 of the Criminal Procedure Act 1986 (NSW) ('CPA'). The Offender entered a plea of guilty to the offence before the Downing Cente Local Court on 3 September 2025. Because of the way the matter is before me the maximum penalty is the jurisdictional limit of the Local Court, being 2 years.

Sequence 1, fail to comply with reporting obligations, contrary to s 17(1) of the Child Protection (Offenders Registration) Act 2000 (NSW) ('CP(OR)'). This offence otherwise has a maximum penalty of 5 years imprisonment.

Each of the Commonwealth offences attract mandatory minimum sentences of imprisonment by virtue of the Offender having a record of prior convictions for child abuse offences.

There is power to reduce the sentence below the prescribed mandatory minimum sentence, but that power is restricted to any discount applied for the utilitarian value of a guilty plea and/or for the Offender's cooperation with authorities. I sought to explain how I understand this all works in *R v Blick* [2024] NSWSC 569 at [14] to [24].

Time in Custody

The Offender was arrested on 2 June 2025. The Offender has been in custody since that time. Any sentence of imprisonment will be backdated so as to commence on 2 June 2025.

Overview of Submissions

The Crown submits that, in all the circumstances, and considering the applicable sentencing principles:

no sentence other than a term of immediate full-time imprisonment, involving a parole-based disposition, is appropriate in relation to the Commonwealth child sex offences;

no sentence other than a term of immediate full-time imprisonment is appropriate in relation to the State offence of failing to comply with reporting obligations (Sequence 1); and

there should be some degree of accumulation between the State and Commonwealth sentences.

The Offender submits that the offending when properly analysed can be seen to be very much towards the lower end of the range of objective seriousness for this type of offending, and that notwithstanding the mandatory minimum sentences applicable to the Commonwealth matters, that it would be open for me to find it appropriate to provide for a discount below the mandatory minimum, because of what is contended was cooperation with the authorities at the time the police attended his premises and because of the streamlined way in which the case was run.

The Offender accepts that no sentence other than a term of immediate full-time imprisonment is appropriate but that the Court should find total concurrency between the sentences for Counts 1, 2 and 3, as they reflect the same episode of offending and that the related State offence ought be subsumed within the total sentence for Counts 1, 2 and 3.

Sentencing for Commonwealth and State Offences

The Offender is to be sentenced for both Commonwealth and State offences. These jurisdictions have separate and quite different sentencing regimes which cause many difficulties when a Court is required to sentence for a combination.

In relation to Commonwealth offences, the Court must apply Pt IB of the Crimes Act 1914 (Cth) ('Crimes Act'). The fundamental principle being that the Court must impose a sentence 'that is of a severity appropriate in all the circumstances of the offence'.

In doing so, the Court is to take into account the matters listed in s 16A(2) to the extent that they are relevant and known.

Section 17A provides that a sentence of imprisonment can only be imposed if the Court is satisfied that no other sentence is appropriate in all the circumstances of the case.

For the State offence, the Court is to sentence the Offender in accordance with the Crimes (Sentencing Procedure) Act 1999 (NSW) ('CSPA'). The factors set out in s 3A are well known and need not be repeated.

The particular aggravating and mitigating factors that a Court is to consider are set out in ss 21A(2) and (3). Section 5 provides that the Court may only impose a sentence of imprisonment if it is satisfied that no other alternative penalty is appropriate.

Relevant Sentencing Principles

The principles applicable in sentencing for offences of this kind are well settled and understood. They include the following:

There is an intrinsic harm caused by sexual offences involving children: *R v Clarkson* (2011) 32 VR 361 ('Clarkson') at [3]. There is a paramount public interest objective in promoting the protection of children as child abuse conduct is not a victimless crime - conduct of this type creates a market for the corruption and exploitation of children: *The State of Western Australia v Collier* (2007) 178 A Crim R 310 at 42.

Unless exceptional circumstances exist, a sentence involving an immediate term of imprisonment is ordinarily warranted: DPP (Cth) v Garside [2016] VSCA 74 at [62].

General deterrence is a significant and will often be the primary sentencing consideration.

