**NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA117/2023**
**[2023] NZCA 449**

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| BETWEEN | ROBERT HOWARD GLADWIN WYNYARD<br>Appellant |
| AND | THE KING<br>Respondent |

Hearing: 21 August 2023

Court: Wylie, Ellis and van Bohemen JJ

Counsel: J C Harder for the Appellant
J V Barry for the Respondent

Judgment: 15 September 2023 at 10 am

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**JUDGMENT OF THE COURT**

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**The appeal is allowed in part. The sentence of six years and three months' imprisonment imposed in the High Court is quashed and a sentence of five years and 10 months' imprisonment is substituted therefore. In all other respects, the appeal is dismissed.**

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**REASONS OF THE COURT**

(Given by Wylie J)

[1] The appellant, Robert Wynyard, entered guilty pleas to nine charges of indecency between a man and a boy contrary to s 140 of the Crimes Act 1961 (as it stood at the time of the offending) and to two charges of indecent assault on a boy under 12, also contrary to s 140. Six of the charges were representative charges. Mr Wynyard was sentenced by Moore J to a term of six years and three months' imprisonment on 7 February 2023.[1]

[2] Mr Wynyard appeals his sentence. He argues that it is manifestly excessive. He says the Judge erred in setting the starting point, failed to make sufficient allowance for his remorse and for reparation he paid to the victims of his offending and erred in failing to reduce his sentence for various personal factors, including that he was sexually abused as a child.

[3] The appeal is opposed by the Crown.

**The offending**

[4] The offending was described by the Judge in his sentencing notes. No issue was taken with his distillation of the relevant facts.[2] Although the Judge's summary is directed to Mr Wynyard, we gratefully adopt the same:

> [3] In April 2020, the Police opened an investigation codenamed "Operation Beverley". It was an inquiry into historical sexual offending against children by former members [of] staff at Dilworth School ("Dilworth["]). You were employed as a teacher at Dilworth for six years between 1977 and 1983. In the last three years you were the Senior Housemaster of MacMurray House, one of several boarding houses which accommodated boys between Standard 4 and Form 7. Members of boarding houses were confined to the school grounds six days a week and had very limited contact with parents, guardians, and family. So that [is] the context.
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> …
>
> *Offending against A*
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> [5] Your first offending was in 1980. It was against A. A was aged 12 to 13 years. He was a student in your class. At the time you were 32.

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1 *R v Wynyard* [2023] NZHC 123 [sentencing notes].

2 The Judge redacted a number of matters to avoid identifying the victims. These redactions were not challenged before us and we retain them.

[6] You asked him to stay behind after class one day. But it was a subterfuge to get him alone with you. You told him it was to help you put things away. He stood on a desk or a step ladder to reach a higher shelf. You put your hand up underneath his shorts and fondled his penis and testicles.

*Offending against B*

[7] The second charge relates to B. It was laid as a representative charge although I note it relates to two separate and identifiable events.

[8] B was not in your form class. Twice in 1980 you summonsed him to your class room alone after school. B was 12 to 13 years old.

[9] On the first occasion, you rubbed your hands over B's chest, back and torso for one to two minutes. You indicated to him that you wished to go further.

[10] On the second occasion, you rubbed your hands over B's chest before moving down towards his groin. B rebuffed your advances. He pushed you away. But you persisted. This went on for five or so minutes, before he left the room.

*Offending against C*

[11] Your third victim was C. He was a boarder at MacMurray House between 1980 and 1981 when you were the Housemaster. C was nine to 10 years' old. You were about 33 at the time.

[12] You approached C one night when he was asleep in bed. The summary does not state where, but I assume this was in a dormitory. You pulled the sheets down. Using his nickname, you attempted to reassure him, telling him several times not to worry while you masturbated him. You only stopped when he rolled over.

*Offending against D*

[13] Your fourth victim was D. He, too, was a boarder in MacMurray House.

[14] In 1981, when he was 12 or 13 years' old, D was in MacMurray House to perform telephone duties. He was alone in the telephone room when you entered.

[15] You wrapped your arms around him before reaching inside his shorts and underwear and touching his penis and genital area. This went on for about two to three seconds before D wriggled free and fled.

*Offending against E*

[16] Your fifth victim was E. You have pleaded guilty to four representative charges in respect of offending against him. E was a boarder in MacMurray House in 1982. He was 12 at the time.[3]

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[3] We interpose to note that this may not be strictly correct: see below at [23] and [33].

[17] The summary records that on "most nights" that year, you approached E while he was asleep in bed and masturbated him. This also occurred in the nearby intercom room. The following year, you and E both left Dilworth. However, you continued your association with E and you continued to offend against him.

[18] [REDACTED].

[19] About three times a week, late in the evening, you visited E [REDACTED]. You engaged in sexual activity. You masturbated each other and on occasions had oral sex. This continued until E was 15 years old. It was at that age that he told you he wanted to stop the sexual activity [REDACTED].

*Offending against F*

[20] The [ninth] charge relates to F. He was a boarder in MacMurray House during 1981. It is representative.

[21] Twice that year, you approached him while he was in bed. You stroked his penis. He estimates this was for five to 10 minutes each time. At the time F was aged 12.

