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IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA412/2023
[2025] NZCA 15

	BETWEEN	BARRIE JOHN WILLIAMS Appellant
	AND	NEW ZEALAND POLICE Respondent

Hearing:	30 May 2024 (further submissions received 7 June 2024)
Court:	Cooper P, French and Ellis JJ
Counsel:	N Bourke for Appellant I R Murray and T Zhang for Respondent
Judgment:	19 February 2025 at 3 pm

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by French J)

Table of Contents

Introduction

[1] To what extent is registration on the Child Sex Offender Register[1] a relevant factor to be taken into account in mitigation of sentence?

[2] That is the key issue for determination in this appeal.

[3] Counsel for Mr Williams says that in accordance with established sentencing principles, the punitive effect of registration should be treated as a factor informing the length of a sentence as well as the choice between a custodial and a non-custodial sentence. The Crown however contends that registration should generally be an irrelevant consideration in all but a few exceptional cases.

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[1] Established under s 10 of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (the Act).

[4] The issue arises in the context of a sentence of eight months' imprisonment imposed on Mr Williams for the offence of exposing a young person to indecent material.[2]

Background

The offending

[5] The complainant was a 14 year old girl who was employed at the same workplace as Mr Williams. On 15 November 2022, she updated her Facebook profile picture. This resulted in Mr Williams, then aged 40, sending her a message saying "[o]h, that's a fine looking profile picture". He continued to send her complimentary messages, often asking for "fit checks".[3] Then, in response to a photo of the complainant fully clothed, he replied with a selfie accompanied by the caption "[l]ooking at your snaps trying to not look too hard at your chest". This made the complainant feel uncomfortable and she ceased social media contact with Mr Williams.

[6] On 18 November 2022, Mr Williams approached the complainant at work and said "so, are you going to keep me up all night again". This again made the complainant feel uncomfortable. She left work and went home.

[7] Later that same evening, Mr Williams sent several messages to the complainant via Snapchat including asking whether she was "all undressed in bed?". She replied she was in her pyjamas. During the remainder of the evening, Mr Williams sent a series of photos of himself to the complainant via Snapchat.

[8] These photos included:

(a) a photo showing him with his jeans unzipped and underwear exposed;

(b) a photo showing his lower torso, including the underwear he was wearing clearly showing the outline of his genitalia;

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2 *Police v Williams* [2023] NZDC 9051 [DC judgment]; and Crimes Act 1961, s 124A — maximum period of imprisonment of three years.

3 "Fit checks" is a common term for "outfit checks" of what the complainant was wearing that day.

(c) a photo with the caption "[y]our undies as dope as mine";

(d) a photo showing him lying on his stomach, fully naked, with his buttocks clearly exposed and visible; and

(e) a photo taken in a mirror with a visibly naked upper torso.

[9] When spoken to by police, Mr Williams admitted he knew the complainant was only 14 and that what he had sent her was indecent. He was charged with the offence of exposing a young person to indecent material under s 124A of the Crimes Act 1961 and pleaded guilty. The maximum sentence for this offence is three years' imprisonment. It is also a qualifying offence for registration on the Child Sex Offender Register.[4]

[10] In her victim impact statement, the complainant said she felt really overwhelmed as a result of the offending and that her trust had been tested to the maximum. She had been in tears multiple times at work and talked of being "lost, upset, drained and ill". She also expressed bewilderment as to why Mr Williams had selected her as his victim and why he seemed unfazed by it all. She was seeking counselling to help her deal with what had happened.

Previous offending

[11] In 2012, Mr Williams was convicted of sexual connection with a vulnerable 14-year-old girl. He had met her at a respite care facility where she was in residence and where he was working one day a week while studying for a nursing degree. He had assisted in her care. His offending was described by the sentencing Judge as a gross breach of trust.[5] The sentencing notes also record information that up until her contact with Mr Williams, the complainant had been progressing well but thereafter her mental health deteriorated to the point that she became suicidal and attempted to kill herself four times.

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4 The Act, s 4 and sch 2 cl 1(a)(i).

5 *Police v Williams* DC Palmerston North CRI-2012-054-1149, 20 August 2012 at [8], [11] and [18].

[12] The Judge sentenced Mr Williams to two and a half years' imprisonment.[6] After his release on parole, Mr Williams committed a further offence of breaching his release conditions by making contact with the complainant and he was recalled to prison.

Previous treatment

[13] Between March 2013 and January 2014, Mr Williams attended 17 offending-specific counselling and treatment sessions with two departmental psychologists. As part of that treatment, he was provided with information relating to the long-term emotional and psychological damage that sexual offending against children causes. During the treatment sessions, he appeared open to discussing his offending and this resulted in the development of a comprehensive safety and relapse prevention plan. Following his recall to prison, a different plan was put in place.

Sentencing on the charge at issue in the District Court

[14] The sentencing Judge in the District Court was Judge Greig. He agreed with the assessment of the pre-sentence report writer that because the offending involved grooming a child, it was demonstrative of ongoing participation in sexual offending.[7] The Judge also referred to a comment in the pre-sentence report that the offending was attributable to a deviant sexual interest in children.[8]

[15] In the Judge's view, the appropriate starting point for the offending was a term of imprisonment of nine months. He uplifted that starting point by two months on account of the 2012 offending, before applying a 25 per cent discount for the early guilty plea to arrive at eight months' imprisonment.[9]

[16] That rendered Mr Williams eligible to be considered for home detention. However, the Judge stated he was not prepared to grant home detention because, in his assessment, that would not be a sufficient deterrent or denunciation.[10]

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6 At [18].
7 DC judgment, above n 2, at [19].
8 At [23].
9 At [35].
10 At [36].

