

OUR REFERENCE

**DIRECTOR'S CHAMBERS**

YOUR REFERENCE

DATE

9 October 2013



The Hon James Wood AO QC  
NSW Sentencing Council  
GPO Box 6  
Sydney NSW 2001

Dear Mr Wood,

**Standard Non-parole periods for Child Sexual Assault Offences**

Thank you for the opportunity to provide comment on the above question, which is part of a broader review.

The attached submission has been prepared in consultation with a number of ODPP lawyers. I agree with these comments and I also note that the earlier questions and the answers will provide context to our response to question 2.4. Accordingly we ask that ultimately this response is read together with the whole ODPP submission.

Yours faithfully

**Lloyd Babb SC**  
**Director of Public Prosecutions**

**Sentencing Council – Standard Minimum Non Parole Periods  
Question Paper  
Submission from the Office of the Director of Public  
Prosecutions – regarding child sexual assault offences**

The Sentencing Council has requested that submissions on this issue are provided before submissions on the remaining questions posed in the question paper on Standard Minimum Non Parole Periods.

We note that the earlier questions and the answers will provide context to our response to question 2.4. Accordingly we ask that ultimately this response is read together with the whole ODPP submission.

**2.4 What child sexual assault offences should be SNPP offences?**

A number of prevalent child sexual assault offences are already included in the SNPP scheme. In 2009 we wrote to the Sentencing Council in regard to a review of the SNPP scheme. In that submission we suggested that section 66C be included in the scheme and noted that the decision of *R v Dagwell* [2006] NSWCCA 98 commented on the incongruity of the absence of this offence from the table.

We also noted in that letter it was unusual that section 66EA was not included in the SNPP scheme. We have previously raised with the Sentencing Council (see our submission to the Sexual Assault Offences – Review of Penalties December 2007), the problems associated with the current section 66EA and called for it to be recast. We understand that the Department of Attorney General and Justice is working on a proposal in this regard.

The standard non-parole period for s61M(2) Indecent Assault Child under 16 needs to be reviewed. A recent case of *KW v R* [2013] CCA 31 demonstrates some of the problems faced by the court in sentencing, in this case the problem was sentencing for an offence of Indecent Assault Child s61M(2)- (that was not a representative count) the CCA commented on the difficulty the sentencing Judge had in accepting that the SNPP was an appropriate sentence in the circumstances:

“His Honour recognised that, in respect of the first count, because it was subject to a standard non-parole period and the provisions of Pt 4 Div 1A of the Sentencing Procedure Act, it was necessary that he assess where, on a scale of objective gravity, that offence lay. He accepted a Crown submission (contrary to that advanced on behalf of the applicant) that that offence was significantly above the mid-range of objective seriousness for offences of its kind. Indeed, he said that there was “no escaping that classification”. That was predominantly because of the age of the child at the time of the offence.

Again, in relation to that offence, he said:

"In relation to Count 1 carrying as it does the standard non-parole period of 8 years for an offence in the mid-range of objective seriousness, in my view, *I cannot see any way that I can avoid imposing that sentence on him as the non-parole period for Count 1. Even for what the offender did that in my own view is a very severe penalty and is significantly more than I would have imposed as a non-parole period even for this offence.* However, I am bound by the requirements of Part 4 Division 1A of the *Crimes (Sentencing Procedure) Act*. Because that is my view I am not prepared to impose an even higher non-parole period even though I have assessed what the offender did in relation to Count 1 as being above the mid-range."

Accordingly, he went on to impose that sentence, and the other sentences to which I have referred to above.

It is clear that his Honour was significantly troubled by the standard non-parole period. An offence carrying a maximum sentence of 10 years, with a standard non-parole period of 8 years, presents a particularly difficult sentencing exercise. *In the course of argument, his Honour had made it plain that he considered that the specification of a standard non-parole period of 8 years in respect of an offence that carries a maximum penalty of imprisonment for 10 years to be unwieldy and unworkable.*[paras 26 – 28]" [emphasis added].

**Office of the Director of Public Prosecutions  
October 2013**