Specific deterrence, denunciation, punishment, and protection of the community are also very important: Walker v The Queen [2008] NTCCA 7 at [34]; R v Gent [2005] NSWCCA 370; (2005) 162 A Crim R 29 at [65].

It follows that an offender's personal mitigatory factors such as good character, age and prospects of rehabilitation will often be given less weight than might otherwise be the case.

The fact that an offender does not pay to access a child abuse website, or was not involved in the distribution or sale of child abuse material, does not mitigate the offending: R v Coffey [2003] VSCA 155; (2003) 6 VR 543 at [30].

The Commonwealth Matters

Relevant Sentencing Factors

Nature and Circumstances of the Offending: s 16A(2)(a) the Crimes Act; 21A(1)(c) CSPA

As the matter was determined by a jury, it is necessary for me to find facts which I am satisfied of beyond reasonable doubt consistent with the jury's verdict.

I am satisfied beyond reasonable doubt of the following facts:

Count 1

On 31 May 2025, the Offender participated in a video chat with an unidentified naked male via the website Bumjr.com using his Apple iPhone.

The unidentified male was or appeared to be under 18 years of age, was masturbating, ejaculated and reasonable people would regard the video chat as being in all the circumstances offensive.

The video chat constituted child abuse material.

In displaying the video chat on the Apple iPhone and participating in the video chat, the Offender accessed child abuse material.

Count 2

During his participation in the video chat, the Offender transmitted footage of himself masturbating to the unidentified male, this footage being indecent.

Through his consideration of the youthful appearance of the unidentified male and his ability to read the chat message which stated: "I'm 15 is that fine I like older men", the Offender believed the unidentified male to be under the age of 16.

Count 3

Approximately 20 seconds into the video chat, the Offender began to screen-record the video chat.

The Offender subsequently moved the video into the 'hidden folder' in his Photos application.

The screen-recorded video constituted child abuse material.

In addition to those facts, the parties agreed on facts for the purpose of the trial before the jury. Because of those agreed facts, the only real issue for the jury to decide was whether the Offender's eyesight was so impaired that he could not see the person on the video clearly enough to identify his age and could not read the text messages and did not believe the unidentified male was underage. By their verdict the jury clearly rejected the Offender's evidence to that effect. The most favourable finding I can make for him is that from the time of the text message he believed he was dealing with a 15 year old.

The factors that inform the assessment of the objective seriousness of offending involving child abuse material are well known and set out in many cases, including *R v Hutchinson* [2018] NSWCCA 152 at [44] to [45].

The Crown has emphasised that when assessing the objective seriousness of Counts 1, 2 and 3, I would have regard to the following matters:

The Offender engaged in a video chat with a real naked male child for nearly two minutes. The Offender screen-recorded the video chat from approximately 20 seconds into the exchange.

The child is depicted in the video chat masturbating and ejaculating.

The Offender, during the video chat, transmitted video footage of himself masturbating with an erect penis to the child.

The Offender was unequivocally 'placed on notice' of the child's age by virtue of his physical appearance, and then, by the child's representation that he was '15'. Despite this, the Offender reading and understanding that message, continued with the video chat and continued to transmit footage of himself masturbating to the child.

The Offender retained the screen-recorded video and placed it in the 'hidden folder' in the photo gallery on his Apple iPhone, which could only be accessed via face identification or a passcode known to the Offender.

The Offender had the screen-recorded video in his possession from the date he created it, being 31 May 2025, until his arrest on 2 June 2025.

The State Matter

When assessing the objective seriousness of Sequence 1 (the State matter) the Crown submits I would have regard to the following matters:

At the time of the offending, the Offender had been on the Child Protection Register for nearly 20 years.

The Offender failed to declare a Snapchat account to law enforcement as per his reporting obligations.

Objective Seriousness

As to objective seriousness of the Commonwealth matters, the Offender points out that notwithstanding an actual child was depicted in the video chat, the content involved solo masturbation, and there was no cruelty or harm occasioned, the content was not disseminated or paid for and the Offender was not proximate to the young person, although he did instigate the activity. It is submitted that the offending constituting Count 1 was impulsive and unplanned and that the young person did not look much younger than 15 years of age, and that there was no risk of the material being accessed or seen by any other person.