*Offending against G*

[22] You committed the tenth offence against G. [REDACTED].

[23] Your offending is captured in a single representative charge. Between 2000 and 2002, G and his brothers often spent nights at your home. On four such occasions while G was asleep, you fondled his penis and testicles underneath his pyjama pants. These episodes lasted for between five and 20 minutes. G was eight or nine at the time.

*Offending against H*

[24] The final offending was committed against H, [REDACTED].

[25] On an evening between 2000 and 2002 when H was staying with you, he awoke to find your hand down the front of his pyjama pants, touching his genitalia.

[26] So, that is a very brief summary of the offending you have admitted through your pleas of guilty. …

## The Judge's sentencing notes

[5] After discussing the offending as noted above, Moore J turned to consider the starting point sentence for Mr Wynyard. He noted that the maximum penalties for the

charges against him were between seven and 10 years' imprisonment.[4] He also recorded that it was common ground that the offending against E should be treated as the lead offending.[5]

[6] The Judge went on to consider the scale and duration of the offending, noting that, in its totality, it spanned 20 years and involved eight victims. Mr Wynyard offended with particular frequency against E, both at Dilworth and later.[6] While the Judge accepted that some of Mr Wynyard's offending could be considered opportunistic, he commented that Mr Wynyard had also orchestrated situations to ensure that he would be alone with his victims; in particular, the offending against E was planned and premeditated, indicating a high degree of cynicism and prior thought.[7]

[7] The Judge considered that the breach of trust involved was a highly aggravating factor. Mr Wynyard was a figure of authority in the victims' lives and, as a teacher, Mr Wynyard was able to exploit the authority that came with that position to his own advantage. Further, as a house master, Mr Wynyard was the leader of the boarding house and, in that role, he wielded particular authority. In many respects, Mr Wynyard was "a parental substitute, standing in to give pastoral and other support [to] those placed in [his] care, day and night for six days out of every week".[8] There was also a breach of the trust which Mr Wynyard owed to the parents and caregivers of the boys he abused, as well as to the governors, administrators and conscientious and decent teachers at Dilworth.[9]

[8] The Judge also viewed the vulnerability of the victims as being a seriously aggravating factor. Their vulnerability had two elements; first, the boys were adolescents placed in Mr Wynyard's care by others who trusted Mr Wynyard to look after them; and secondly, the boys accepted into Dilworth came from disadvantaged backgrounds — some had been orphaned and others came from struggling homes.

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4 Sentencing notes, above n 1, at [30].
5 At [32].
6 At [33(a)].
7 At [33(b)].
8 At [33(c)].
9 At [33(c)].

The parents and caregivers of the boys who were accepted into Dilworth thought they had "struck the jackpot".[10]

[9] The Judge noted the harm to the victims, acknowledging that Mr Wynyard's actions had inflicted lifelong trauma on them.[11]

[10] The Judge then turned to consider various cases which had been referred to him by counsel in relation to setting the starting point. Among the most helpful were those that related to other defendants charged as a result of Operation Beverley who had already been sentenced. He agreed with the Crown that Mr Wynyard's offending against E bore the greatest similarity to offending by another Dilworth offender, Mr Wilson.[12] Judge Collins in the District Court had determined that a starting point of at least four years' imprisonment was appropriate on a stand alone basis for Mr Wilson's offending.[13] The Judge considered that Mr Wilson's offending was more serious than Mr Wynyard's offending but that Mr Wynyard's offending was more frequent and prolonged.[14] Mr Wynyard took advantage of E not only while he was a boarder at Dilworth, but later, after he left school. The Judge adopted a starting point of five years' imprisonment for Mr Wynyard's offending against E.[15]

[11] The Judge then turned to consider the appropriate uplift for the remaining offending. He assessed Mr Wynyard's offending as being less serious than that of another Dilworth offender, Mr Browne, where an uplift of six years' imprisonment was applied for indecencies against an additional 13 victims,[16] but more serious than Mr Wilson's offending, where an uplift of three years' imprisonment was applied for indecencies against four additional victims.[17] The Judge held that an uplift of five and half years was appropriate to reflect Mr Wynyard's additional offending.[18]

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10 At [33(d)].
11 At [33(e)].
12 At [35], discussing *R v Wilson* [2021] NZDC 5366.
13 *R v Wilson*, above n 12, at [16].
14 Sentencing notes, above n 1, at [36].
15 At [37].
16 At [39], discussing *R v Browne* [2021] NZHC 3286 at [40].
17 *R v Wilson,* above n 13, at [17].
18 Sentencing notes, above n 1, at [41].

[12] It followed that the starting point sentence for Mr Wynyard's offending was one of 10 years' and six months' imprisonment. The Judge then adjusted this starting point to allow for totality. He reduced the starting point sentence to nine years' imprisonment.[19]

[13] The Judge then turned to consider Mr Wynyard's personal circumstances.

