

OUR REFERENCE

DIRECTOR'S CHAMBERS

YOUR REFERENCE

DATE

18 October 2013



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

Dear Mr Wood

Standard Non-parole periods Sentencing Council Question Paper

Thank you for the opportunity to provide comment on the question paper dealing with Standard Non-Parole Periods.

The attached submission has been prepared in consultation with a number of ODPP lawyers. I agree with these comments.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Lloyd Babb'.

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**

(1) What offences should be SNPP offences?

As is evident from the discussion in the Question Paper it is difficult to establish a logical rationale for making some offences SNPP offences and others not and formulate criteria for SNPPs that are both transparent and objective. Further, because the criteria for future SNPP offences is being determined retrospectively, it is not possible in our view to formulate criteria and principles that all the current SNPP offences will meet. Accordingly at the end of this exercise we support a review of current SNPP offences and removing those offences that do not meet the criteria.

It is our position that offences should be added to the scheme sparingly, and the scheme should focus on serious offending such as aggravated forms of the offences.

(2) What criteria should be used to assess whether an offence should be an SNPP offence?

The criteria identified in paragraph 2.3 of the question paper at first blush appear to be appropriate. However the criterion, "community concern" for instance has a rhetorical appeal but it is not possible to accurately define it or quantify it. "Any need for general deterrence" may cover the same territory as "community concern", and also cross over into the concerns about the "prevalence of the offence". "Need for general deterrence" suffers from similar problems of definition and quantification as "community concern", but at least as far as "prevalence" is concerned it is possible to measure the incidence of particular types of offending from statistics.

There is ambiguity about the term "type of offence". Is it addressing a particular offence (e.g. murder) or particular conduct (e.g. making fraudulent transactions or robbing banks or dealing in drugs which might include a number of particular offences all of which would logically need to be included in the scheme). One of the inherent problems in this exercise is that the SNPP scheme supposes that a particular charge addresses a particular type of crime, which is not how the Crimes Act has evolved. The Crimes Act is a historical instrument, which has been added to over time and consequently and inevitably has overlaps, inconsistencies and anomalies, and more than one offence may meet a generic type of conduct.

"Sentencing patterns not reflecting the seriousness of the offence" is also problematic as what criteria could be used to assess whether or not the seriousness of the offence has been sufficiently recognised by the courts?

The instances of what appear to be overly lenient sentences could equally relate to the offence capturing a wide variety of circumstances.

(3) How should the criteria be applied? (In what combination?)

In our view the most important criteria are the seriousness of the offence and the prevalence of the offence. SNPPs should not apply to Table 2 offences, and preferably not Table 1 offences that are usually dealt with in the Local Court. We however, agree with the comment at 2.51 of the question paper that excluding all offences that may be tried summarily could have significant consequences for dealing with serious offending behaviour.

2.2 If the maximum penalty for an offence were to be a criterion for assessing whether an offence should be an SNPP offence, how should it be used?

The maximum penalty for an offence should be at least 10.

2.3 (1) If the type of offence were to be a criterion for assessing whether an offence should be an SNPP offence, how should it be used?

As previously noted the only types of offence that is we think might usefully be used as a criterion is serious offending or aggravated offences.

(2) What types of offence should be SNPP offences?

Consistent with our comments above these would be serious offences that represent a high degree of public mischief, danger to the community or harm to victims.

2.4 What child sexual assault offences should be SNPP offences?

See our earlier submission

2.5 In determining which offences should be SNPP offences, what should the approach be to offences that cover a wide range of offending behaviour?

In our view there is limited utility including offences that cover a wide range of offending behaviour and inclusion could lead to injustice and/or increased appeals.

2.6 In determining which offences should be SNPP offences, what should the approach be to aggravated offences?

Aggravated offences tend to cover more defined circumstances and are considered of their nature to be a more serious type of conduct and accordingly should be considered for inclusion in the SNPP scheme.

