IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2013-404-000279
[2014] NZHC 218

CHIEF EXECUTIVE OF
THE DEPARTMENT OF CORRECTIONS

v

TONY DOUGLAS ROBERTSON

Hearing:	13 and 14 February 2014
Appearances:	A R Longdill for the Chief Executive A J Holland and S Youn for the Respondent
Judgment:	19 February 2014

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 19 February 2014 at 4.00 pm
Pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

Introduction

[1] The Department of Corrections seeks an extended supervision order in respect of the respondent, Mr Robertson. The application is made pursuant to s 107F of the Parole Act 2002.

[2] The application for the extended supervision order is not opposed. Both the Department and Mr Robertson called evidence from clinical psychologists – a Ms Tolond for the Department and a Dr Sakdalan for Mr Robertson. Both psychologists agreed that it is appropriate for the Court to make an extended supervision order. However, Mr Holland, on behalf of Mr Robertson, and relying on the evidence of Dr Sakdalan, argued that any extended supervision order should only run for a period of five years. The Department, relying on the evidence of Ms Tolond, contended that it should run for the maximum period permitted by the Act, namely 10 years.

Background

[3] Mr Robertson was born in 1987. He has an extensive criminal history, starting when he was 16 years' old in 2003. He has a number of convictions for assault, aggravated robbery, possession of an offensive weapon, wilful damage, threatening to kill, burglary, receiving and the like. He also has convictions for breaching conditions of supervision and a community work order.

[4] Mr Robertson's index offending occurred in Tauranga over two days, namely on 14 and 15 December 2005.

[5] On 14 December, he accosted a 12 year-old boy, who was walking home from school, and took his cell phone. Shortly thereafter, he approached three children, aged six, seven and eight. He invited them to enter his car, telling them that their mother was at a nearby service station and that she had a present for them. One of the children ran up to his mother, who was in the vicinity. She approached Mr Robertson who then drove off.

[6] Shortly before school the next morning, Mr Robertson approached a five year-old girl and her seven year-old brother. He invited the girl into his car, telling her that her mother was at a nearby beach and that she had a present for her. The girl got into his car. Mr Robertson pretended to speak to the girl's mother by cell phone. He told her brother not to get into the car and drove off. The brother promptly alerted his teacher, who in turn alerted the police. An extensive search was mounted. At 9.45 am, Mr Robertson was found with the girl a short distance out of Tauranga. The child was on the front seat which had been reclined. She was upset and crying. In a later interview, the girl stated that Mr Robertson had asked to photograph her in her boxer shorts. The shorts were later found in the back of the car. He had asked her to roll on her stomach, touched her underwear and bottom, licked her thigh, and tried to kiss her face. She had pushed him away and protested.

[7] Mr Robertson was found guilty following a trial before Keane J and a jury, of seven offences, namely:

(a) abduction with intention to have sexual connection, contrary to s 208(b) of the Crimes Act;

(b) robbery, pursuant to s 234 of the Crimes Act;

(c) attempted kidnapping, contrary to s 209(b) and s 72 of the Crimes Act (x 2);

(d) doing an indecent act on a child, contrary to s 132(3) of the Crimes Act (x 3).

[8] On 4 October 2006, Mr Robertson was sentenced by Keane J.[1] A sentence of seven years and six months' imprisonment was imposed in relation to the conviction for abduction, a sentence of six months' imprisonment in respect of the conviction on the robbery charge, a sentence of two years and six months' imprisonment on each of the convictions for attempted kidnapping, and a sentence of two years' imprisonment on each of the three convictions for doing an indecent act on a child. The Court

[1] *R v Robertson* HC Auckland CRI 2005-070-453, 4 October 2006.

directed that the sentences should be served concurrently. At the same time, Mr Robertson was sentenced to a six-month term of imprisonment, to be served cumulatively, for offending whilst he was on remand awaiting trial. Thus, the total sentence imposed was eight years. Keane J imposed a minimum non-parole period of two-thirds of the total sentence.