(a) Mr Wynyard had entered guilty pleas about a fortnight before his trial. The Judge allowed Mr Wynyard a discount of 20 per cent for these pleas.[20] The Judge noted that while such discount could be seen as generous, the trial would have been lengthy and the pleas meant that eight men were not required to come to Court and give evidence about the offending.[21]

(b) The Judge then addressed Mr Wynyard's remorse and the reparation he had paid to the victims. He noted that Mr Wynyard had paid $10,000 to each victim to "do something tangible to acknowledge [his offending]".[22] He referred to an affidavit which Mr Wynyard had filed accepting responsibility for his offending, apologising to the victims, to their wider families and friends, as well as to his own family. Notwithstanding comments attributed to Mr Wynyard in the pre-sentence report, the Judge was satisfied that Mr Wynyard had insight into his actions, but the Judge did record a counterfactual — that Mr Wynyard must have known the level of harm he was inflicting on others as he too had been a victim of abuse as a child.[23] The Judge gave Mr Wynyard a discount of 10 per cent for both his remorse and for the reparation paid.[24]

(c) As for Mr Wynyard's personal background and the fact that Mr Wynyard was abused as a child, the Judge acknowledged that abuse

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19 At [42]–[43].
20 At [48].
21 At [47].
22 At [51].
23 At [54].
24 At [56].

> victims often go on to abuse others. However he considered that the extent and scale of Mr Wynyard's offending made "recognition of this factor difficult to accept".[25] The Judge considered that a discrete discount for this factor was not available, reiterating the parental function Mr Wynyard had assumed in relation to his victims and the breach of trust involved in the offending. [26]

[14] In total, the Judge allowed Mr Wynyard a discount of 30 per cent from the sentence he would otherwise have imposed, leading to a sentence (with some rounding) of six years' and three months' imprisonment.[27]

**The appeal**

[15] The appeal is brought pursuant to s 250 of the Criminal Procedure Act 2011. The Court must allow the appeal if it is satisfied that, for any reason, there is an error in the sentence imposed on conviction and that a different sentence should be imposed.[28] In any other case, the Court must dismiss the appeal.[29]

[16] This Court does not start afresh, nor simply substitute its own opinion for that of the original sentencer.[30] Rather it must be shown that there was an error "whether intrinsically, or as a result of additional materials submitted" on appeal.[31] If there is an error of the requisite character, the Court must then form its own view of the appropriate sentence.[32] The focus is on whether the sentence imposed is within range, rather than the process by which the sentence was reached.[33]

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25 At [61].
26 At [61].
27 At [63]–[64]. In respect of the offending against E, Mr Wynyard was sentenced to three years' imprisonment on charge 8 and one year's imprisonment on each of charges 5, 6 and 7 to be served concurrently with each other but cumulative on the sentence imposed on charge 8. Mr Wynyard was sentenced to two years and three months' imprisonment on the remaining charges, to be served concurrently with each other but cumulative on the four years' imprisonment total in respect of E. This led to a final sentence of six years and three months' imprisonment.
28 Criminal Procedure Act 2011, s 250(2).
29 Section 250(3).
30 *R v Shipton* [2007] 2 NZLR 218 (CA) at [138]; and *Tutakangahau v R* [2014] NZCA 279, [2014] NZLR 482 at [30].
31 *R v Shipton*, above n 30, at [139].
32 *Tutakangahau v R*, above n 30, at [30] citing *R v Shipton,* above n 30, at [140].
33 *Tutakangahau v R,* above n 30, at [36].

**Submissions**

[17] Mr Harder, on behalf of Mr Wynyard, submitted that the Judge erred:

(a) in setting the starting point;

(b) in giving insufficient allowance for Mr Wynyard's remorse and the reparation paid to the victims; and

(c) by failing to reduce Mr Wynyard's sentence because of his personal factors, including the sexual abuse he suffered as a child.

[18] In relation to the starting point, it was argued that the Judge approached the lead offending against E on an erroneous basis, namely that the maximum penalty available in respect of charge 8 was 10 years' imprisonment, when it was only seven years' imprisonment. Further it was argued that the starting point did not reflect sentencing at the time of the offending (in the mid-1980s) and that the Judge's analysis of *Wilson* as justifying a five year starting point for the lead offending was in error.[34] It was also argued that the uplift for Mr Wynyard's remaining offending was too great. It was submitted that the starting point for the offending against E should have been no more than four years' imprisonment, with an uplift of no more than four years and then a one year reduction for totality, resulting in a global starting point of seven years' imprisonment.

[19] Regarding mitigating factors, Mr Wynyard did not take issue with the 20 per cent discount he received from the Judge for his guilty pleas. He submitted however that the further combined discount of 10 per cent, for remorse and reparations paid, was inadequate. Mr Harder also referred to Mr Wynyard's age — 75 years at the time of sentencing — and to that fact that he had been in poor health prior to sentencing. It was noted that some 20 years had lapsed since Mr Wynyard last offended and that Mr Wynyard was sexually abused as a child. It was argued that the 10 per cent discount allowed was inadequate and that rather there should be a 10 per

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[34] For completeness, we note that in written submissions, counsel for Mr Wynyard stated the starting point was set at five and a half years' imprisonment. We proceed on the basis that the starting point was five years, as set out in the sentencing notes, above n 1, at [37].

cent discount for remorse, a 10 per cent discount for reparations and a further 10 per cent discount for Mr Wynyard's personal circumstances. In total, discounts amounting to 50 per cent of the sentence that would otherwise have been imposed were sought. It was argued that the end sentence should have been no more than three to four years' imprisonment.

