

**Submission  
No 16**

## **SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS**

**Organisation:** Local Court of New South Wales  
**Date Received:** 28/02/2014



NEW SOUTH WALES  
**THE CHIEF MAGISTRATE OF THE LOCAL COURT**

28 February 2014

The Committee Manager  
Child Sexual Offences Committee  
Parliament House  
Macquarie St  
SYDNEY NSW 2000

Dear Sir/Madam

**Submission – Inquiry into the Sentencing of Child Sexual Assault Offenders**

I am writing on behalf of the Local Court of New South Wales in response to the public call for submissions in respect of the above inquiry.

The purpose of this submission is to outline the jurisdiction and experiences of the Local Court in sentencing offenders for child sexual assault offences, to assist in informing the Committee’s consideration of the issues set out in its terms of reference. My comments on sentencing options are confined to aspects of existing sentencing law where consideration of some adjustment would be desirable.

Jurisdiction

A number of particularly serious offences, such as aggravated sexual assault involving a child victim, are classed as strictly indictable. These matters usually commence as committal proceedings in the Local Court for a determination of whether there is sufficient evidence to warrant the defendant being put on trial. Such matters must be finalised, and where relevant an offender must be sentenced, in the District Court.

The Local Court effectively shares jurisdiction with the District Court in respect of a number of other child sexual assault offences under the *Crimes Act 1900*, including:

Section	Offence	Table	Sentencing		
			SNPP	Maximum	LC limit
61M(1)	Indecent assault in circumstances of aggravation	1	5 yrs	7 yrs	2 yrs
61M(2)	Aggravated indecent assault – victim under the age of 16	1	8 yrs	10 yrs	2 yrs
61N(1)	Act of indecency - victim under the age of 16	2	-	2 yrs	2 yrs
61O(1)	Aggravated act of indecency - victim under the age of 16	2	-	5 yrs	2 yrs
61O(2)	Aggravated act of indecency - victim under the age of 10	1	-	7 yrs	2 yrs

Table = Table 1 or 2 of Schedule 1, Criminal Procedure Act 1986  
SNPP = Standard non-parole period scheme applicable where offence dealt with on indictment  
LC limit= Local Court jurisdictional sentencing limit

All of the above offences are 'Table' offences, that is, they are included in the list of indictable offences in Schedule 1 of the *Criminal Procedure Act 1986* that are capable of summary disposition in the Local Court. This jurisdictional flexibility recognises the fact that within the elements of a particular offence, there can be significant variation in the objective seriousness of the offending conduct involved. The decision as to whether or not an offence should be dealt with summarily or on indictment is not made by the Court. Instead, section 260 of the *Criminal Procedure Act 1986* requires Table matters to be finalised summarily unless the prosecution elects to have a matter proceed on indictment in the District Court. The defence may also make an election in a Table 1 matter, though in practice will rarely (if ever) do so.

One significant matter relevant to the question of election is the extent of the sentencing power available to the court should the offender ultimately plead or be found guilty of an offence. The District Court may impose a sentence up to the maximum penalty prescribed by law, whereas the Local Court is limited to a maximum sentence of two years imprisonment for a single offence, and a total of 5 years when sentencing for multiple offences.<sup>1</sup>

From a prosecutorial perspective, the published guidelines of the Office of the Director of Public Prosecutions provide that an election is not to be made unless, amongst other considerations, "the accused person's criminality (taking into account the objective seriousness and his or her subjective considerations) could not be adequately addressed within the sentencing limits of the Local Court"<sup>2</sup>. However, such a guideline must be understood as operating in the context of the current fiscal environment where the cost to government, resources and time taken to prosecute a matter summarily in the Local Court is considerably less than on indictment in the District Court.<sup>3</sup>

While the ratio in the division of Table child sexual assault offences between the Local Court and District Court has varied (particularly in relation to aggravated indecent assault offences under s 61M, which are classified as standard non-parole period offences), overall the majority of matters tend to remain in the Local Court. According to the most recent available data, the number of persons convicted of at least one such offence has been as follows:

Offence	Court	2008	2009	2010	2011	2012
61M(1) Indecent assault in circumstances of aggravation (where victim under the age of 16) <sup>4</sup>	Local Court	137	92	35	21	21
	District Court	82	91	62	33	32
61M(2) Aggravated indecent assault – victim under the age of 16	Local Court	48	34	72	71	99
	District Court	36	45	46	95	75

<sup>1</sup> *Criminal Procedure Act 1986*, ss 267, 268; *Crimes (Sentencing Procedure) Act 1999*, s 58

<sup>2</sup> Office of the Director of Public Prosecutions, Guideline 8 – *Election for offence to be dealt with on indictment*, [www.odpp.nsw.gov.au/prosecution-guidelines](http://www.odpp.nsw.gov.au/prosecution-guidelines)

<sup>3</sup> For instance, see Productivity Commission, *Report on Government Services*, Table 7A.31. The real net recurrent expenditure (excluding payroll tax) per criminal finalisation in 2012-13 was \$693 in the Local Court and \$6,700 in the District Court.