2.7 If the prevalence of an offence were to be a criterion for assessing whether an offence should be an SNPP offence, how should it be used?

The prevalence of an offence should only be considered in conjunction with the seriousness of the offence, and what might be considered to be a need for general deterrence.

2.8 In determining which offences should be SNPP offences, what should the approach be to indictable offences that can be tried summarily?

We would generally consider that indictable offences that are dealt with summarily should not be excluded from the application of the scheme.

2.9 In determining which offences should be SNPP offences, what should the approach be to offences that are subject to a guideline judgment?

In our view the SNPP scheme and the Guideline Judgment scheme should be mutually exclusive. This is because guideline judgments provide greater particularity and guidance as to sentencing ranges and the SNPP. Guideline judgements pose fewer problems on appeal. Guideline judgements are able to take into account a variety of factors relevant to sentencing. Combining the two is liable to create undue complexity in the sentencing process.

2.10 If community concern about an offence were to be a criterion for assessing whether an offence should be an SNPP offence:

(a) how should it be identified and measured; and

In our view "community concern" is a concept too broad and ill-defined to usefully be a criterion for setting a SNPP offence. The reality is that the community as a whole is not well informed as to sentencing principles or the prevalence of particular types of crimes.

(b) how should it be used?

While not resiling from the above, a possible way that "community concern" could be included as a criterion would be via community representation in a forum such as the Sentencing Council.

2.11 (1) If the disparity in sentencing levels for an offence were to be a criterion for assessing whether that offence should be an SNPP offence, how should it be used?

Disparity in sentencing levels should only be used as a criterion for assessment if there is a clear case of being able to compare like offending. It would not be useful for instance in offences such as manslaughter that covers a wide range of offending.

(2) How should that disparity be measured?

It would require a full consideration of all the facts and the sentences exposed for all cases.

2.12 If forms of complicity were to be included in the SNPP scheme:

- (a) which forms of complicity should be included; and**
- (b) to which SNPP offences should they relate?**

There was no clear view within the office about which forms of complicity, if any, should be included in the scheme. Attempt murder is already included and other attempt offences such as s66B, attempt sexual intercourse with a child, may also be suitable.

3.1 At what level should the SNPPs be set?

In our view the SNPP should be consistently set across offences at no more than 50% of the maximum penalty. If that figure is considered not to adequately reflect the seriousness of the offence then the question of what the appropriate maximum penalty is needs to be reviewed.

3.2 If SNPPs are to be set on an offence by offence basis, how should the analysis be undertaken?

Any approach to setting different percentages for SNPPs for different offences should be on a case by case basis, with a reasoned approach being adopted to varying a default percentage.

3.3 If the SNPP for an offence is to be set as a fixed percentage of the maximum penalty for all SNPP offences, what should that percentage be?

If the SNPP for an offence is to be set as a percentage of the maximum penalty from within a range:

- (a) what should the range be, and**
- (b) how should the amount be determined for each individual SNPP offence from within that range?**

25 to 50% of the maximum penalty.

3.5 In what circumstances, if any, would a high proportion of SNPP to maximum penalty (for example, 80%) be appropriate for an SNPP offence?

It is difficult to envisage a circumstance where it should be 80% of the maximum penalty, if the SNPP is to be that high it suggests that perhaps the maximum penalty is not high enough.

3.6 How should SNPPs be set for offences carrying a maximum penalty of imprisonment for life?

We question the need to set a SNPP for an offence that carries a maximum penalty of life imprisonment.

4.1 What procedures should be followed, in future, to determine whether an offence should be included in or removed from the SNPP scheme and the level of the SNPP for any offence included in the scheme?

4.2 (1) Who should assess and recommend whether an offence should be included in the list of SNPP offences and the level of the SNPP for each offence included?

The Sentencing Council.

(2) How should community views be taken into account in assessing whether an offence should be included in the list of SNPP offences and the level of the SNPP for each offence included?

The Sentencing Council should have community representatives or access to community representatives to ascertain community concern.