[9] In sentencing, Keane J observed as follows:[2]

> …even though there may be no evidence that you had an entrenched deviancy on 14 – 15 December 2005, you were both calculating and determined. You may have offended by robbing AK almost fortuitously. Your real intent… was disclosed when you approached the three children shortly after and attempted to induce one at least into the car only to be frustrated; a stratagem you persisted in the following morning, that time successfully. Your intent was graphically demonstrated by the indecencies disclosed by KM after she was rescued by the police. Everything suggests that you preyed on these children for sexual relief.

It is noteworthy that Keane J declined a request by the Crown to sentence Mr Robertson to preventive detention, noting that the Court's ability to impose an extended supervision order upon his release was a relevant factor in determining whether a non-finite sentence was appropriate.[3]

[10] Mr Robertson appealed his conviction. The appeal was dismissed on 8 August 2008. The Court of Appeal recorded that it had surveyed the evidence, and that it was completely satisfied that there was abundant evidence which justified Mr Robertson's conviction on each count.[4]

The Application

[11] The Department's application, together with a psychological report from Ms Tolond, was filed on 18 September 2013.

[12] At that date, Mr Robertson was still in custody. He was only released on 11 December 2013. At the time of the application, Mr Robertson was an "eligible offender" within the meaning of those words as detailed in s 107C of the Act. The

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2 Above, n 1, at [39].
3 At [30].
4 *R v Robertson* [2008] NZCA 282 at [19].

convictions for doing indecent acts on the child are relevant offences as defined in s 107B(2)(l). The conviction for abduction with intent to have sexual connection is also a relevant offence.[5] The application was made before Mr Robertson's sentence expired. There is no issue with the timing of the application.[6]

[13] There was nothing on the Court file to indicate whether or not Mr Robertson had been served, as required by s 107G(1). I raised this issue with Ms Longdill, appearing for the Chief Executive. She confirmed that service had been attended to. Mr Holland advised that service was not in issue.

[14] Similarly, I inquired from Ms Longdill whether or not the victims of the offending have been notified, as required by s 107H(4). Ms Longdill advised that there were no victims' names recorded on the victims' register, presumably because the victims, or more probably their parents, had decided that they did not wish to have their names recorded.

Extended Supervision Orders

[15] The purpose of an extended supervision order is to protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk with committing sexual offences against children or young persons.[7]

[16] Pursuant to s 107I(2), a court may make an extended supervision order if, following a hearing, it is "satisfied", having considered the matters raised in the health assessor's report, that the respondent is "likely" to commit various relevant offences, which are detailed in s 107B(2), on ceasing to be an eligible offender.

[17] The word "satisfied" has the same meaning as it does in relation to the imposition of a sentence of preventive detention – in other words, it requires the sentencing court to exercise its judgment. It is inappropriate to import notions of the burden of proof, or of setting a particular standard, for example, beyond reasonable

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5 Parole Act 2002, s 107B(2)(m).
6 Section 107F(1).
7 Section 107I(1).

doubt. The word "satisfied" simply requires that the sentencing court makes up its mind, and, on the evidence, comes to a judicial decision.[8] The word "likely" used in s 107I(2) must be read in light of s 107I(1), which provides for the purpose of an extended supervision order.[9] The jurisdiction to impose an extended supervision order depends upon the risk of relevant offending being both real and ongoing and one that could not sensibly be ignored having regard to the nature and gravity of the likely offending.[10]

[18] The effect of an extended supervision order is that a respondent, in respect of whom an order is imposed, will be subject to the standard conditions contained in s 107JA of the Act. Further, the Parole Board can specify special conditions pursuant to s 107K to meet a respondent's particular risk management needs. The type of supervision envisaged under that regime includes frequent contact with a probation officer and conditions designed to manage known high-risk situations, such as unsupervised contact with children, or engagement in substance abuse.