As to Count 2, the Offender points out that this offending was impulsive and unplanned, and limited to the short duration of a live stream. As to Count 3, there was no risk of the video being disseminated or seen by anyone else.

As far as the objective seriousness of all three Commonwealth offences, I accept the Offender's submission that they are each towards the lower end of the scale, however they cannot reasonably be said to be at the very lowest. The simple point is that from the time of the text message the Offender had no doubt that he was dealing with a 15 year old. He could have terminated the call at that point, but instead continued and then kept a copy secretly.

Personal circumstances of victims of the offence: s 16A(2)(d) Crimes Act; injury, loss or damage resulting from the offence: s 16A(2)(e)

There is intrinsic harm that is caused by the creation of child abuse material depicting real children, regardless of the fact that the personal circumstances of the child depicted in the video accessed, possessed, and transmitted to by the Offender may not be known. There are many judicial statements to this effect, one example is Clarkson.

Contrition and plea of guilty: ss 16A(2)(f) and (g) Crimes Act; ss 21A(3)(i) and (k) and 25D CSPA

The Offender has not shown any contrition with respect to Counts 1, 2 and 3. He entered pleas of not guilty to these charges, resulting in the matter proceeding to trial. As is his right, he maintains his innocence.

The Crown accepts that the Offender is entitled to a discount of 25% in relation to his plea of guilty to Sequence 1, which was entered at an early opportunity.

Deterrence and adequate punishment: ss 16A(2)(ja), (j) and (k) Crimes Act; s 3A CSPA

At the risk of repetition, general deterrence is a paramount factor in sentencing for offences of this nature. While s 16A(2) does not create a hierarchy of sentencing considerations, the need for primacy to be given to general deterrence in most cases involving child sex offending has been regularly recognised by Courts around Australia and is linked to the fundamental duty of every civilised society to protect all children.

The sentence to be imposed upon the Offender must make clear to other like-minded people within the community considering this type of behaviour, that these types of offences are abhorrent and that offenders will be met with stern punishment as a means of reflecting the community's attitude towards the sexual exploitation of children. To fail to adequately punish the Offender would undermine society's rejection of any exploitation of children, let alone for a sexual purpose.

Specific deterrence is also a matter of significance in this sentencing exercise, given that the Offender has a not insignificant history of sexual interest in pubescent and/or pre-pubescent male children and acting on that intent.

Specific deterrence also must also have significant weight with respect to Sequence 1 in circumstances where the Offender has an extensive history of failing to comply with his reporting obligations, despite the lengthy period of time he has been on the Child Protection Register.

Character, antecedents, age, physical or mental condition of the offender: s 16A(2)(m) Crimes Act; s 21A(3)(e)-(h) and (j) CSPA

The Offender is a 62 year old dealer of arts and antiques who was 60 years of age at the time of the offending.

The Offender has a criminal history of similar offending; his prior convictions do not aggravate the objective seriousness of the present offences and must not be taken into account when determining a sentence that is proportionate to the objective circumstances of the offending before the Court. However, the Offender is not entitled to any leniency that might otherwise be afforded to first time offenders. His criminal history is also very relevant to the important question of the Offender's prospects of rehabilitation, to which I will come.

The Offender's background and upbringing is unremarkable. He has a reasonably good work history, and by 2011 had built up his own business, which failed sending him bankrupt.

He was involved in a car accident in 2019 being hospitalised for a month and on crutches which combined with the impact of COVID-19 left him unemployed. He spent two years in rehabilitation and was diagnosed with PTSD as result of the accident.

After receiving a payout for his injury claim, he started a business in fine arts buying and selling from 2021, which appears to have been successful.

He has a gambling addiction and mental health issues. The gambling became more problematic after the COVID-19 shutdown era.

He has been diagnosed by Mr Awit, psychologist, with an adjustment disorder, mixed anxiety and gambling disorder. There is no suggestion that these disorders materially contributed to the offending.

In 2024, he suffered a significant injury to one of his eyes which was the subject of considerable evidence at the trial.

Otherwise, the Offender's mental and physical health has made his time in custody and will continue to make his time in custody more onerous, along with his advancing age and other medical issues, including his deteriorating eyesight for which he needs a further operation.