<sup>4</sup> Offences against s 61M(1) in the above table are limited to those where a recorded circumstance of aggravation was that the victim was a child under the age of 16. Section 61M(1) formerly included this as a circumstance of aggravation, whereas s 61M(2) specified an offence of aggravated indecent assault where the victim was a child under the age of 10. From 1 January 2009, the section was recast to specify in subsection (2) the offence of aggravated indecent assault where the victim is a child under the age of 16. This change may explain the decrease in s 61M(1) offences and increase in s 61M(2) offences seen between 2008 and 2012.

61N(1)	Act of indecency – victim under the age of 16	Local Court	33	42	55	52	52
		District Court	9	10	11	10	9
61O(1)	Aggravated act of indecency - victim under the age of 16	Local Court	8	3	5	11	5
		District Court	9	5	9	11	10
61O(2)	Aggravated act of indecency - victim under the age of 10	Local Court	11	7	12	11	11
		District Court	3	3	4	6	5
		<b>LC total</b>	<b>237</b>	<b>178</b>	<b>179</b>	<b>166</b>	<b>188</b>
		<b>DC total</b>	<b>139</b>	<b>154</b>	<b>132</b>	<b>155</b>	<b>132</b>
		<b>TOTAL</b>	<b>376</b>	<b>332</b>	<b>311</b>	<b>321</b>	<b>320</b>

Source: NSW Bureau of Crime Statistics and Research

Another factor that is not discernible in data recording persons ultimately convicted is the significant effect that charging decisions and negotiations between the parties may have upon the course of proceedings in practice. Due to the benefits to both parties of having proceedings finalised in the Local Court, it is not uncommon for a plea of guilty based on certain agreed facts to be accepted in return for the matter remaining in the Local Court. Negotiation may also occur around charges, enabling matters that commence as committal proceedings on the basis of charges for strictly indictable offences to be finalised by way of sentence proceedings in the Local Court on charges for Table offences. As a matter of established principle, a sentencing court cannot take into account a factor that would constitute an element of a more serious offence than the one for which the offender has been convicted or pleaded guilty.<sup>5</sup>

### The sentencing task

In its recent report on sentencing, the Law Reform Commission observed:

Almost every aspect of sentencing concerns the inherent and unavoidable tension between the exercise of individual judicial discretion, and the consistency of approach that is required in order to maintain public confidence in the criminal justice system. This tension lies at the heart of much debate and criticism of sentencing...<sup>6</sup>

The object of consistency in approach has been explained by the High Court as being “consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence”, that is achieved by “having proper regard not just to what has been done in other cases but *why* it was done”.<sup>7</sup> In the absence of a penalty being fixed by statute there is “no single correct sentence”, with the result that judicial officers sentencing at first instance “are to be allowed as much flexibility... as is consonant with consistency of approach and as accords with the statutory regime that applies”.<sup>8</sup>

It is thus not necessarily the case that one instance of an offence under a particular section can be treated as essentially the same as another. Across the different instances of an offence, a broad spectrum of offending behaviour can be observed, and within any single sentencing occasion the synthesis of a range of processes and considerations is required. The diversity of the legislative list of the purposes for which a court may impose

<sup>5</sup> *R v De Simoni* (1981) 147 CLR 383 at 398 per Gibbs CJ

<sup>6</sup> Law Reform Commission of NSW, Report 139 *Sentencing* (July 2013), [1.28]

<sup>7</sup> *Hill v R; Jones v R* [2010] HCA 45 at [18], emphasis in original

<sup>8</sup> *Markarian v R* [2005] HCA 5 at [27]

a sentence set out in s 3A of the *Crimes (Sentencing Procedure) Act 1999* is indicative of this complexity. It refers to:

- Ensuring that the offender is adequately punished for the offence,
- Preventing crime by deterring the offender and other persons from committing similar offences,
- Protecting the community from the offender,
- Promoting the rehabilitation of the offender,
- Making the offender accountable for his or her actions,
- Denouncing the conduct of the offender,
- Recognising the harm done to the victim of the crime and the community.