[20] Mr Barry for the Crown argued that the sentence was within range and that no error was made by the Judge. It was submitted that the correct maximum penalty for the offending against E, by reference to the statutory provisions as they stood at the time, was 10 years' imprisonment, noting that the specific conduct charged, in charge 8 was mutual oral sex. It was not disputed that Mr Wynyard was entitled to be sentenced by reference to a reduced penalty of seven years' imprisonment for the other charges where oral sex was not part of the charge, but it was submitted that where the charge involved oral sex, the maximum penalty should still be regarded as 10 years' imprisonment notwithstanding legislative amendments over time. It was further argued that the Judge was correct to assess the offending against E as being more serious than Mr Wilson's offending. It was noted that the duration of Mr Wynyard's offending against E was almost double that of Mr Wilson's offending. As to the uplift, it was submitted that there were aggravating features that aligned Mr Wynyard with offenders involved in other cases, in particular, there was the gross abuse of trust, that some of the offending (for reasons which the Judge redacted) had other unique features and that there were many victims, all subjected to serious abuse over a lengthy period. It was argued that starting point adopted by the Judge was within the available range.

[21] In relation to mitigating factors, it was noted that Mr Wynyard is seeking a total discount of 20 per cent for remorse and reparation, despite only seeking 15 per cent at sentencing. Reference was made to s 10(2)(b) of the Sentencing Act 2002 and to the observation made by the Judge that some of the victims had said that the reparation paid was "no compensation for what they suffered".[35] It was also argued that Mr Wynyard was not entitled to a credit for his age and health. It was put to us that these matters had not been raised with the Judge and that there was no factual basis for the claimed discounts. It was accepted that an offender's history of sexual abuse

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[35] Sentencing notes, above n 1, at [52].

as a child can result in a discount but, it was argued, such a discount was not appropriate in Mr Wynyard's case, given the scale and extent of the offending committed by him.

**Analysis**

[22] We start with the submission made for Mr Wynyard that the starting point sentence adopted by the Judge was too high. There are four issues which fall for consideration in this regard. First, what was the correct maximum penalty for charge 8? Secondly, does the correct maximum penalty for charge 8 matter? Thirdly, did the Judge appropriately compare Mr Wynyard's offending with Mr Wilson's offending? Finally, what was the appropriate starting point by reference to comparable authorities?

*The correct maximum penalty*

[23] As we have noted, it was common ground before the Judge that the lead offending for sentencing purposes was Mr Wynyard's offending against E. It commenced in 1982 and recommenced for the period of 1984–1986. It resulted in four charges:

(a) Charge 5 involved masturbation. It was laid pursuant to s 140(1)(a) of the Crimes Act (which was in force at the time of the offending) and covered the period between 1 January 1982 and 31 December 1982. E was 11 to 12 years' old at the time.

(b) Charge 6 also involved masturbation. It was laid under the same section as charge 5 and it related to the period 1 March 1984 to 26 July 1986. E was then aged between 13 and 15 years.

(c) Charge 7 involved masturbation as well. It was laid pursuant to s 140(1)(c). It also alleged offending between 1 March 1984 and 26 July 1986.

(d) Charge 8 involved mutual oral sex. It was laid under s 140(1)(c) and it alleged offending over the same period as charges 6 and 7.

All charges involving E were representative charges.

[24] Mr Wynyard asserted that the Judge approached this offending on an erroneous basis — namely that the maximum penalty for the charge 8 offending was 10 years' imprisonment. He contends that the maximum penalty for this offending was in fact seven years' imprisonment.

[25] The Judge did not directly deal with this issue. Rather he stated as follows:[36]

> [30] The maximum penalties for the charges against you are either seven or 10 years. I do not need to go into the reasons for that, but they are not entirely straight forward because since you committed these offences there have been changes in the law.
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> [31] But in summary, it is agreed that … charges 1, 2, 4, 5, 6, 7, 9, 10 and 11 carry a maximum penalty of seven years' imprisonment. It seems agreed that the maximum penalty for charge 3 is 10 years but there is a dispute as to what the maximum penalty for charge 8 is. However, as [I] have discussed with counsel in their oral submissions, for the purpose of this particular sentencing exercise, in respect of E, that is really a distinction without a difference.

[26] As noted, charges 5 to 8 inclusive were laid under the applicable provisions in force at the time of the offending — s 140(1)(a) and (c) of the Crimes Act. Section 140 provided that every one was liable to imprisonment for a term not exceeding 10 years who, being a male, indecently assaulted a boy,[37] did an indecent act with or upon a boy,[38] or induced or permitted a boy to do an indecent act with or upon him.[39] A boy was any boy under the age of 16 years. There was no separate offence for indecencies against boys under the age of 12 years.