The Offender points out that despite a number of breaches of the Registerable Person Order, he has not committed any offences against children for decades, and that this is his first offence for dealing with child abuse material.

There are two significant episodes of earlier offending. The facts involved the touching of boys on a camping trip in 2002 and 2003 when the boys were under his care as he was a volunteer on a trip organised by Apex for sick and handicapped children in Western Australia to the NSW Snowy Mountains region.

The second led to a conviction in the United States of America in the 1990s, again for inappropriate sexual conduct against children, for which he appears to have spent about a year in custody, followed by another year in some sort of custody during a process where he was deported from the United States.

On top of all this the Offender has a history of breaching his reporting obligation as a person who has been on the CP(OR) Act for many years.

Likelihood of reoffending: s 16A Crimes Act

In this context it is submitted by the Offender that he has some prospects of rehabilitation albeit, Mr Awit expresses the opinion that the Offender is at a moderate to high risk of reoffending.

The fundamental difficulty with Mr Awit's opinion is that for reasons which the Offender was unable to explain, but which to my mind are obvious, he neglected to tell Mr Awit any detail about the offending in the United States when taking him through his life story.

To the extent it is necessary to say so, I reject entirely the Offender's evidence that he did mention this event, but that Mr Awit told him that it was not a matter of any great moment. The reason it is not referred to in Mr Awit's report is because the Offender did not explain the relevance of the earlier time in custody in the context of an interview with a person where it was obvious that such a history was relevant.

For that reason, I reject Mr Awit's opinion as to the Offender's prospect of reoffending, because it is based on a fundamental misunderstanding of the Offender's criminal history.

I consider the Offender presents a significant risk of reoffending.

Prospects of rehabilitation: ss 16A(2)(n) and 16A(2AAA) Crimes Act; ss 21A(3)(g) and (h) CSPA

When sentencing an Offender for a Commonwealth child sex offence, the Court must have regard to the objective of rehabilitating the person, including by considering whether it is appropriate to impose conditions about rehabilitation or treatment options (when making an order) and in determining the length of any sentence, to include sufficient time for the person to undertake a rehabilitation program: s 16A(2AAA) Crimes Act.

The objective of rehabilitation does not, however, displace the requirement that the sentence must be of a 'severity appropriate in all the circumstances of the offence' as per s 16A(1). That is, while the requirements of s 16A(2AAA) must be taken into account, the objective of rehabilitation should not swamp other very important sentencing considerations such as general and specific deterrence and adequate punishment.

In light of the history of not dissimilar offending against underage children, albeit many decades ago, and having put Mr Awit's opinion to one side, I think the best that can be said for the Offender's prospects of rehabilitation is that they are "guarded".

Mandatory Minimum Head Sentence

Section 16AAB of the Crimes Act provides for mandatory minimum sentences of imprisonment upon conviction for certain Commonwealth child sex offences committed on or after 23 June 2020, following a prior conviction for a child sexual abuse offence.

Sections 474.22(1) and 474.22A(1) of the Criminal Code are offences that attract a mandatory minimum head sentence of imprisonment for 4 years.

Section 474.27A(1) is an offence that attracts a mandatory minimum head sentence of imprisonment for 3 years. The effect of a mandatory minimum sentence can be summarised as follows:

First, it confines the power of this Court to prohibit it from imposing a sentence less than the statutory minimum, subject to s 16AAC of the Crimes Act, discussed below.

Second, it sets the beginning of the yardstick against which the offending to be sentenced and within which a Court is to exercise its sentencing discretion to determine the appropriate sentence.

Third, a mandatory minimum imposes an increased starting point for the appropriate term of imprisonment for the offence in the least serious circumstances and therefore operates to increase the appropriate term of imprisonment generally for that offence.

Sub-sections 16AAC(2) and (3) allows for a Court to ultimately impose a sentence less than the mandatory minimum, where it considers that adequate recognition cannot be given to an Offender's plea of guilty or cooperation without having to go below the mandatory head sentence.