[19] The imposition of an extended supervision order is a penalty.[11] An order is likely to result in significant restrictions being imposed on offenders in response to their criminal behaviour. This amounts to a form of punishment.[12]

[20] An offender subject to an extended supervision order is not liable to recall, but may be charged with breaching his or her conditions, with a maximum penalty of two years' imprisonment.[13]

[21] The evolution of the extended supervision order legislation, and its passage through Parliament, has been discussed by the Court of Appeal.[14] It has been variously contended by counsel in a number of the decided cases that the legislation is inconsistent with the New Zealand Bill of Rights Act 1990, that it constitutes an

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8 *McDonnell v Chief Executive of the Department of Corrections* [2009] NZCA 352 (CA) at [71]–[75], adopting the reasoning in *R v Leitch* [1998] 1 NZLR 420 (CA) at 428.

9 *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA) at [11]; *McDonnell*, above n 9, at [76].

10 *Belcher*, above n 9, at [11].

11 *Belcher*, above n 9, at [30]–[56].

12 *R v Peta* [2007] 22 CRNZ 925 (CA) at [12]–[13].

13 Parole Act 2002, s 107T.

14 *Belcher*, above n 9, at [30]–[56]; *Belcher v Chief Executive of the Department of Corrections (Belcher No 2)* [2007] NZCA 174; *McDonnell*, above n 9, at [114]–[131].

encroachment on civil liberties and that it places offenders at risk of double jeopardy. There has also been strong criticism that the legislation is retrospective. The Court of Appeal has, to date, declined to make a declaration of inconsistency. Insofar as I am aware, no one has yet sought such an order in the appropriate way, and the contentions noted above have not been the subject of either evidence or full argument.

[22] No declaration of inconsistency was sought in the present case and I have proceeded on the basis of the legislation as it stands. I accept the argument made by Mr Holland that an extended supervision order has the potential to place major restrictions on the freedom of movement and association of Mr Robertson. Caution is clearly needed and there is an obligation on me to carefully consider the evidence and explain clearly why the order is being made.[15] Notwithstanding that Mr Holland does not oppose the making of an extended supervision order, I consider that there is an obligation on me to satisfy myself that an order is warranted on the basis of the evidence before me.[16] As discussed by the Court of Appeal,[17] I have adopted a two-step approach. First, I have asked myself whether or not an extended supervision order should be made. I have then considered the issue of its duration.

Should an Extended Supervision Order Be Made?

[23] As I have already noted, pursuant to s 107I(2) of the Act, a sentencing court may make an extended supervision order if the court is satisfied that the offender is likely to commit any of the relevant offences referred to in s 107B(2) on ceasing to be an eligible offender. The Court must consider the matters addressed in the health assessor's report, as set out in s 107F(2). Inter alia, that section requires that the report address:

> (a) the nature of any likely future sexual offending by the offender, including the age and sex of likely victims;

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15 *Peta*, above n 12, at [56]–[57].

16 See, *Peta*, above n 12, at [57]; *Chief Executive of the Department of Corrections v Miki* HC Auckland CRI 2005-404-124 11 March 2010; *Chief Executive of the Department of Corrections v Peterson* HC Auckland CRI 2007-404-0398, 24 April 2008.

17 *Peta*, above n 12, at [61]; *McDonnell*, above n 8, at [96].

(b) the offender's ability to control his/her sexual impulses;

(c) the offender's predilection and proclivity for sexual offending;

(d) the offender's acceptance of responsibility and remorse for past offending;

(e) any other relevant factors.

[24] I have considered Ms Tolond's report into Mr Robertson. Ms Tolond is a qualified registered psychologist, who has been in practise for some 10 years. She has completed numerous risk assessment reports for both the Court, and the New Zealand Parole Board. She has an undergraduate degree with honours and a Masters degree, both in psychology, and she is registered with the New Zealand Psychological Board. Clearly, she had the expertise to assess Mr Robertson. She conducted two lengthy interviews with him, and met him on one additional occasion. She had discussions with the departmental psychologist who dealt with Mr Robertson while he was in custody, and considered a report that that psychologist had prepared for the Parole Board. She had telephone discussions with Mr Robertson's mother and maternal aunt, discussions with the principal corrections officer and the case officer, and telephone and email correspondence with the police detective in charge of the case. She considered the Parole Board assessment reports, a psychological assessment report, Mr Robertson's pre-sentence report, the sentencing notes prepared by Keane J, and the police summary of the facts.