[27] Section 140 was repealed as from 8 August 1986 and replaced with two new provisions — ss 140 and 140A.[40] The replacement s 140 dealt separately with indecencies against boys under the age of 12 years. The maximum penalty for such

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36 Sentencing notes, above n 1.
37 Crimes Act, s 140(1)(a).
38 Section 140(1)(b).
39 Section 140(1)(c)
40 Homosexual Law Reform Act 1986, s 3.

offending was a term of imprisonment not exceeding 10 years.[41] Section 140A dealt with indecencies against boys between the ages of 12 and 16 years. It provided for a maximum term of imprisonment not exceeding seven years.[42]

[28] Sections 140 and 140A were in turn repealed as from 20 May 2005 by s 7 of the Crimes Amendment Act 2005 which substituted new provisions — ss 132 and 134. Both are still in force. Section 132 governs sexual conduct with a child, defined as a person under the age of 12 years old.[43] Section 132(1) provides that every one who has sexual connection (which includes oral sex)[44] with a child is liable to imprisonment for a term not exceeding 14 years. Section 132(3) provides that every one who does an indecent act on a child is liable to imprisonment for a term not exceeding 10 years. Section 134 governs sexual conduct with a young person, defined as a person under the age of 16 years. Section 134(1) provides that every one who has sexual connection with a young person is liable to imprisonment for a term not exceeding 10 years and, under s 134(3), every one who does an indecent act on a young person is liable to imprisonment for a term not exceeding seven years.

[29] Relevantly, s 6 of the Sentencing Act 2002 provides as follows:

> **6 Penal enactments not to have retrospective effect to disadvantage of offender**
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> (1) An offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.
>
> (2) Subsection (1) applies despite any other enactment of rule of law.

Section 6 mirrors s 25(g) of the New Zealand Bill of Rights Act 1990. It also reflects art 15(1) of the International Covenant on Civil and Political Rights to which New Zealand is a party. The effect is that when a penalty is increased after the date on which the offence is committed, but before the date of sentence, the offender is

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41 Section 140(1).
42 Section 140A(1).
43 Crimes Act, s 132(6)(a).
44 Unlawful sexual connection can include oral sex, and such conduct can also be charged as a sexual violation under ss 128 and 128B of the Crimes Act. These provisions came into force in February 1986 pursuant to Crimes Amendment Act (No 3) 1985, s 2. They initially attracted a maximum sentence of 14 years' imprisonment. That sentence has since been increased to 20 years' imprisonment.

entitled to be sentenced by reference to the lesser maximum (as long as there is no indication that the increased penalty is to be given retrospective effect).[45] Equally, an offender is entitled to the benefit of any decrease in penalty enacted after the offending but before sentencing.[46]

[30] Section 6 and/or 25(g) have been applied in the High Court in relation to what was s 140 of the Crimes Act. It has been held that offenders who have offended against young persons aged between 12 and 16 years are entitled to be sentenced by reference to the lower penalty which came into force for such offending as from 8 August 1986.[47] However in other cases, involving 12 to 16 year old victims, and where the offending involved oral sex, it has been held that the maximum penalty can be regarded as 10 years' imprisonment.[48] Unfortunately there is no detailed discussion in the latter cases as to why 10 years' imprisonment was considered to be the maximum available sentence. It appears that the courts have taken this approach because the maximum sentence for such offending under s 134(1) of the Crimes Act (the analogous provision) is 10 years' imprisonment.

[31] Notwithstanding that charge 8 involved oral sex and might today be charged under s 134(1), the only available offence at the time of the offending was s 140, which provided it was an offence to do an indecent act. Section 6 of the Sentencing Act and s 25(g) of the New Zealand Bill of Rights Act focus on the offence, not the offending. Doing an indecent act on a person under 16 remains a discrete offence under s 134(3), which carries a maximum penalty of seven years' imprisonment. Charge 8 was laid under what was s 140(1)(c), carrying a maximum penalty of 10 years' imprisonment. The same offence now carries a maximum penalty of seven years' imprisonment. It follows that pursuant to ss 6 of the Sentencing Act and s 25(g) of the New Zealand Bill of Rights Act, Mr Wynyard was entitled to the benefit of the lesser penalty, being seven years' imprisonment.

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45 *Morgan v R* [2022] NZCA 112 at [17]. See also *R v Poumako* [2000] 2 NZLR 695 (CA) at [55].

46 *Robinson v R* [2016] NZCA 188 at [19]–[22].

47 *S v Police* HC Auckland CRI 2008-404-41, 23 May 2008 at [12]; *R v Tia* HC Auckland CRI 2009-092-7402, 5 October 2010 at [55]–[56]; and *R v Lindsay* [2021] NZHC 2160 at [2].

48 *R v Hearling* HC Auckland CRI 2008-004-010860, 6 March 2009 at [2], affirmed on appeal in *R v Hearling* [2009] NZCA 298 [*R v Hearling* (CA)] at [13]; and *R v Snowden* [2012] NZHC 604 at Appendix at [6].

[32] We make an additional observation.

[33] The Judge (and it seems counsel) assumed that charge 5 attracted a maximum sentence of seven years' imprisonment — presumably relying on the amendments which came into force in August 1986. E was aged between 11 and 12 years at the time of the offending the subject of charge 5. He was under 12 for approximately seven months of the period covered by the charge and over 12 for the remaining five months. The charge was a representative charge and as a result there is no way of knowing when or how often, during the year covered by the charge, the offending took place. If the offending took place prior to E's 12th birthday, it would have attracted a maximum penalty of 10 years' imprisonment and that maximum penalty was not varied. If the offending occurred after E's 12th birthday, Mr Wynyard would be entitled to the benefit of a maximum penalty of seven years' imprisonment pursuant to ss 6 and 25(g) of the Sentencing Act and the New Zealand Bill of Rights Act respectively.