[17] In imposing a custodial sentence, the Judge noted it would mean automatic registration on the Child Sex Offender Register but added that even if registration had not been the automatic consequence of the sentence, he would still have directed it having regard to the risk posed by Mr Williams.[11]

High Court appeal

[18] Mr Williams appealed his sentence to the High Court on the grounds the sentence was manifestly excessive and that he should have been granted home detention. The appeal was dismissed by Palmer J.[12] He considered that, in the circumstances, the prison sentence was "well justified" and not manifestly excessive.[13] The Judge further noted that these conclusions were not affected by the fact the sentence automatically required registration as a child sex offender. That, Palmer J said, was the consequence of the offending.[14]

Application for leave to appeal to this Court

[19] Dissatisfied with that outcome, Mr Williams then sought leave to appeal his sentence to this Court on three grounds.[15] The first was that both the District Court and the High Court failed to adequately account for the impact of registration on the Child Sex Offender Register; the second was that there should not have been an uplift for the previous conviction; and thirdly that the lower courts failed to impose the least restrictive outcome.

[20] In its leave decision, this Court held that only the first ground potentially raised an issue of general and public importance. The remaining two were, in its view, fact specific and a matter of discretionary assessment. It also stated that putting aside the first alleged error, the reasoning of the lower Courts was sound.[16]

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11 At [37] and [39].
12 *Williams v Police* [2023] NZHC 1935 [HC judgment].
13 At [10].
14 At [10(e)].
15 Leave was required because the appeal to this Court is a second appeal: see s 253 of the Criminal Procedure Act 2011. Leave may only be granted if the proposed appeal raises an issue of general or public importance, or if there is a risk that a miscarriage of justice has occurred or may occur if the appeal is not heard.
16 *Williams v Police* [2023] NZCA 745 [CA leave judgment] at [7].

[21] As regards the first ground, the Court noted that while there is a consensus in the authorities that registration is punitive, the sentencing response to that fact is not yet settled. It considered that this case, involving as it does a custodial sentence for relatively minor offending, provided a proper vehicle for considering that issue.[17]

[22] It therefore granted Mr Williams leave to appeal, the specific issues for consideration being identified as:[18]

> (a) whether the impact of registration is a relevant factor to be taken into account when deciding [whether] to impose a custodial sentence; and if so (whether generally or in this case)
>
> (b) whether the [c]ourts below failed to give adequate consideration to this factor.

[23] As will become apparent, counsel's submissions at the hearing before us ranged more widely than the issues identified in the leave decision.

[24] We now turn to a brief exposition of the legislative framework. For ease of reference, we refer throughout the remainder of the judgment to the Child Sex Offender Register as "the Register".

The legislative framework

[25] The Register was established by the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (the Act). The Act came into force on 14 October 2016.

[26] The purpose of the Act is expressly stated in s 3 as being to:

> ... establish a Child Sex Offender Register that will reduce sexual reoffending against child victims, and the risk posed by serious child sex offenders, by—
>
> (a) providing government agencies with the information needed to monitor child sex offenders in the community, including after the completion of the sentence; and
>
> (b) providing up-to-date information that assists the Police to more rapidly resolve cases of child sexual offending.

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17 At [10].
18 At [11].

[27] Under the Act, the responsibility for establishing and administering the Register rests with the Commissioner of Police (the Commissioner).[19]

[28] Section 7 identifies registrable offenders — that is to say, offenders to whom the Act applies — as being persons convicted of a qualifying offence who have either been sentenced to imprisonment or sentenced to a non-custodial sentence and made subject to a registration order. The qualifying offences are listed in a schedule to the Act.[20] As indicated, the schedule includes the offence for which Mr Williams was convicted.

[29] The two categories of registrable offenders delineated in s 7 reflect the fact that under the Act, registration is mandatory for those sentenced to a custodial sentence for a qualifying offence but not for those given a non-custodial sentence.[21]

[30] In the case of the former, once the prison sentence is imposed the offender automatically becomes subject to the registration regime without the Court needing to make a specific order to that effect.[22] However, if a non-custodial sentence is imposed, registration is at the discretion of the sentencing court and may only be imposed by virtue of s 9 if the court is satisfied that the offender "poses a risk to the lives or sexual safety of [one] or more children, or of children generally".[23] A registration order made under s 9 is made at the time of sentencing.[24] A s 9 registration order is a sentence for the purposes of pt 6 of the Criminal Procedure Act 2011, which means it can be appealed.[25]

[31] For the purposes of assessing the risk posed by an offender sentenced to a non-custodial sentence, s 9(3) sets out a list of relevant mandatory factors. These include the seriousness of the offence, the period of time that has elapsed since the offence was committed, the respective ages of the offender and any victim, any

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19 The Act, ss 10 and 11.
20 Schedule 2.
21 See s 9.
22 Although the sentencing judge must explain to the offender that they are a registrable offender under the Act: s 12.
23 Section 9(2).
24 Subject to two very limited exceptions that allow orders to be made after sentencing: sch 1 cls 4 and 8.
25 Section 9(4); and Criminal Procedure Act, pt 6 subpt 4.

assessments or submissions relating to the risk posed by the offender, any evidence or submissions from the victim, and "any other matter the court considers relevant".

[32] In the Supreme Court decision of *D (SC 31/2019) v New Zealand Police*, the inquiry under s 9 was described as involving a two-step process.[26] First, the court must determine whether the threshold requirement of a real or genuine risk has been met applying the s 9 factors.[27] The risk need not be a high one.[28] Second, if the threshold is met, the court must then consider whether to exercise its discretion to make a registration order, having regard to the nature and seriousness of the risk posed by the offender and whether the risk is sufficient to warrant the making of an order.[29] That was said to involve balancing the protective objectives of the registration order against the level of intrusion into the offender's rights.[30]

[33] The provisions of the Act are retrospective, meaning they have effect before the Act's commencement date of 14 October 2016. The Act is expressed to apply to persons who: committed a qualifying offence before 14 October 2016 but who were convicted and sentenced after that date, offenders who were serving a prison sentence[31] for a qualifying offence on 14 October 2016, and those who were convicted of a qualifying offence before 14 October 2016 but sentenced thereafter.[32]

[34] The consequences of being placed on the Register primarily involve reporting obligations. Under the Act, a breach of the reporting obligations is a criminal offence.[33] The reporting obligations begin immediately the registrable offender ceases to be in custody or in the case of an offender sentenced to a non-custodial sentence and a s 9 registration order, they begin at sentencing.[34]

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26 *D (SC31/2019) v New Zealand Police* [2021] NZSC 2, [2023] 1 NZLR 213 at [104] per Winkelmann CJ and O'Regan J and [260] per Glazebrook J.
27 At [104]–[105].
28 At [105] and [128].
29 At [106]–[108].
30 At [108].
31 Or who were subject to associated restrictions: the Act, sch 1 cl 1.
32 Section 5 and sch 1 cls 1 and 5.
33 Sections 39 and 40.
34 Section 34.