[25] Ms Tolond's report was comprehensive and careful. I found it to be of considerable assistance. She detailed Mr Robertson's pattern of offending and concluded that he displays a tendency to use violence, both instrumentally, and reactively. Having considered Mr Robertson's criminal history, I agree with that comment. Ms Tolond considered that Mr Robertson's move to sexual offending increased the risk he poses to the community. Again, I agree with this comment.

[26] Ms Tolond noted that Mr Robertson is in denial and that he continues to claim that he has been framed by the police. She reported that he was

confrontational when the index offending was referred to. She also noted that his responses at interview were inconsistent with details he had provided to other departmental psychologists, and she considered that he has a tendency to "impression manage".

[27] Ms Tolond used two psychometric instruments to analyse Mr Robertson, the ASRS test, and the STABLE 2007 test.[18]

[28] The ASRS (Automated Sexual Recidivism Scale) tool considers static risk factors, which the offender is unable to change. Ms Tolond considered that it has clear empirical validation, and that it has been demonstrated to have predictive accuracy for sexual recidivism, especially over the longer term. Using this tool, Ms Tolond assessed Mr Robertson as presenting in the medium–high risk category of reoffending. The STABLE 2007 tool measures dynamic factors, namely those risk factors that can be changed. Using this tool, she considered that Mr Robertson is in the high-risk category. She noted that issues which were problematic for Mr Robertson include his social influences, his limited capacity for relationship stability, his hostility towards women, his sense of general social rejection, his lack of concern for others, his impulsivity, his poor problem solving skills, his negative emotionality, his sex drive and sexual preoccupation, his deviant sexual preferences, and his lack of cooperation with supervision.

[29] Ms Tolond did not use a further tool, the ACUTE 2007 tool. She considered that this tool was not particularly helpful, because it analyses dynamic risk factors presented by an offender's living environment. Given that Mr Robertson was in custody at the time, and because she had limited information about his post-release living environment, Ms Tolond considered that it was inappropriate to use this tool.

[30] Ms Tolond expressly considered each of the s 102F(2) factors. Relevantly:

(a) She considered that should Mr Robertson sexually reoffend, his victims were likely to include pre-pubescent female children, not known to him, whom he would access through opportunistic means in

[18] The ASRS test has been discussed by the Court of Appeal in *R v Peta*, above n 12, at [17]–[30].

public places. She considered that he is likely to use deception to gain the children's compliance, and that any sexual offending could extend from illicit photography of the victim through to indecent assault. She also expressed the view that the possibility of full sexual intercourse could not be excluded.

(b) She acknowledged that it is difficult to assess Mr Robertson's ability to specifically control his sexual impulses, because he refused to discuss these issues with her. However, file information and her assessment of his behaviour led her to conclude that he has an ongoing difficulty with impulse control generally. She noted that Mr Robertson admitted a history of susceptibility to impulsivity and poor behavioural controls, and that he has a poor record of compliance with supervision. She observed that Mr Robertson was using cannabis at the time of the index offending, and she considered that, if Mr Robertson were to return to substance abuse, it is likely that its disinhibiting effects would further reduce his already limited ability to control his impulses. She noted that a previous psychological report recorded that Mr Robertson had described an active sex life with his then partner, which entailed sexual intercourse multiple times per day. On balance, she assessed Mr Robertson's ability to control his sexual impulses as low.

(c) She then went on to consider Mr Robertson's predilection and proclivity for sexual offending. She noted that while there is only one recorded child sexual offence victim, Mr Robertson used a similar modus operandi with other pre-pubescent victims within a short timeframe. She considered that his index offending was likely to be an extension of his pro-criminal attitudes and behaviours, together with his sexual preoccupation, where he prioritised his needs over the needs of others, and vulnerable victims were opportunistically selected for his immediate gratification. She noted that his criminal history shows that he has been involved with recidivist antisocial

offending, which has remained unabated despite various sanctions, including several periods of imprisonment.