[34] We now turn to the more important issue — does the maximum penalty for charge 8 make any difference?

*Does the correct maximum penalty for charge 8 matter?*

[35] Mr Harder for Mr Wynyard submitted that the Judge adopted an initial starting point of 50 per cent of the maximum sentence available in respect of the charge 8 offending — five years — on the assumption that the maximum penalty available was 10 years. He argued that if the maximum penalty available for the charge 8 offending was seven years' imprisonment, the Judge should have adopted a starting point of three and a half years' imprisonment, being 50 per cent of the maximum penalty available.

[36] We do not agree with this logic. Sentencing is not an arithmetical exercise.[49] The correct maximums that apply can be, at least to an extent, academic, although they can affect whether a combination of concurrent and cumulative sentences is necessary to reflect the totality of the offending in issue.[50] The important thing is that the overall

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49 *Knox v Police* [2014] NZCA 51 at [16]; and *Romana v R* [2013] NZCA 464 at [58].

50 *R v Snowden*, above n 48, at Appendix at [2]; and *R v Afeaki*, HC Auckland T198/94, 20 December 1994.

sentence should reflect "the totality of the offending whether that is achieved through a lead sentence and concurrent sentences, or a combination of concurrent and cumulative sentences".[51]

[37] Mr Wynyard was being sentenced for, inter alia, having engaged in masturbation with E at Dilworth on most nights over 1982. Later, over a period of nearly two and a half years, Mr Wynyard was engaged in mutual masturbation with E approximately three times a week, as well as oral sex on occasion. We agree with Moore J that the change in the maximum penalty available in respect of charge 8 was really a "distinction without a difference".[52] There must have been hundreds of occasions of masturbation and mutual masturbation, and a number of occasions of oral sex. All of the various aggravating features noted by the Judge were in play. We also note the point made in [33] above regarding E's age at the time of the offending. Part of the offending against E which was the subject of charge 5 was subject to a maximum penalty of 10 years' imprisonment. For these reasons we agree with the Judge that, on the facts of this case, the correct maximum penalty for charge 8 does not affect the starting point analysis.

*Did the Judge appropriately compare Mr Wynyard's offending with Mr Wilson's offending?*

[38] Both Mr Wynyard and Mr Wilson taught at Dilworth. The offending committed by each of them came to light as a result of Operation Beverley.

[39] Mr Wilson was convicted of seven offences, two of which were representative.[53] Mr Wilson's offending involved mutual oral sex with a victim, A, on a weekly basis and over a lengthy period of time.[54] In sentencing Mr Wilson, Judge Collins, in the District Court, said that "a court in the 1980s could not have avoided a starting point of less than four years for the offending in relation to A and may well have been higher".[55] He adopted a starting point of four years' imprisonment

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51 *R v Snowden*, above n 48, at Appendix at [2].
52 Sentencing notes, above n 1, at [31].
53 *R v Wilson,* above n 13, at [4].
54 At [7].
55 At [16].

for Mr Wilson's offending against A. Later he described this starting point adopted as being "generous".[56]

[40] Moore J noted that, while Mr Wynyard's offending against E was not as serious as Mr Wilson's offending against A, it was more frequent and prolonged. He also commented that Mr Wynyard took advantage of E, not only while he was a boarder at Dilworth, but later after E had left the school. He considered that this latter offending in particular evinced a gross and enduring breach of trust.[57]

[41] We agree with Moore J's assessment. In total, Mr Wynyard's offending against E took place over a period of approximately three and a half years — almost double the period of offending by Mr Wilson against A. As the Judge noted, Mr Wynyard's offending against E, particularly after E had left Dilworth, involved a very significant breach of trust and demonstrated a high level of premeditation. Further the offending after E had left the school escalated and Mr Wynyard clearly orchestrated what occurred. This was deserving of a condign approach from the Court.

[42] We are not persuaded that the Judge erred in comparing Mr Wynyard's offending with Mr Wilson's offending. Rather, in our view the Judge appropriately compared the offending in both cases and the conclusions which he drew were open to him.

*What was the appropriate starting point by reference to comparable authorities?*

[43] We start with an observation that sentencing in the mid-1980s followed a rather less sophisticated methodology than is used today and that starting point sentences were not generally identified in the sentencing decisions made at the time. It can be difficult to find out what the starting point sentences were in the various cases. In any event, this Court has held that courts should not try to reconstruct the sentencing practices which applied in earlier decades.[58] Rather present-day attitudes must govern

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56 At [17].
57 Sentencing notes, above n 1, at [36].
58 *R v Accused (CA463/97)* (1998) 15 CRNZ 602 (CA) at 609.

the appropriate sentencing approach.[59] We also observe that other cases should not determine the starting point. Rather they can be used as a cross-check.[60]

[44] Moore J was clearly aware that he had to sentence Mr Wynyard by reference to the penalties which were applied to such offending at or about the time of the offending. Various more or less contemporaneous decisions were cited to the Judge in support of the appropriate starting point for Mr Wynyard's offending.[61] We have considered these various decisions. We have also considered others involving sentencing for indecencies on young persons committed in or about the 1980s.[62] None is directly comparable. Some involve more serious offending; others do not involve the frequency, duration and scale of Mr Wynyard's offending. Suffice to say that, in our judgement, the starting point sentence of five years' imprisonment for Mr Wynyard's offending against E, while stern, was well within the available range.