[35] Within 72 hours of being released from custody or being made subject to a s 9 registration order, an offender must make what is called an "initial report" of all relevant personal information to the Commissioner.[35]

[36] What constitutes "relevant personal information" is defined in s 16. It includes name, date of birth, place of residence, details about all children residing there, postal address, employment details, club/organisation affiliations with child membership or participation, motor vehicles, distinguishing features of the offender such as tattoos or scars, passport details, telecommunication details, internet service provider details, online usernames, details of any website administered or owned by the offender, and email addresses.

[37] The reporting obligations are ongoing. Starting in the first year after the initial report, the offender must make a periodic report in each year thereafter.[36] The purpose of the periodic reports is to confirm that the information in the previous report remains correct.[37] Any change to the personal information, other than a change of address, must be reported to the Commissioner within 72 hours of the change occurring.[38] In the case of a change of address, that must be notified to the Commissioner at least 48 hours before the change occurs.[39] A change of name under the Births, Deaths, Marriages, and Relationships Registration Act 2021 requires prior approval from the Commissioner, and failing to obtain that approval is a criminal offence.[40]

[38] There are also special provisions relating to travel plans.[41] If a registrable offender intends to travel within New Zealand away from their registered residential address for more than 48 hours, they must report the intended travel to the Commissioner 48 hours in advance.[42] The report is required to include each address where the offender intends staying, the dates of the various stays, whether a child resides or is likely to reside at any of the addresses, and the date of return.

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35 Section 72.
36 Sections 18 and 19.
37 Section 18(3).
38 Section 20(1)(b).
39 Section 20(1)(a).
40 Section 53.
41 Sections 21–23 and sch 1 pt 2.
42 Section 21(1)–(2).

[39] Overseas travel plans must be reported to the Commissioner at least 48 hours before departure with details as to the date of departure, the address where the offender intends to stay and the date of return or a statement of their intention not to return to New Zealand.[43] On returning, the offender must report their return to the Commissioner and also present their passport for inspection and copying.[44]

[40] The various reports may be made at a specified police station or at a place approved by the Commissioner, which may include the offender's own residential address.[45] For the purposes of ongoing identification, the Act authorises a person receiving the report to take fingerprints or photos of the offender. Although most reports must be made in person, electronic reporting may be permitted by the Commissioner in respect of some reports.[46]

[41] The length of the reporting period — and hence the period of time for which an offender remains on the Register — is determined by the class of the qualifying offence and whether the offender received a custodial sentence.[47]

[42] Schedule 2 of the Act lists three classes of offences. Of these, class 3 offences are the most serious. They include sexual violation and sexual connection against children and young persons. The reporting period for class 3 offences in respect of which the offender has been sentenced to imprisonment is life.[48]

[43] Class 2 offences include indecent acts against children and young persons. The reporting period for an offender who has been sentenced to imprisonment for a class 2 offence is 15 years.[49]

[44] The offence committed by Mr Williams in this case — exposing a young person to indecent material — is a class 1 offence. Other offences categorised under the Act as class 1 offences include the offence of meeting a young person following

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43 Section 21(4) and (6).
44 Section 23(2).
45 Section 24.
46 Section 25.
47 Section 35.
48 Section 35(1)(a).
49 Section 35(1)(b).

sexual grooming, promoting child sex tours and various offences under the Films, Videos, and Publications Classification Act 1993. The reporting period for an offender who has been sentenced to imprisonment for a class 1 offence is eight years.[50]

[45] Where an offender is sentenced to a non-custodial sentence for a qualifying offence, and the sentencing judge makes a s 9 registration order, the reporting period is always eight years.[51] That is so regardless of which class the qualifying offence falls into.

[46] It follows from the above that even if Mr Williams had been sentenced to home detention and the Judge had made a registration order, the reporting period would have been the same as the mandatory eight year period Mr Williams currently faces consequent on his custodial sentence.

[47] Suspension of reporting obligations is possible under ss 36 and 38 of the Act.

[48] Section 36 empowers the Commissioner, either on application by the offender or the Commissioner's own initiative, to suspend the reporting obligations if satisfied on reasonable grounds that the offender does not pose a risk to the lives or sexual safety of children and is either terminally ill or suffering from a health condition that makes it difficult or impossible for the offender to fulfil their reporting obligations. The suspension period is not taken into account for the purposes of calculating when the offender's reporting period ends.

[49] Section 38 empowers the District Court, on application by the offender, to suspend indefinitely a lifetime reporting obligation provided certain conditions are met. The offender must have been subject to lifetime reporting obligations for at least 15 years, not be on parole or subject to any other post-sentence order,[52] and not have applied for and been declined a suspension in the last five years. The offender is also required to satisfy the court that they do not pose a risk to the lives or sexual safety of children. The same factors that are required to inform the decision whether to make an order under s 9 detailed above at [31] must be applied.

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50 Section 35(1)(c).
51 Section 35(1)(d).
52 For example, an extended supervision order or a public protection order.

[50] The provision that became s 38 was added at the select committee stage of the legislative process.[53] It was added in response to a concern expressed by the Attorney-General in his report to Parliament under s 7 of the New Zealand Bill of Rights Act 1990.[54] The concern was that in the absence of a mechanism for review, the imposition of lifelong reporting obligations was inconsistent with s 9 of the New Zealand Bill of Rights Act.[55] Section 9 confirms the right not to be subjected to disproportionately severe treatment or punishment.