(d) She recorded that Mr Robertson does not accept that he sexually offended against the victim, and that he has not accepted any responsibility for his actions. He has manifested no empathy for the victims, and he became agitated when he was questioned in regard to these matters. She noted that Mr Robertson's lack of remorse, penchant for externalising responsibility, and ongoing sense of entitlement, appear to be part of an enduring personality pattern, whereby he blames and holds others accountable for his behaviour.

Overall, Ms Tolond signalled there is a high risk that Mr Robertson will engage in relevant sexual offending on his release. She considered that his sexual reoffending is likely to place female children who are unknown to him, including those in public places, at risk of abduction, indecent assault, or further sexual offences.

[31] I have also considered the psychological report obtained by Mr Robertson. That report was from Dr Sakdalan.

[32] Dr Sakdalan used four risk assessment instruments – STATIC 99, STABLE 2007, ACUTE 2007, and SVR20. Using the STATIC 99 test, he assessed Mr Robertson's risk of sexual recidivism as being in the moderate–high category. Using the STABLE 2007 test, he assessed that Mr Robertson's risk of sexual recidivism is in the moderate–high risk group. Using the SRV20 tool, Mr Robertson was assessed as being at a moderate risk of sexual offending, and using the ACUTE 2007 tool, Mr Robertson was assessed as being in the "moderate priority" category. Overall, it was Dr Sakdalan's opinion that Mr Robertson is at a moderate risk of sexual recidivism.

[33] Dr Sakdalan also considered each of the relevant s 107F(2) matters:

(a) Given his assessment of Mr Robertson's risk profile, he considered that Mr Robertson would be likely to offend against female pre-

pubescent girls. He considered that if Mr Robertson reoffends in the future, that he will most likely commit offences against potential victims he has met in public places or in unsupervised situations.

(b) He noted that Mr Robertson does not have a history of deviant sexual interest or an established diagnosis of paedophilia, and that he was 18 years' old at the time of the index offending. He observed that Mr Robertson is now 26 years' old, and he considered that Mr Robertson now displays some degree of emotional maturity. He recorded Mr Robertson's assertion that he has low sexual drive, and that he is not sexually preoccupied. He also considered, again from Mr Robertson's statements, that he is less impulsive than he was when he was younger. However, he noted that Mr Robertson continues to deny his sexual offending, and that he still has limited insight into his sexual offending issues.

(c) In considering Mr Robertson's predilection and proclivity to sexual offending, he noted that Mr Robertson has no record of previously offending in a similar manner, and that there is no reported history of sexually inappropriate or abusive behaviours.

(d) He noted that Mr Robertson continues to deny his sexual offending, and that he has not demonstrated any responsibility or remorse. However, he considered that this factor is not predictive of sexual recidivism, but is rather a responsivity issue. He noted that Mr Robertson has now expressed a willingness to attend a sex offender treatment programme if required. However, he recorded the reservation that his motivation to engage in treatment is more external than internal, and expressed the hope that his motivation might change once he starts to attend the programme.

[34] Again, Dr Sakdalan was extremely well qualified. However, I did not find his report as helpful as that of Ms Tolond. I note the following:

(a) Dr Sakdalan did not have the same range of information as Ms Tolond. His report was based principally on his two-hour interview with Mr Robertson;

(b) It is clear that Mr Robertson was much more cooperative with Dr Sakdalan than he was with Ms Tolond. Both psychologists agreed that reports can be manipulated by the answers offenders give. I have no doubt that Mr Robertson was seeking to procure a favourable report from Dr Sakdalan. I note Ms Tolond's observations that Mr Robertson seeks to "impression manage". In my view, the impression which Mr Robertson created with Dr Sakdalan was false. It is inconsistent with contemporaneous events, which I refer to shortly;

(c) Dr Sakdalan agreed that it was possible that his assessment of the risk of recidivism that Mr Robertson poses, using the ASRS tool, may have been conservative;