[45] We now turn to consider the uplift applied by the Judge.

*The uplift*

[46] As noted, the Judge applied an uplift of five and a half years' imprisonment to reflect Mr Wynyard's additional offending against the other victims.[63]

[47] It was submitted for Mr Wynyard that the uplift was too great and that it should have been no more than four years' imprisonment.

[48] We disagree. We note the following:

(a) There were seven additional victims, all were under the age of 16 at the relevant time. Many were in the 12- to 13-year-old age group. One, the victim of the charge 3 offending, was nine to 10 years of age.

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59 At 609.

60 *Cheung v R* [2021] NZCA 175, [2021] 3 NZLR 259 at [63].

61 *R v Morris (aka Phipps)* [2020] NZHC 1662; *R v Moloney* [2009] NZCA 9; *R v Hearling* (CA), above n 48; *D (CA368/2017) v R* [2017] NZCA 464; and *S v Police*, above n 47.

62 *R v Darke* CA255/88, 20 April 1989 (end sentence of seven years' imprisonment); *A (CA289/98) v R* CA289/88, 4 November 1998 (end sentence of six years' imprisonment); *R v [L]* CA134/01, 26 February 2002 (end sentence of four and a half years' imprisonment); and *R v Snowden*, above n 48 (end sentence of seven and a half years' imprisonment).

63 Sentencing notes, above n 1, at [41].

(b) The offending against the other victims spanned a lengthy period. It was significant offending in its own right.

(c) Mr Wynyard was aged between 32 and 54 years over the time of the offending.

(d) The offending had a considerable effect on the additional victims. Many said that the offending altered the course of their lives, caused them life long mental health issues, was responsible for the breakup of their intimate relationships, and, for at least one victim, played a part in his attempted suicide.

(e) While all of Mr Wynyard's additional offending involved a breach of trust, some of the offending involved a much more significant breach of trust than the other offending. We do not go into detail, to preserve the privacy of the victims. Suffice it to say that the nature of some of Mr Wynyard's additional offending involved a very gross abuse of trust, distinguishing Mr Wynyard's offending from that of other offenders who have faced uplifts in similar situations.

[49] Nor do we consider that the uplift applied by the Judge was out of step with uplifts applied in similar cases.

(a) In *Wilson*,[64] Judge Collins took an uplift of two years for one additional victim, D, and further uplifted this by a year for other offending against three additional victims.[65] Taken together with the starting point of four years' imprisonment for the offending against A, the Judge adopted an initial starting point of seven years' imprisonment, before affording Mr Wilson a six month adjustment for totality.[66]

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64 *R v Wilson*, above n 13.
65 At [17].
66 At [18].

(b) Mr Browne's offending, also at Dilworth, spanned the period 1987 to around 2002 and involved fourteen child and adolescent victims.[67] He was convicted of 10 charges of indecency with a boy aged between 12 and 16, three charges of indecency with a boy under 12, indecent assault on a man or boy, possession of an objectionable publication, and a representative charge of sexual violation by unlawful sexual connection. Toogood J adopted a starting point of four years' imprisonment for the charge of sexual violation by unlawful sexual connection.[68] He then applied an uplift of six years' imprisonment for the additional offending, taking him a global starting point of 10 years' imprisonment.[69]

[50] We do not consider that either *Browne* or *Wilson* requires fine grained comparison as suggested, in effect, by Mr Wynyard. Neither case is directly comparable. In our judgement, the five-and-a-half-year uplift adopted by the Judge for Mr Wynyard's offending against the remaining seven victims, while again stern, was within the available range, as was the totality adjustment. It follows that in our judgement, the starting point of nine years' imprisonment adopted by the Judge for all of Mr Wynyard's offending was appropriate and within range.

[51] We now turn to consider the various discounts allowed by the Judge.

*Credit for remorse and reparation*

[52] The Judge adopted a 10 per cent discount for remorse and reparation.[70]

[53] We accept that Mr Wynyard is remorseful and that he has accepted full responsibility for his offending. Further, Mr Wynyard sold his house and used $80,000 from the proceeds of sale to pay reparation of $10,000 to each of his eight victims. He seeks a total 20 per cent discount for both his remorse and the reparation paid.

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67 *R v Browne*, above n 16, at [5].
68 At [37].
69 At [40].
70 Sentencing notes, above n 1, at [56].