[51] Finally, another important feature of the Act is that access to the Register is restricted. It is not publicly available and under s 41 of the Act, only persons authorised by the Commissioner may access it. The Act also requires the Commissioner to issue guidelines regarding access so as to ensure it is only accessed for purposes aligned with the purposes of the Act.[56]

[52] There is provision for limited sharing of information on the Register between government agencies for purposes aligned with the purposes of the Act,[57] as well as provision for information on the Register to be disclosed to an affected person where there is a threat to a child's life, sexual safety or welfare.[58]

[53] The government agencies who are permitted to share information are defined in s 43 as the Police, the Department of Corrections, the Ministry of Social Development, Kāinga Ora, the Department of Internal Affairs, the New Zealand Customs Service, and "any public sector agency … that the Minister [of Police], after consultation with the Privacy Commissioner, identifies as a specified agency by notice in the *Gazette*". Gazette notices have added Oranga Tamariki and the

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53 Child Protection (Child Sex Offender Register) Bill 2016 (16–2), cl 36A.
54 Child Protection (Child Sex Offender Register) Bill 2016 (16–2) (explanatory note) at 4.
55 Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Child Protection (Child Sex Offender Register) Bill* (6 May 2015) [section 7 report] at [14], [17] and [21].
56 The Act, ss 41 and 43.
57 Section 43.
58 Section 45.

Registrar-General of Births, Deaths and Marriages to the government agencies permitted to share information.[59]

Application of the Act

[54] We were not provided with any evidence as to the current number of offenders on the Register. Mr Murray for the Crown however advised us that an Official Information Act 1982 request made in late 2021 or early 2022 indicated there were some 3,196 individuals on the Register.

[55] As regards the caselaw, in terms of the key issue before us, there have been relatively few decisions on point.

[56] The first decision in time is a 2017 decision of this Court in *Bell v R*.[60] Mr Bell had been convicted of sexual offending including unlawful sexual connection and indecent assault of children and teenage girls over a 15-year period. He was sentenced in the High Court to eight years' imprisonment with a minimum period of five years.[61] He had previous convictions for sexual offending and, in the view of the sentencing Judge, had come close to preventive detention.[62]

[57] The main focus of the appeal as regards the Register was on retrospectivity, Mr Bell having been sentenced prior to the Act coming into force. The relevant ground of appeal involved an argument that his sentence should be reduced because he was now subject to the punitive registration regime, something that had not been contemplated at sentencing. This Court acknowledged that although the primary purpose of the Act was the protection of further potential victims from harm, its effects were punitive.[63]

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59 "Child Protection (Child Sex Offender Government Agency Registration) (Specified Agency) Notice 2017" (9 March 2017) 33 *New Zealand Gazette* 1050; and "Child Protection (Child Sex Offender Government Agency Registration) (Specified Agency) Notice 2020" (8 February 2020) *New Zealand Gazette* No 2020-go669.

60 *Bell v R* [2017] NZCA 90 [*Bell* (CA)].

61 *R v Bell* [2016] NZHC 51 [*Bell* (HC)].

62 At [5], [13]–[14] and [18].

63 *Bell* (CA), above n 60, at [26].

[58] The Court further pointed out that the reason why the Act was expressly intended to apply to offenders who were sentenced prior to its enactment was for community protection reasons and went on to state:[64]

> It is entirely unlikely that Parliament, in legislating retrospectively in this fashion, intended that its effect should be to discount sentences already imposed or to be imposed in the future. That would, we venture, be contrary to the underlying purpose of the measure.

[59] Since *Bell*, there has been a number of relevant High Court decisions. These have consistently rejected arguments that the punitive consequences of registration should be taken into account as a discrete discount which in itself or in combination with other discounts would reduce a prison sentence to under two years and so bring the sentence within the threshold for home detention.[65]

[60] At the same time, following the decision of Ellis J in *Bird v Police*,[66] several High Court judges have also accepted it is open to a sentencing judge to have regard to the Act and the effect of registration when deciding between prison and home detention, but only once the home detention threshold is met by reference to other factors.[67]

[61] Thus, for example in an appeal against a 21-month prison sentence, Thomas J held that a factor which may be relevant in deciding whether to opt for home detention combined with a s 9 registration order was the difference between the 15 and eight-year reporting periods under the Act.[68]

[62] The relevance of registration at sentencing has also been held to arise from the fact that registration provides protection for the community. Thus, in *C v Police*, where there were compelling personal factors favouring home detention rather than imprisonment, registration was taken into account because when combined with home

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64 At [26].
65 *Hughes v R* [2022] NZHC 2835 at [40]; and *Hales v R* [2023] NZHC 670 at [64].
66 *Bird v Police* [2017] NZHC 1296.
67 *Partridge v R* [2017] NZHC 2440 at [25]; *Hughes v R*, above n 65, at [40]; *C v Police* [2019] NZHC 3431 at [57]; and *T v R* [2018] NZHC 3274 at [33] and n 11.
68 *T v R*, above n 67, at [33].

detention it meant concerns about community safety would be met while the offender could continue to be a contributing member of the community.[69]

[63] In *Bird* itself, it was the punitive consequences of registration on the offender that were considered to make it relevant to the decision of whether to commute a prison sentence to home detention.[70] Ellis J held this was required by s 8(h) of the Sentencing Act 2002. Section 8(h) states that in sentencing an offender the court must:

> …take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe …

[64] Mr Bird was a first time offender aged 43. He had been sentenced in the District Court to 15 months' imprisonment on charges of doing an indecent act on a young person and arranging to meet a young person following grooming in relation to a 15 year old who was close to turning 16.[71] Mr Bird was assessed as at low risk of reoffending and the length of his sentence rendered him eligible for home detention. On appeal in the High Court, the Crown conceded that if home detention were to be imposed, Mr Bird should not be placed on the Register.

Arguments on appeal

The appellant's submissions

[65] Counsel for the appellant, Mr Bourke, accepted that registration was appropriate in this case. What he challenged was the failure of the lower courts to take registration into account as a reason not to impose a prison sentence.