(d) Dr Sakdalan used the various assessment tools, but then overlaid the answers yielded by those tools with what he called his "structured clinical judgment". That is, of course, a highly subjective exercise which it is difficult to properly assess. As the Court of Appeal has warned, there are dangers in failing to follow standardised procedures and in failing to recognise scoring criteria for recognised risk measures. Pseudo-scientific validity can otherwise be lent to assessments which are not properly based.[19]

[35] Regardless of the description of the level of risk posed by Mr Robertson, Dr Sakdalan agreed in cross-examination that Mr Robertson is likely to commit a relevant offence on being released, and that he meets the criteria for an extended supervision order.

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[19] *Peta*, above n 12, at [67].

[36] There are other contemporaneous events which I have considered. It became clear from Ms Tolond's evidence that, on 23 November 2013, two days before he was interviewed by Dr Sakdalan, Mr Robertson became abusive towards corrections staff when staff did a cell search in his cell. Further, on 30 November 2013, Mr Robertson became belligerent towards corrections staff, and he abused them. He stated that if staff "wanted a shitty day, [he] would give it to [them]". This occurred because Mr Robertson wanted to use the telephone before he had a shower. On 5 February 2014, when he was appearing in front of Judge Wade in the District Court, Mr Robertson lost his temper and started yelling obscenities at the Judge. Mr Robertson was seeking bail in relation to a charge that he had breached his Parole Board release conditions. The following exchange took place:

> You might have thought it would have been sensible for any offender wearing an electronic bracelet with GPS, being told not to go to a particular area, would not go within a mile of it yet alone well within it. [I didn't even know that park was there, Your Honour].
>
> Yes, Mr Robertson. [I had no idea that the park was there]. I will also add this, every single time you have appeared, Mr Robertson, you have shown your utter contempt for this Court, [Because you fellas just judging on the fucking shit that I was charged with in the fucking past man] which is also the utter contempt you have for the judicial system. Get down into custody please. [I haven't fucking committed any crime]. Yes, thank you very much Mr Robertson. [You fucking done me for eight years for a crime I haven't even fucking committed man].

Finally, on 13 February 2014, the date on which the application was heard, Mr Robertson was spoken to by Corrections Department staff regarding his behaviour.

[37] All of these matters suggest that Mr Robertson has little or no self control, and that he can be abusive and aggressive. They throw into doubt the demeanour that Mr Robertson exhibited to Dr Sakdalan and on which Dr Sakdalan relied in large part in preparing his report.

[38] I also note that Mr Robertson has had difficulty in complying with the release conditions imposed on him:

(a) On 6 January 2014, Mr Robertson was convicted for breaching his parole conditions by failing to comply with the house rules imposed

by the Prisoners Aid and Rehabilitation Society which was providing him with accommodation. He was evicted from that accommodation. The eviction occurred because Mr Robertson allowed visitors not approved by the Society to reside with him overnight. Mr Robertson was sentenced to six months' community detention for this offence.

(b) It is also charged that on 16 January 2014, Mr Robertson, despite a previous warning, was in a public park. The Parole Board required as a condition of his release that he should not enter a public park or reserve or other place where children were likely to congregate, unless he was under direct supervision at the time. Mr Robertson has denied this breach. The matter is set down for hearing on 13 March 2014. Mr Robertson is, of course, entitled to the presumption of innocence. I have therefore given the charge itself no weight. The fact, however, that Mr Robertson faces a charge at all is a matter of concern. In my view, this is a matter I am entitled to take into account.[20]

[39] Having considered the reports of both Ms Tolond, and Dr Sakdalan, and the other evidence which is available to me, I am satisfied that Mr Robertson is likely to commit one or more of the offences referred to in s 107B. Specifically, I consider that it is likely that he will commit an indecency on a child under the age of 12 years, and that he will abduct a child for the purpose of sexual connection. There is also a risk that he may have, or attempt to have, sexual connection with a child under the age of 12 years.