On behalf of the Offender it was initially submitted that I should find that the Offender's cooperation with authorities at the time of his arrest, combined with the manner in which the trial was conducted, which I accept was in a very streamlined and minimalist basis focusing really on nothing more than evidence concerning the Offender's limited ability to see. Ultimately, this submission was withdrawn. I consider that concession to be appropriate. I accept that when police attended at his premises the Offender was polite, cooperative and helpful. I also accept the case was run on his behalf in a sensible and efficient way, those matters are relevant and weigh the balance in favour of the Offender when determining an appropriate sentence, however the type of co-operation here falls far short of what I consider to have been contemplated by the legislation: s 16AAC

Minimum term

The necessary deterrent and punitive effects of sentences must be reflected in both the head sentence and also in the minimum term to be served. The principles relevant to the setting of minimum terms have not been altered by the introduction of the mandatory minimum sentencing regime.

Totality and presumption of accumulation

Where, as here, an offender is to be sentenced for more than one offence, the preferable course is to fix an appropriate sentence for each offence and then determine whether to order that the sentences be served concurrently or cumulatively, in order to arrive at the appropriate total sentence to reflect the criminality before the Court.

As the Offender stands to be sentenced for three 'Commonwealth child sex offences', a presumption of accumulation for those offences applies under s 19(5) of the Crimes Act.

Despite this presumption, the Court can impose partially cumulated or concurrent sentences if satisfied that the overall sentence is of a severity appropriate in all the circumstances: s 19(6), but the reasons for the Court doing must be stated and the Court must cause the reasons to be entered into the Court's records: s 19(7).

On behalf of the Offender, it is submitted because the offending for the Commonwealth offences conduct is so closely related, Counts 1 and 2 are in effect different ends of the same live video stream and Count 3 is a single recording of that same encounter, that I should find total concurrency between the sentences for Counts 1, 2 and 3.

I accept those submissions and for that reason propose to find a large amount of concurrency between the Commonwealth offences, but consider it appropriate that there must be some accumulation.

Aggregate sentences

In *The King v McGregor* [2026] HCA 3; (2026) 427 ALR 699, the High Court confirmed that the Court has the power to impose aggregate sentences of imprisonment for multiple Commonwealth offences, including offences that attract mandatory minimum penalties, pursuant to s 53A CSPA.

Sentencing for Commonwealth and State offences

The Offender must be separately sentenced for each of the offences in accordance with the respective Commonwealth and State sentencing regimes. The Court is not permitted to fix a single aggregate sentence or a single non-parole period in respect of both Commonwealth and State sentences of imprisonment.

While setting the sentence for a State offence first is often considered the "simplest approach" (as was observed in *DPP v Swingler* [2017] VSCA 305; (2017) 269 A Crim R 526 at [78]), a Court does not necessarily have to adopt that approach.

The pre-release period / non-parole period

For the Commonwealth matters, all of the circumstances of the matter must be taken into account in determining a pre-release period of an appropriate length, just as they are when determining the 'head' sentence.

In *Hili v The Queen*; *Jones v The Queen* [2010] HCA 45; (2010) 242 CLR 520, the High Court made clear that the term of imprisonment to be served should not be determined with reference to a ratio or an assumed starting point.

The necessary deterrent and punitive effects of sentences must be reflected in both the head sentence and also in the minimum term to be served.

Under s 19AB of the Crimes Act, where an offender is convicted of a Commonwealth offence and the Court imposes a sentence that exceeds three years, the Court must fix a single non-parole period: s 19AB(1), unless it decides, it is not appropriate to do so: s 19AB(3).

A disconnect between the State and Commonwealth sentencing regimes – a practical problem

I am not the first Judge, nor will I be the last, to consider it necessary to again point out to both the Commonwealth and NSW Parliaments that the fact that there are different sentencing regimes imposed by each Parliament, in circumstances where it is very common for offenders to be charged and sentenced for a mixture of Commonwealth and State matters leads to unnecessary difficulty and confusion. Sentencing should not be as hard as it seems to have become when dealing with a combination of Commonwealth and State matters.

At the end of the day, sentencing is a practical exercise, the end result required being an appropriate sentence for the totality of the criminality before the Court, taking into account the objective seriousness of that criminality and the various other subjective features. Despite the very different approach required by each of the Commonwealth and State sentencing regimes, that is the fundamental goal of both. That is not to say the regimes do not need to be considered separately, but when it comes to an ultimate sentence or sentences to be imposed for a combination of Commonwealth and State offences, including the question of the minimum time an offender is to spend in custody there has to be an overlap. To consider each regime and sentence separately without noticing the other regime and sentence or, pretending they are entirely separate would be productive of almost inevitable error.