[66] By the time of the hearing before us, Mr Williams had served his prison sentence and the six-month period of his release conditions had expired. He remains of course on the Register, his eight-year reporting obligations beginning on his release from prison. However, given the acknowledged appropriateness of registration, he would still be on the Register even if he had been sentenced to a non-custodial sentence

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69 *C v Police*, above n 67, at [58].
70 *Bird v Police*, above n 66, at [41] and [45].
71 *R v Bird* [2017] NZDC 3360.

combined with a s 9 registration order.[72] The only difference in terms of the Register is that a non-custodial sentence would have resulted in an earlier start date for the eight-year period.

[67] It might therefore be thought this appeal is essentially moot. However, Mr Bourke submitted that if we accept that registration was a relevant consideration at sentencing and a community-based sentence was warranted, then the appropriate disposition of the appeal would be to substitute a sentence of conviction and discharge. That approach, he submitted, has been taken by this Court before in circumstances where the Court was satisfied the correct sentence was intensive supervision not imprisonment, but the appellant had already served the prison sentence.[73] In light of the acknowledgment that registration was appropriate, we assume it is contemplated that the conviction and discharge would be accompanied by a s 9 order. We doubt very much whether there would be jurisdiction to do that, but for reasons we will go on to explain, it has proved unnecessary for us to reach a concluded view on the point.

[68] As a fall back position, Mr Bourke submitted that if we were to consider that imprisonment was warranted, then rather than the eight months imposed, it would be open to us to hold that a shorter sentence of two to three months' imprisonment would have adequately met the Sentencing Act purposes and principles.

[69] A third fall back position was the imposition of an order to come up for sentence if called on.

[70] The central theme of Mr Bourke's comprehensive submissions was that registration directly engages the issue of sentence proportionality, by which he meant the need for a sentence to be proportionate to the features of the offending and the personal circumstances of the offender. That, he pointed out, was a cardinal principle of sentencing,[74] enshrined in s 9 of the New Zealand Bill of Rights Act and s 8(g) and (h) of the Sentencing Act as well as being recognised in Supreme Court decisions such as *Fitzgerald v R*.[75]

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72 See above at [45]–[46].
73 *Crighton v R* [2020] NZCA 33 at [10].
74 Citing *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [8].
75 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [105] per Winkelmann CJ.

[71] In *Fitzgerald*, a majority of the Supreme Court allowed an appeal against a sentence which had been imposed under the mandatory provisions of the "three strikes" regime[76] on the grounds that the sentence was disproportionately severe in breach of s 9 of the New Zealand Bill of Rights Act.[77] The Court held that Parliament did not intend in enacting the three strikes regime to require judges to impose sentences that breach s 9 and New Zealand's international obligations.[78]

[72] As for the provisions of the Sentencing Act cited by Mr Bourke, s 8(g) requires the court to impose the least restrictive outcome that is appropriate in the circumstances. Section 8(h) is the provision relied upon by the High Court in *Bird*. As already mentioned, it requires the court to take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with an offender that would otherwise be appropriate would be disproportionately severe.

[73] Developing these central arguments, Mr Bourke noted that the proportionality assessment commonly includes considering ancillary orders and extra-curial penalties. "Extra-curial penalties" or "extra-curial punishments" are terms used to denote a punishment that is not imposed directly by the sentencing court itself but by a third party or by legislation as a consequence or incident of conviction or sentence. Given that registration is a penalty, Mr Bourke contended there was no reason, as a matter of principle or policy, why it should not be taken into account at sentencing in just the same way as loss of employment and immigration consequences are. The fact that registration on the Register is not listed in the Sentencing Act as a mitigating factor was not significant, given that the statutory list is not exhaustive and that the Sentencing Act expressly authorises the Court to take into account any mitigating factor it "thinks fit".[79]

[74] By way of further analogy, Mr Bourke also relied on the fact that allowances in the form of discounts are routinely given at sentencing for restrictive bail conditions as well as forfeiture of property and have also been given in relation to parole

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76 These provisions were found in ss 86A–86I of the Sentencing Act 2002.

77 *Fitzgerald v R*, above n 75, at [79]–[81] per Winkelmann CJ, [167] per O'Regan and Arnold JJ and [239] per Glazebrook J.

78 At [123] and [128]–[130] per Winkelmann CJ, [203] per O'Regan and Arnold JJ and [247]–[248] per Glazebrook J.

79 Sentencing Act, s 9(2) and (4)(a).

eligibility/lifelong parole. He acknowledged that the availability of an extended supervision order has been held most unlikely to justify a reduction in the end sentence — a point made by the Crown — but submitted extended supervision orders were in a different category to registration.[80] At sentencing, extended supervision orders are only a prospective possibility. And, further, once an order is made, it must be reviewed by the courts. Thus, in Mr Bourke's submission, by its very nature an extended supervision order is judicially controlled so as to ensure its proportionality.[81]

[75] As for the distinction drawn in the High Court authorities between length of sentence and type of sentence — registration being relevant to the latter but not the former — Mr Bourke contended that was an illogical distinction and simply a product of *Bell* which High Court judges had felt bound to follow. In his submission, to the extent that *Bell* is authority for the proposition that registration can never be relevant to sentence length, it was wrong. It had failed to engage with the proportionality principle, as well as the Australian authorities cited by Ellis J in *Bird*.[82]

The Crown's submissions

[76] The main focus of the Crown submissions was on automatic registration, that is to say registration consequent on the imposition of a prison sentence for a qualifying offence, rather than registration orders made in the exercise of the Court's discretion under s 9.

[77] Mr Murray accepted that registration constitutes a penalty in law but argued that was not the end of the enquiry. In written submissions, he invited the Court to hold that no allowance is available in law for child sex offenders who are automatically placed on the Register.

[78] In oral submissions, Mr Murray slightly modified that position rendering it less absolute. On the basis of "never say never," he was prepared to countenance the

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80 See for example *Bell* (CA), above n 60, at [20].

81 Parole Act 2002, s 107RA. There is also provision for extended supervision orders to be cancelled, varied and suspended; see ss 107M–107P.

82 *Bird v Police*, above n 66, at [28] and [43], citing *Ryan v The Queen* [2001] HCA 21, (2001) 206 CLR 267, *TMTW v R* [2008] NSWCCA 50 and *R v CV* [2013] ACTCA 22, (2013) 233 A Crim R 67.

possibility of circumstances where registration might be able to be taken into account. However, he maintained that to be consistent with the legislative intent and history of the Act, this should only happen in rare or exceptional cases.