[40] In reaching this conclusion, I note that Mr Robertson has an appalling criminal history. That history has escalated to offending against young children. The offending has extended to sexual offending against young children. I am satisfied that any further sexual offending by Mr Robertson would be likely to involve prepubescent female children, who have been abducted after being deceived into accompanying him. The evidence compels the conclusion that Mr Robertson is impulsive, and that he is unable to control his anger and aggression. Mr Robertson's self reports, his previous offending, and his recorded discussions with departmental

[20] Parole Act 2002, s 107H(2).

psychologists, suggest that he has a strong sexual drive and impulses. There is nothing, other than his own assertion to Dr Sakdalan, to suggest that he is able to control his sexual impulses. Everything else points to the opposite conclusion. The assessment tools used by both Ms Tolond and Dr Sakdalan suggest that there is a real risk of recidivism by Mr Robertson. The index offending and the evidence suggest that Mr Robertson has a predilection for, and a proclivity towards, sexual offending. He has shown no remorse, and undertaken no treatment for such offending. Indeed, he continues to deny it. He has a history of failing to comply with court orders, and recent events suggest that his behaviour has not changed in this regard. As a non-familial child sex offender, Mr Robertson belongs to a group at a greater risk of sexual recidivism than those convicted solely of offences against family members. He is now aged 26 years. However, research into the effect of age upon release identified those aged between 18 and 40 years as having a higher recidivism rate than any other age group.

[41] There is a real and ongoing risk that cannot sensibly be ignored, having regard to the nature and gravity of the likely offending. In my judgment, an extended supervision order should be made.

Duration of Extended Supervision Order

[42] Section 107I(5) provides as follows:

> **107I Sentencing court may make extended supervision order**
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> …
>
> (5) The term of the order must be the minimum period required for the purposes of the safety of the community in light of—
>
> (a) the level of risk posed by the offender; and
>
> (b) the seriousness of the harm that might be caused to victims; and
>
> (c) the likely duration of the risk.
>
> …

[43] Ten years is the maximum period permitted under the Act. [21]

[44] The factors identified in s 107I(5) demonstrate the protective focus of the statutory scheme set out in Part 1A of the Act. This was emphasised in *Chief Executive of the Department of Corrections v McIntosh*,[22] where this Court (sitting as a full Court) stated as follows:

> … Our function in terms of s 107I(5) is to decide the minimum period required for the purposes of the safety of the community in light of the level of risk posed, the seriousness of harm which might be caused and the likely duration of the risk in Mr McIntosh's case. These criteria underline the protective focus of the present jurisdiction. Put bluntly, orders are not to be made for the minimum period required to facilitate treatment, rather, for the minimum period required to achieve protection of vulnerable members of the community.

The latter part of this paragraph was expressly approved by the Court of Appeal in both *Belcher*[23] and *Peta*.[24]

[45] I have already commented on the levels of risk assessed by the experts. While there was a measure of disagreement between them, I am satisfied that, in reality, they were not far apart. Ms Tolond assessed the risk posed by Mr Robertson as being slightly higher than that assessed by Dr Sakdalan. However, Dr Sakdalan acknowledged that there were some debateable factors which could have affected his use of one of the assessment tools – the STABLE 2007 tool. He acknowledged that it is possible that Mr Robertson should be assessed as being at a high risk. Regardless of the classification, for the reasons noted above, I am satisfied that Mr Robertson poses a very considerable risk indeed. It is also clear that if he is to reoffend, the harm that would be caused to his victims would be very serious indeed. Sexual offending on prepubescent girls will invariably have a major impact on their physical and psychological wellbeing.

[46] The likely duration of the risk is harder to assess. Dr Sakdalan suggested that a five-year term would suffice, but he accepted that the risk posed by Mr Robertson

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21 Parole Act 2002, s 104I(4).

22 *Chief Executive of the Department of Corrections v McIntosh* HC Christchurch CRI 2004-409-162, 8 December 2004.

23 *Belcher*, above n 9, at [108].