I have decided that the appropriate course here is to impose a fixed-term sentence for the State matter and then a total aggregate sentence for the Commonwealth matters, with the Commonwealth aggregate sentence commencing after the commencement date of the State sentence. A difficult question arises in that context as to how I ought set the “pre-release” period, which because of the structure of this sentence will be on the aggregate Commonwealth sentence, because the fixed-term State sentence will have expired long before any prospect of release under the aggregate Commonwealth sentence. I raised this issue with Counsel during the hearing. Neither was aware of any authority directly on the point. I invited further written submissions and gratefully received some from both the Crown and the Offender. In those submissions, the Crown reminded me that s 19AJ of the Crimes Act disentitles a Court from fixing a single non-parole period that purports to traverse both Commonwealth and State sentences of imprisonment, and that in *Spartaco Fasciale v R* [2010] VSCA 337 at [27], Weinberg J observed that:

“...it is well established that, when sentencing for both State and Commonwealth offences, separate sentences must be imposed. Moreover, it is not possible to fix a single non-parole period in relation to both State and Commonwealth sentences. If a non-parole period is considered to be appropriate, a separate such period should be fixed for the State sentences and for the Commonwealth sentences, and the commencement dates stipulated”

The Crown accepts that if I were to structure the sentence in the way I have proposed, the Offender will necessarily have served a period of actual imprisonment solely referral to the State offence prior to the commencement of the aggregate Commonwealth sentence. In those circumstances, the Crown accepts that looking at the matter by reference to the concept of totality this period would necessarily inform the length of the single non-parole period to be fixed in respect of the Commonwealth aggregate sentence.

The Crown also points out that as the Court is required to explain the effect of its orders to the Offender it is necessary to articulate the total effect of the sentences that have been passed including the actual minimum period that the Offender must spend in custody before being eligible for release, however, the Crown has submitted that this period cannot be characterised as an “aggregate non-parole period”.

On behalf of the Offender it was submitted that where a Court sentences an offender for more than one offence, or sentences an offender serving an existing sentence, the aggregate or overall sentence must be “just and appropriate” to the totality of the offending behaviour, referring to well-known passages in various cases including *Johnson v The Queen* (2004) 78 ALJR 616 at [18]; *Mill v The Queen* (1988) 166 CLR 59 at 63, and what Street CJ said in *R v Holder* (1983) 3 NSWLR 245.

Reference is also made to what was said in *R v MMK* [2006] NSWCCA 272 at [15] to [18] concerning the totality principle.

Ultimately, on behalf of the Offender the submission was that notwithstanding the State offence represents different offending and may be the subject of a fixed term, the overall sentence imposed must be just and proportionate to the totality of the offending ensuring further that the sentence is not crushing relative to that offending. It is further submitted that any effective finding allowing the Offender to serve his sentence for a period on parole should be preserved in the overall sentence, and that ultimately the minimum period for the overall offending needs to be considered in the context of all of the sentences being considered, both Commonwealth and State and the totality of the offending giving rise to those offences.

I am very grateful to the parties for those thoughtful and helpful submissions, they confirm that there does not appear to be any direct authority on this difficult point. In my opinion, the law of sentencing should not be allowed to turn on semantics, it is as I have said a practical thing. Whether a minimum period to be served in custody as a matter of totality is described as an “aggregate non-parole period”, or “the parole period”, or “the time the Offender must spend in custody before being eligible for parole” or the “pre-release period” or any other turn of phrase, the real issue is the actual outcome, which must be explained to the Offender in a way that can be understood together with a requirement for a Court to provide rational reasons that can be understood.

If one approaches the matter strictly in accordance with the Commonwealth statute, then I would set a non-parole period for the aggregate Commonwealth sentences and ignore the period that will have also been served in a practical sense for the State matter. That first, does not appear to

be fair; second, appears to be contrary to the intention of both Acts; third, is yet another example of the inability of the two separate statutory sentencing regimes being able to operate in a sensible fashion together, and fourth, will result in a minimum period of imprisonment which I consider disproportionate to all of the offending, both Commonwealth and State.