[79] The Crown's ultimate position was thus that registration is not generally relevant to either type of sentence or length of sentence. However, it could be taken into account if registration rendered the overall sentence disproportionately severe. The threshold was to be viewed as a high one. In sentencing, registration should therefore be irrelevant in all but a very few cases.

[80] Mr Murray did not submit that adopting the threshold he advocated would mean the outcomes in the various High Court authorities discussed above at [59]–[64] were necessarily wrong. He did however argue that to the extent *Bird* supports a general proposition that the impact of registration permits a reduction of the end sentence, the decision should be overruled.

Analysis

[81] A critical feature of the Act is that unlike some registration regimes in other jurisdictions,[83] the registration regime is limited to offenders who sexually offend against children.[84] A sex offender who offends against an adult is not subject to the Act.

[82] Singling out child sex offenders clearly reflects Parliament's recognition of the special vulnerability of children, and the need to protect them from a type of offending that very often causes profound and lifelong harm. The Act was of course passed before the recent Royal Commission of Inquiry into Abuse in Care final report, *Whanaketia*. But that report in our view serves to underscore the pervasiveness of sexual offending against children in this country — including by serial offenders —

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83 For example, in the United Kingdom, the Sexual Offences Act 2003 (UK) provides that all sexual offences are registrable. In the Australian Capital Territory, the Crimes (Child Sex Offenders) Act 2005 (ACT) includes murder when committed in the course of, or the attempted course of, sexual offending against a child. The Child Protection (Offenders Registration) Act 2000 (NSW) in New South Wales includes murder, manslaughter, kidnapping and child abduction. The Community Protection (Offender Reporting) Act 2005 (Tas) in Tasmania includes almost all sexual offending and is not limited to offending against children.

84 The Act, sch 2.

and the devastating impact such offending has on its victims.[85] The report can thus be seen as further reinforcing the importance of the Act's purpose and the social value of the Register.

[83] The Act aims to reduce sexual offending against children by deterring those who might be tempted to re-offend, reducing their opportunities to re-offend and by facilitating early detection of offenders should re-offending occur.[86] It is based on the assumption that many child sex offenders retain a pre-disposition to offend.

[84] In *D v New Zealand Police*, the Supreme Court confirmed that the restrictions that arise from being placed on the Register are penal in character.[87] Although that case was concerned with a registration order, rather than automatic registration, the same conclusion must hold for both.

[85] However, we agree with the Crown that the fact registration is penal is not in itself the end of the enquiry as far as relevance at sentencing is concerned. Not all ancillary penalties — for example protection orders in the family violence context — are regarded as mitigating factors.[88] Regard must also be had to the text and purpose of the Act, its legislative history and of course the severity of the penalty that registration represents.

[86] On the latter issue, the parties expressed what were at times diametrically opposed views. Mr Bourke depicted registration as very onerous, endorsing a description of it as "Orwellian",[89] and referring to a high level of intrusion into all aspects of Mr Williams' life. In contrast, the Crown at one point of its submissions described the punitive effects of registration as "modest".

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85 Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions *Whanaketia — Through pain and trauma, from darkness to light: Whakairihia ke te tihi o Maungārongo* (July 2024).

86 The Act, s 3; and *D (SC31/2019) v New Zealand Police*, above n 26, at [58] per O'Regan J.

87 *D (SC31/2019) v New Zealand Police*, above n 26, at [59] per O'Regan J.

88 In oral submissions, Mr Bourke submitted that protection orders were distinguishable from registration orders, because protection orders are subject to a right of review. But that submission overlooks ss 36 and 38 of the Act, which provide that a registrable offender's reporting obligations can be suspended on an application or on the Commissioner's own initiative.

89 Kris Gledhill "Legislation note: the Child Protection (Child Sex Offender Government Registration) Act 2016" [2017] NZCLR 267 at 270.

[87] In our assessment, to describe the obligations imposed on a registered offender as modest can fairly be viewed as something of an understatement. On the other hand, we also consider that the obligations are not as draconian and significant as some of the submissions made on behalf of Mr Williams might suggest.

[88] The key reason the Supreme Court in *D v New Zealand Police* considered registration penal in nature was that it involves restrictions enforced by criminal sanctions on protected rights. The affected rights were identified as freedom of movement, freedom of expression, freedom of association, and the right to privacy. The restriction on freedom of movement arises from the need for advance notification and the Commissioner's ability to prevent travel plans at short notice.[90] The restriction on freedom of expression lies in the coercing of the supply of information to the Commissioner and the restriction on changing names, something the Supreme Court considered relatively minor.[91] The interference with the freedom of association is the requirement to disclose affiliations with certain clubs, organisations and social networks. It too was considered relatively minor.[92] While the intrusion on the right to privacy was described as significant, that was tempered by the fact the Register is not a public register.[93]

[89] It should also be noted that generally, the main effect of being on the Register is the imposition of disclosure obligations. The registered offender must keep the Commissioner informed of certain matters.[94] But, subject to one exception,[95] the offender is not required to seek the Commissioner's permission. To that extent, the registration regime is largely an information sharing exercise and far less intrusive than, for example, the intense monitoring and restrictions on liberty that occur under

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90 *D (SC31/2019) v New Zealand Police*, above n 26, at [91] per O'Regan J.

91 At [89] per O'Regan J.

92 At [90] per O'Regan J.

93 At [92] per O'Regan J.

94 The Act, s 16. This information includes where the registered offender resides, the details of each child who generally resides in the same household, details surrounding any employment, details of any vehicle they use, details of any club affiliations that has a child membership or child participation in its activities and the details of any telecommunications services used. The offender must make an initial report within 72 hours of being made subject to a registration order and then each year during their reporting period: ss 17 and 19.

95 Prior approval is required before an offender is able to change their name.

an extended supervision order.[96] Under those orders, a probation officer is able to exercise extensive control over an offender's life and dictate what they can and cannot do.