24 *Peta*, above n 12, at [11].

will not change, unless he undergoes treatment. The following exchange took place in cross-examination:

> Q. But in order for his risk that you're assessing today to change in five years' time, it's going to require some positive action by Mr Robertson, do you agree?
>
> A. That's correct.
>
> Q. So in suggesting to the Court that a five year order is the minimum required to protect the safety of the community, we're in effect asking the Court to place confidence that Mr Robertson is going to lower his risk under that threshold within the five year period, aren't we?
>
> A. Can you, so what's the question?
>
> Q. He meets the criteria today.
>
> A. Yes, that's correct.
>
> Q. In five years' time, if nothing changes, he'll still meet the criteria.
>
> A. That's correct. If nothing changes.

[47] I have little or no confidence that Mr Robertson will undergo treatment. It is noteworthy that he was in prison for a number of years. He did not undergo treatment while he was in custody. That was the obvious time for him to undertake treatment, given that it would have affected the likelihood of his release on parole. He remains in denial, and except for his assertion to Dr Sakdalan that he is now prepared to undergo treatment, there is nothing to suggest any change in motivation by him.

[48] Mr Robertson's proclivities, as demonstrated by the index offending, combined with his failure to take any steps to date to ameliorate the risk he poses, give cause for considerable concern. The minimum term appropriate for the purposes of the safety of the community is ultimately dependent on the risk posed by Mr Robertson reducing, so that the Court can be satisfied that he is no longer likely to commit a relevant offence. There is nothing concrete to suggest that the risk posed by him will lessen in the short–medium term. As matters stand, Mr Robertson has been assessed by a number of statistical tools and by two clinicians as posing either a moderate or high risk of recidivism. Any reoffending is likely to be of a serious sexual nature, causing significant harm to vulnerable individuals.

Mr Robertson has consistently denied his offending, and he has not participated in any form of treatment. He has been uncooperative with efforts to manage his risk. Other than Mr Robertson's belated and self-serving assertion to Dr Sakdalan, there is nothing to suggest that the risk posed is likely to change. The position is very similar to that discussed in *McDonnell*.[25]

[49] As a result, I conclude that the maximum term of 10 years should be fixed for the extended supervision order. That is the minimum period required, on the facts as they currently present, to protect vulnerable members of the community.

[50] I observe that were I to impose a five-year term, or some other term less than the maximum, the Court would not be able to extend the length of the extended supervision order, unless either Mr Robertson consented or Mr Robertson was convicted of an offence of breaching a condition of the order, in the 12 months preceding any application for extension.[26] There are, however, no such constraints if Mr Robertson seeks to cancel the extended supervision order, consequent on successfully completing a rehabilitation course. Either Mr Robertson, or the Chief Executive, could apply to the Court to cancel the extended supervision order on the ground that Mr Robertson is no longer likely to commit a relevant offence.[27] Further, either Mr Robertson, or the Chief Executive, could apply to the Parole Board to vary the conditions attaching to the order.[28] The power to apply for a discharge, or to vary the conditions, provide both an incentive and a safeguard for Mr Robertson, and in imposing the maximum term, I am entitled to take comfort from these provisions.[29]

Orders

[51] For the reasons set out in this judgment, I direct that Mr Robertson be made subject to an extended supervision order for a term of 10 years.

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25 *McDonnell*, above n 8, at [112].
26 Parole Act 2002, s 107N(2).
27 Ibid, s 107M.
28 Ibid, s 107O(1).
29 *Woodhouse v Chief Executive of the Department of Corrections* [2011] NZCA 333 at [33].

[52] Mr Robertson was released from custody on 11 December 2013, notwithstanding that the statutory release date was 14 December 2013. The statutory conditions of release, and the conditions imposed by the Parole Board, run from the statutory release date, as opposed to his actual release date. Hence, the conditions imposed run through until 14 June 2014. Counsel have filed a joint memorandum recording that any extended supervision order should commence on 15 June 2014. I agree that this is appropriate. The Court has power to fix the date on which an extended supervision order comes into force.[30] I direct that the extended supervision order in respect of Mr Robertson is to take effect as from 15 June 2014.

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Wylie J

[30] Parole Act 2002, s 107L.