The way I propose to resolve the question is when I come to consider an appropriate period to be served before being eligible for release for the Commonwealth sentences, I will take into account the period to be served for the State sentence, and if I consider it appropriate in a practical sense to think about the matter by reference to a percentage, that percentage will be by reference to the practical overall effective aggregate sentence that I am imposing taking into account both the State and Commonwealth matters. The same result could be achieved by a different route, that is by imposing the pre-release period just by reference to the Commonwealth aggregate sentence, but in so doing, to take into account as a relevant circumstance the period served solely referable to the State sentence. Either way the result will be the same. That is not to say that I have lost sight of the obvious point that the two regimes are different and need to be considered separately. Rather, it is my attempt to resolve what I see as an unintended consequence of the two regimes not aligning perfectly. For my part, whilst I have tried to avoid using the phrase I find it close to impossible to think about this issue sensibly without conceptualising firstly an effective aggregate head sentence and then a non-parole period by reference to that. If that be error of law, it has no effect on the result.

Resolution

In relation to the three Commonwealth matters, after taking into account all the matters I have mentioned. I consider it appropriate for there to be an aggregate sentence for the three Commonwealth matters.

I have given considerable weight to general deterrence. Any conduct involving child abuse material is abhorrent and must be deterred. The maximum and mandatory minimum penalties imposed by Parliament reflect societies utter rejection of this type of conduct. Moreover, even though the earlier offending is many decades ago, there is a need for specific deterrence. The Offender's subjective case is largely unremarkable absent his criminal history. Nothing in that history, nor Mr Awit's opinion really provides any explanation for the conduct other than the Offender's perverted sexual interest in young children. The objective seriousness of the offending is in the context of offending of this kind towards the lower end, but is by no means at the lower end. I consider his prospects of rehabilitation to be at best guarded and his chances of reoffending to be significant. I do accept that the Offender's time in custody has been and will continue to be difficult, and that he is in poor health. I also have taken into account the impact on his very elderly mother – these matters weigh in his favour.

My indicative sentences for each Commonwealth matter are:

Count 1, 5 years imprisonment;

Count 2, 4 years imprisonment;

Count 3, 4 years imprisonment.

I take into account the principles of totality, the substantial overlap between the conduct constituting each offence and what I consider to be appropriate punishment for the conduct, and I have determined that an appropriate aggregate sentence for the three Commonwealth matters to be 6 years imprisonment.

As far as the State matter (Sequence 1), breaching the reporting obligations of the CP(OR) Act, I do consider general deterrence must be given significant weight. The whole point of the register is to stop conduct of the type identified, and it must be seen in the community to be a real consequence for breach. The objective seriousness cannot be said to be anything less than the mid-level.

I consider an appropriate sentence for the State matter to be 1 year and 4 months of imprisonment. After deduction of 25% for the early guilty plea, the sentence will be 1 year imprisonment.

Structure of Sentence - Effective Aggregate Sentence

I have determined that an appropriate effective aggregate sentence for all of the Commonwealth and State matters to be 6 years and 6 months.

The way I propose to structure the sentences is to commence the aggregate Commonwealth sentence 6 months after the commencement of a 1 year fixed term sentence for the State matter. The State sentence will be backdated to commence 2 June 2025 to take into account the time spent in custody.

Time Served to be Eligible for Parole

As far as the time for the Offender to spend in full-time custody before being eligible for parole, because of the way I propose to structure the sentence, there will be no non-parole period for the State matter, it will be a fixed-term of 1 year. In relation to the Commonwealth sentence, whilst there is no need to make a finding of special circumstances as there would be under the State regime I do find special circumstances because I accept that the Offender's time in custody has and will be more onerous than for a more able person, and I give some weight to the need for the Offender to look after his ageing mother. It is not her fault that he is being sent to prison. It is true that I have also factored those matters into the head sentence in the Offender's favour and there is a risk of double-counting. Notwithstanding that, I feel the ultimate result I have arrived at is appropriate.