[54] Payments made by an offender to a victim must be taken into account as a mitigating factor in sentencing.[71] There is however no fixed tariff. Rather the significance of any payment must be viewed against the circumstances as a whole, including the offending and its effects.[72] In deciding whether and to what extent any offer of amends, whether financial or otherwise, should be taken into account, the courts must inter alia take into account whether or not it has been accepted by the victims as expiating or mitigating the wrong.[73]

[55] In Mr Wynyard's case, the victims were consulted about the reparation payments offered by Mr Wynyard. As Moore J recorded, the clear majority was sceptical about Mr Wynyard's motives.[74] Several commented that it was no compensation for what they had suffered. Others were equivocal about whether they would accept the payment offered. As the Judge noted, a recurring theme was that the victims did not believe that the payment expiated or mitigated Mr Wynyard's wrongs.[75]

[56] Nevertheless, in our judgement the 10 per cent allowed by the Judge for remorse and for the payment of reparation was insufficient. There was clear remorse expressed by Mr Wynyard. We accept that the victims do not consider that the payments made expiate or mitigate the wrong, but we consider that the payments are demonstrative of the very real remorse Mr Wynyard has expressed. The reparation payments made were a concrete affirmation of that remorse. We consider that the discount should have been 15 per cent from the sentence which would otherwise have been imposed. The discount could have been a little higher, perhaps 20 per cent, but we consider that the discount for the guilty pleas allowed by the Judge was generous given that the pleas were only entered two weeks before trial. On balance, a total discount of 35 per cent for the pleas, for remorse and for the reparation paid, is in our view appropriate.

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71 Sentencing Act 2002, s 10(1)(a). See also *R v Johnson* [2010] NZCA 168 at [28]; and *Pollard v R* [2018] NZCA 244 at [37].
72 *R v M* [2008] NZCA 112 at [37].
73 Sentencing Act, s 10(2)(b).
74 Sentencing notes, above n 1, at [52].
75 At [52].

[57] Mr Wynyard sought further credit for his age, poor health, and the fact that he was sexually abused as a child.

[58] Age and health were not raised before the Judge.

[59] We accept that Mr Wynyard is elderly. He was born in 1948. He is now 75 years old. Age is a mitigating factor relevant to sentencing,[76] but of itself it is unlikely to be significant.[77] We can take judicial notice of the fact that imprisonment will not be easy for a man of 75 years but there is nothing before us to suggest that it will be unduly burdensome or harsh for Mr Wynyard.

[60] We acknowledge that Mr Wynyard's sentencing had to be adjourned for some 10 months to enable him to undergo surgery. There is however nothing to suggest that he has not recovered from that surgery, that the fact that he had surgery will make serving a sentence of imprisonment more difficult for him, or that he suffers from ongoing ill health.

[61] While age and ill health can mitigate the sentence which might otherwise be imposed, whether or not they do so depends on the circumstances of the offence and the offender.[78] Here there is no evidential foundation for the submission that Mr Wynyard's age, coupled with his earlier ill health, will make a sentence appreciably harsher for him. Even if there were such evidence, any reduction would be limited.[79]

[62] In an affidavit provided for sentencing, Mr Wynyard deposed that he was a victim of sexual abuse as a child. He seeks credit for this factor, as having causatively contributed to his offending.

[63] We accept that, in appropriate circumstances, a discount for the causative contribution of an offender's own history of sexual abuse to subsequent offending may be appropriate,[80] but agree with the Judge that this case does not call for a discount. First, there is no evidential foundation for the causative contribution claimed.

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76 Sentencing Act, s 9(2)(a).
77 *M (CA91/2012) v R* [2013] NZCA 325 at [54].
78 At [54].
79 At [54].
80 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509.

Secondly, as the Judge acknowledged, the abused can often become the abusers, but the extent and scale of Mr Wynyard's offending makes recognition of the fact that he was abused as a child difficult to accept in this case. The Judge considered that the extent and scale of Mr Wynyard's offending took his case out of the realm where a discrete discount for his personal history was available.[81] We agree. We note the observations of the Supreme Court in *Berkland v R* — the more serious and carefully orchestrated the offending, the more the courts are likely to emphasise the choice made by the offender to offend.[82] Any causative contribution is reduced and other sentencing purposes become more prominent, for example denunciation and deterrence.[83]

[64] Here, Mr Wynyard was an adult, exercising parental and leadership roles over adolescent boys placed in his care by those who, not unreasonably, reposed the upmost trust in him. Mr Wynyard cynically and callously abused that trust. The scale and extent of his offending is such that a discount for his personal background is not available to him.

[65] It was also suggested by Mr Wynyard that he should receive a credit for the fact that, for a period of some 20 years, he did not offend. We do not consider that Mr Wynyard was entitled to a discount for this factor. His offending continued over a long period and it involved multiple victims. It cannot be explained as being a momentary and out of character lapse in judgment by an otherwise upstanding member of the community. Again, the scale and duration of his offending precludes any discount for this factor.

[66] For the reasons we have set out, we consider that the starting point adopted by the Judge — nine years' imprisonment — while stern, was within range. We would allow discounts of 20 per cent for the guilty pleas and 15 per cent for remorse and the reparations paid. With some relatively minor rounding this results in an end sentence of 5 years and 10 months' imprisonment.

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81 Sentencing notes, above n 1, at [61].
82 *Berkland v R,* above n 80, at [16(c)].
83 At [16(c)].

**Result**

[67] The appeal is allowed in part. The sentence of six years and three months' imprisonment imposed in the High Court is quashed and a sentence of five years and 10 months' imprisonment is substituted therefore. In all other respects, the appeal is dismissed.

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