[90] We conclude that although the restrictions arising from registration are not insignificant, they are limited. That is a finding which we consider accords with the Supreme Court's analysis in *D v New Zealand Police*.[97]

[91] It is noteworthy too that in his report to Parliament on consistency with the Bill of Rights Act, the Attorney-General had identified — for the same reasons as the Supreme Court in *D v New Zealand Police* — that registration and reporting obligations constituted a punishment for registrable offenders. The Attorney-General noted that registration imposes restrictions on protected rights in the Bill of Rights Act, such as freedom of movement and expression, and that it is an offence to fail to comply with reporting obligations.[98] The report also stated that:

> Placing registrable offenders on the Register and requiring them to comply with reporting obligations is not, in itself, disproportionate. Parliament is entitled to take the view that persons convicted of sexual offences against children should be placed on a register and require to comply with reporting obligations. The Bill pursues legitimate aims – the prevention of sexual offending against children by such persons in the future.

[92] As mentioned, the one area of concern the Attorney General did have (namely the absence of a right of review in relation to lifetime reporting obligations) was addressed. For present purposes, the significance of the Attorney-General's report is that it confirms Parliament was aware the Act would have the effect of increasing the penalty to be imposed on child sex offenders if they were placed on the Register. It is therefore reasonable to assume it considered that was justified in light of the addition of a right of review.

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96 See Parole Act, s 107JA which outlines the standard extended supervision conditions for a person subject to an extended supervision order. The offender must report to a probation officer as and when required and must obtain the prior written consent of a probation officer before moving to a new residential address, leaving New Zealand or changing their employment.

97 *D (SC31/2019) v New Zealand Police*, above n 26, at [263] per Glazebrook J and [295] per William Young J.

98 Section 7 report, above n 55, at [11]; and *D (SC31/2019) v New Zealand Police*, above n 26, at [58]–[59] per O'Regan J,

[93] That being the case, we also consider some weight can be attached to the fact that Parliament chose not to amend the Sentencing Act as it had done when enacting the Criminal Proceeds (Recovery) Act 2009.[99]

[94] Like the registration scheme, the Criminal Proceeds (Recovery) Act is a separate regime imposing penalties incidental to criminal offending. It empowers the court to make orders forfeiting property used to commit or facilitate the commission of certain specified offences. At the same time the Criminal Proceeds (Recovery) Act came into force, the Sentencing Act was amended to include a new provision s 10B.[100] Section 10B expressly states that in sentencing an offender convicted of a qualifying forfeiture order offence, the court must take into account any forfeiture order that has been made.[101]

[95] If Parliament had wished that to happen in the case of automatic registration or registration orders, it could easily have said so. It did not.

[96] On the other hand, the point can also be made that had Parliament intended to preclude any allowance for registration at sentencing, it could have followed the example of the Victorian State legislature and enacted an express prohibition to that effect.[102] It did not do that either.

[97] There is clearly a balance to be drawn between the competing considerations and we therefore consider that the Crown was right to modify its original unqualified position.[103]

[98] Drawing all these threads together — general sentencing principles, the provisions of the Sentencing Act, in particular s 8(h), the purpose and text of the Act including its retrospective provisions concerning those already sentenced, the fact of

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99 Sentencing Amendment Act 2009, s 7.

100 Sentencing Act, s 10B was inserted, as from 1 December 2009, by s 7 of the Sentencing Amendment Act 2009 (2009 No 10).

101 Sentencing Act, s 10B(1)(a).

102 Sentencing Act 1991 (Vic), s 5(2BC) provides that in sentencing an offender, a court must not have regard to any consequences that may arise under the Sex Offenders Registration Act 2004 (Vic) from the imposition of the sentence.

103 As discussed above at [78].

registration being a penalty and the limited nature of that penalty — we have reached the following conclusions:

(a) Sentencing is quintessentially a discretionary exercise and clearer words would be required in either the Act or the Sentencing Act before Parliament can be assumed to have intended to remove completely any discretion to take the impact of registration into account at sentencing.

(b) However, having regard to the important purpose of the Act to reduce sexual reoffending against children,[104] any judicial discretion to take registration into account must be considered a limited one.

(c) Generally speaking, it would be contrary to Parliament's clear intention were registration to result in reduced sentences for child sex offenders in anything other than exceptional cases. That approach applies to both the issue of length of sentence where registration should not generally be regarded as warranting a discrete discount and also to the type of sentence.

(d) Exceptional circumstances justifying an allowance for the effects of registration will exist if registration is exceptional in its effects on the particular offender and will render an otherwise appropriate sentence unusually or disproportionately severe.

(e) It follows that the operation of the Act will seldom result in a sentence otherwise within range being manifestly excessive.

(f) It also follows that it would be inconsistent with the legislative purpose and hence wrong for a sentencing court to reduce a prison sentence on account of registration so as to bring it within the range of home detention. That would be to subvert the distinction drawn in the Act for

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[104] The Act, s 3.

the purposes of registration between child sex offending that warrants a prison sentence and offending that does not.[105]

(g) For the avoidance of doubt, we confirm that where the length of a prison sentence arrived at without regard to the impact of registration is under the home detention threshold, then in deciding between prison and home detention, the availability of a s 9 registration order may be taken into account in determining whether home detention will sufficiently meet the need for community protection. Home detention should not however be imposed for the purpose of avoiding registration.

[99] Where does this leave the decisions in *Bell* and *Bird*?

[100] In our view, the general sentiments expressed in *Bell* are entirely consistent with the approach we have taken. We acknowledge that the Court in *Bell* did not qualify its general statements but the absence of any qualifier in the judgment is simply a product of the facts in that case and the issue for determination. The focus was the issue of retrospectivity.[106] There was no suggestion of any other unusual or exceptional circumstances.

[101] As regards the decision in *Bird*, we consider that *Bird* is best viewed as a decision that turned on its own facts, including in particular a Crown concession.[107] It should not be viewed as authority for some of the more generalised statements made in the course of the judgment. These were made without the benefit of the comprehensive arguments we have heard.