For the reasons I have explained in light of the structure of the combined sentences, I propose that the Offender be eligible for release on parole after serving 60% of the effective aggregate sentence for both the State and Commonwealth matters of 6 years and 6 months, which after a little rounding in favour of the Offender is 3 years and 10 months. That period is to run from 2

June 2025. If that reasoning is legally wrong, then I reach the same result by taking into account the period of time referable only to the State offence to conclude that the minimum time in custody for the Commonwealth offence ought be 3 years and 4 months, to be calculated from the commencement of the aggregate Commonwealth sentence which has the same practical result.

Registrable Persons Order and Forfeiture Order

There is no dispute but that I should make an order pursuant to s 23ZD of the Crimes Act for the forfeiture of the Apple iPhone, nor that in the circumstances the Offender must be placed on a Registrable Persons Order under s 3C of the C(PO)R Act for life. I will make those orders.

Orders

For those reasons:

For the State matter (Sequence 1), after deducting 25% for the guilty plea, I sentence the Offender to a fixed term of imprisonment of 1 year to commence to 2 June 2025 and expire 1 June 2026.

For the Commonwealth matters, Counts 1, 2 and 3, I sentence the Offender to an aggregate term of imprisonment of 6 years to commence 2 December 2025 and expire on 1 December 2031.

The minimum time the Offender is to spend in custody before being eligible for parole years is 3 years and 10 months also to date from 2 June 2025 to expire on 1 April 2029, which is the first date the Offender will be eligible for parole.

Order that pursuant to s 23ZD of the Crimes Act 1914 (Cth) and upon the application of the Director of Public Prosecutions the following items are forfeited to the Commonwealth:

Apple iPhone (X0005010559)

Pursuant to s 3C of the Child Protection (Offenders Registration) Act 2000 (NSW), the Offender is to be a registerable person, required to be recorded on the NSW Child Protection Register for life.

Direct the Court Registry to provide a copy of the Registerable Person Order, and the Form 3 documents to corrective services.

Direct Corrective Services to then provide a copy of the Registrable Person Order and the Form 3 document to the Offender.

Direct the Court Registry to provide a copy of the Registrable Person Order and the Form 3 document to the New South Wales Commissioner of Police, and the supervising authority of the Offender.

Child Protection (Offenders Registration) Act 2000 (NSW) Explanation

It is common ground that the CP(OR) Act applies.

Even though the Offender has been on the register for many decades, and if anyone knows the consequences of breach it must be him, I am required to give the Offender the following explanation as to his obligations under the CP(OR) Act following his release, which I now do:

I have made a Registrable Person Order under the CP(OR) Act, making you a person required to be recorded on the NSW Child Protection Register for the remainder of your life. The reporting period will commence on the day you are released from custody.

You will be subject to reporting obligations, under which you will have an ongoing obligation to make reports of particular information to police within a particular time period.

A written notice of your reporting obligations will be provided to you to sign, acknowledging that you have been notified of your various reporting obligations. You should read the document carefully and seek legal advice if you do not understand it. It is very important that you clearly understand your obligations.

Your reporting obligations include that you will need to make an initial report to a police station, attending in person with identification documents, within 5 days after your release from custody or otherwise after the date of sentence. You must complete an initial personal information report, providing various personal information, including with respect to your address, tattoos or identifying marks, your work, your club or organisation affiliations, vehicles you use, your use of communication devices and communications services, any prior criminal record or time in custody in NSW or elsewhere, your passport details, any travel outside NSW and any contact or residence with a child.

You must then further report in person to a police station within a specified period of time if there are any changes to relevant reportable circumstances. You must also report in person to a police station to complete an annual report each year.

You must also report information to police with respect to any intended international travel, or travel within Australia outside NSW, and after returning to NSW.

You may also, without notice, be subject to checks by police to ascertain if you are complying with your reporting obligations. Under s 16C of the CP(OR) Act, police hold powers to enter properties or vehicles to conduct these checks and may require you to cooperate in police gaining access to data held in any electronic devices.

Sections 17 and 18 of the CP(OR) Act provide for offences of failing, without reasonable excuse, to comply with reporting obligations, or of furnishing false or misleading information in connection with complying with reporting obligations. Such offences are punishable by imprisonment of up to five years or a fine of \$50,000, or both.

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Decision last updated:

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