Overseas authorities

[102] In reaching these conclusions, we have not overlooked Mr Bourke's reliance on the overseas authorities cited in *Bird* and his criticism of the *Bell* judgment for failing to consider them. It was implicit in his submission that these authorities

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105 Sections 7 and 35.

106 *Bell* (CA), above n 60, at [25]–[27].

107 *Bird v Police*, above n 66, at [30]. The Crown accepted that if home detention was imposed, Mr Bird should not be placed on the Register.

generally do not support a restrictive approach and may have made a difference had the Court in *Bell* engaged with them.

[103] Some caution needs to be taken when comparing authorities from overseas jurisdictions. The various registrations schemes differ in terms of the type of offending they cover, the intensity of the monitoring and the extent to which the public has access to the register. Further, the sentencing regimes within which the registration schemes operate are also different.

[104] In any event, rather than supporting the liberal approach advocated by Mr Bourke, the overseas authorities in question tend to support the more restrictive approach that we favour and an exceptional circumstances test. Others do not take matters much further because they relate to whether registration is an extra-curial penalty, a proposition which, in light of the decision in *D v Police*, is uncontroversial in this country.[108] The issue here is whether it is an extra-curial penalty *entitling the offender to any mitigation of the sentence that would otherwise be imposed.*

[105] Of the various sex offender registration regimes that we have considered, New South Wales appears to be the closest to the New Zealand version.

[106] In New South Wales, doubts have been expressed in the appellate court as to whether registration can be properly described as an extra-curial punishment entitling the offender to any mitigation of penalty.[109] In decisions where the court has been prepared to countenance the possibility of it being relevant, it has been said to be a factor deserving of "little weight" and relevant to sentencing only in exceptional circumstances.[110]

[107] In *TMTW v R*, a New South Wales case, all that was said was that registration was not regarded as "entirely irrelevant" to the length of sentence.[111] That was a case where the adult offender squeezed the penis of a ten-year-old boy by using a pair of

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108 *D v Police*, above n 26, at [59] per O'Regan J. For that reason we do not consider those decisions further.

109 *R v KNL* [2005] NSWCCA 260 at [49].

110 At [50], citing *R v Daetz* [2003] NSWCCA 216 at [62].

111 *TMTW v R*, above n 82, at [53].

pliers. The offender did so not for the purpose of sexual gratification but to extract information from him about the sexual offending committed by the boy and his older brother against the offender's six-year-old daughter.[112]

[108] The New South Wales Court of Criminal Appeal ultimately reduced the sentence not because of registration but because of a mathematical error made by the sentencing Judge.[113] The Court noted that in the course of the appeal, counsel had raised the argument that registration on the Child Protection (Offenders Registration) Act 2000 (NSW) was a relevant sentencing consideration, citing the decisions of *R v Daetz* and *R v KNL*. The Court accepted that the regime to be imposed on the offender could be considered as extra-curial punishment, but did not accept in the circumstances that it ought to be accorded any weight in the sentencing decision.[114]

[109] As mentioned, in Victoria there is now a statutory prohibition on taking the effect of a registration and reporting requirement into account at sentencing.[115] However, prior to the statutory prohibition coming into force, the issue of whether the reporting obligation of registered sex offenders could be relied upon as a mitigating factor at sentencing was considered in *DPP v Ellis*.[116] The Court held that:

> [16] As a general rule … reporting obligations … are irrelevant. Parliament has decided that persons sentenced for particular offences constitute a class in relation to whom such obligations are appropriate. They are an incident of the sentence. It would unduly burden the sentencing process if judges were required to take them into account, any more than if they were required to take into account other ordinary incidents of the criminal justice system. An exception should be recogni[s]ed only where the reporting obligations operate with unusual severity on a particular offender. In other words, they are relevant to sentencing only in exceptional circumstances.

[110] Similarly, in *R v ONA*, a case involving a person convicted of a federal sexual offence where doubts were expressed as to whether the statutory prohibition applied, the Victorian Court of Appeal held that even if the prohibition did not apply,

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112 At [6]–[8].
113 At [34]–[37] and [56]–[57].
114 At [52]–[53].
115 Sentencing Act 1991 (Vic), s 5(2BC).
116 *Director of Public Prosecutions v Ellis* [2005] VSCA 105, (2005) 11 VR 287 at [15].

registration would still only be relevant in "unusual circumstances".[117] The New South Wales decision of *KNL* was cited in support,[118] as was *DPP v Ellis*.[119]

[111] In light of all the above, we are satisfied that to the extent the cited overseas authorities are relevant, they tend to reinforce our approach. The authorities recognise the important protective function of registers for people who sexually offend against children and apply, in some instances, very similar touchstones or thresholds to the one we have adopted, namely that registration will not be relevant to the sentencing exercise save in exceptional circumstances. Certainly, the authorities do not suggest our decision is out of kilter with other comparable jurisdictions.

Application of the exceptional circumstances threshold to Mr Williams' case

[112] Although Mr Bourke eschewed the suggestion he was advocating for a registration discount to be afforded as a matter of routine in the same way as discounts for electronically monitored bail and the like are given, we consider that would be the effect were we to allow a discount in this case.

[113] In our view, there was nothing exceptional about the circumstances in this case to warrant any allowance being made for the impact of registration whether in relation to the period of imprisonment or the substitution of a non-custodial sentence.

[114] That in itself disposes of the appeal. We would also add that we do not take the same benign view of Mr Williams' offending as Mr Bourke would have us do when he sought to describe the offending as "pathetic". It was more serious than that. The uplift for the previous conviction was appropriate, as were the various discounts bringing the end sentence within range. The decision not to impose home detention was made by the sentencing Judge after careful consideration and confirmed in the High Court, also after careful consideration. We are satisfied the reasoning in both Courts was sound and we can detect no error warranting appellate intervention.

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117 *R v ONA* [2009] VSCA 146, (2009) 24 VR 197 at [131] per Neave JA.
118 At [132] per Neave JA, citing *R v KNL*, above n 109, at [49]–[50].
119 At [133] per Neave JA, citing *Director of Public Prosecutions v Ellis*, above n 116, at [16].

Outcome

[115] The appeal against sentence is dismissed.

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