Sentencing will thus often involve considerable challenges for the court in seeking to arrive at an outcome that is just in all the circumstances of the offence and having regard to the object of consistency of approach. Undoubtedly, there are instances that compel the conclusion that no penalty other than imprisonment is appropriate, having considered all possible alternatives, as required by s 5 of the *Crimes (Sentencing Procedure) Act 1999*. There are others where the nature of the offending conduct and/or the subjective circumstances of the offender is such that an offence may properly be dealt with by an alternative custodial sentence or a non-custodial sentence.

These observations are pertinent to the sentencing of individuals for Table child sexual assault offences and evident in the Local Court sentencing statistics available from the NSW Judicial Commission's Judicial Information Research System (JIRS), set out in the enclosed table. This data cannot of itself identify whether a sentence in any particular instance is within the range of sentences that may be appropriate for a given offence and is simply indicative of the general pattern of sentencing. As the NSW Court of Criminal Appeal has noted, the JIRS sentencing data should be approached as "reflect[ing] what was regarded as appropriate in the wide variety of circumstances in the cases reported in those statistics".<sup>9</sup>

#### Standard non-parole offences and the Local Court

As noted above, the aggravated indecent assault offences in s 61M are classified as standard non-parole offences, for which the Parliament has indicated the non-parole period that should apply for an offence dealt with on indictment that falls in the middle of the range of seriousness for that type of offence.

The scheme set out in Division 1A of Part 4 of the *Crimes (Sentencing Procedure) Act* does not apply to offences dealt with summarily. As a result, issues in regard to its application – for instance, the SNPPs for offences against ss 61M(1) and (2) have been the subject of some criticism insofar as the periods specified for each (5 years and 8 years respectively) represent a significant proportion of the maximum sentence available at law (71.4 percent and 80 percent respectively) and may thus be difficult to apply<sup>10</sup> – have no direct impact upon matters finalised in the Local Court.

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<sup>9</sup> See *R v Lao* [2003] NSWCCA 315 at [33] per Spigelman CJ

<sup>10</sup> See Law Reform Commission of NSW, Report 134 *Standard minimum non-parole periods* (May 2012) at [2.11]-[2.13]

However, it should be observed that offences of aggravated indecent assault under ss 61M(1) and (2) are routinely dealt with in the Local Court in circumstances where the current jurisdictional limit upon its sentencing powers means that it is not possible for an offender to receive a sentence that even approaches the prescribed SNPP.

It may be that such a sentence would not be appropriate for the large majority of offenders appearing before the Local Court (the rationale being that a prosecution election should have been made to proceed on indictment if it appears that the alleged conduct falls within the middle of the range of objective seriousness). In some instances, though, the two-year jurisdictional sentencing limit can act as a constraint on the imposition of a sentence that adequately reflects the seriousness of the offending conduct. The enclosed JIRS data indicates that between October 2011 and September 2013, a total sentence at the Court's jurisdictional limit was imposed in 6.2 percent of sentences of full-time imprisonment for offences under s 61M(2), or 4.0 percent of all sentences for such offences, an increase from 3.9 percent and 2.9 percent respectively in the previous 2-year period.

Despite this experience, which extends more broadly to the large number of Table offences being determined in the Local Court, there has not been support for an increase to the jurisdictional sentencing limit.<sup>11</sup> It is, however, an area that the Law Reform Commission has indicated should be the subject of further monitoring. I remain of the view that an increase in the Local Court's sentencing jurisdiction is timely and appropriate.

A further issue particular to the Local Court is the structuring of sentences for offences to which a SNPP would apply if dealt with on indictment. Section 45 of the *Crimes (Sentencing Procedure) Act 1999* on its face precludes the imposition of a fixed term of imprisonment for such offences, even where dealt with in the Local Court, and requires a non-parole period to be set for such an offence. It provides:

(1) When sentencing an offender to imprisonment for an offence or, in the case of an aggregate sentence of imprisonment, for offences, **(other than an offence or offences set out in the Table to Division 1A of this Part)**, a court may decline to set a non-parole period for the offence or offences if it appears to the court that it is appropriate to do so.

While s 54D(2) provides that the SNPP scheme in Division 1A does not apply if the offence is being dealt with summarily, s 45 (located in Division 1) simply identifies the offences for which there is no power to impose a fixed term of imprisonment by reference to the list in the Division 1A Table. It is unclear whether Parliament intended that the prohibition on imposing a fixed term of imprisonment for a standard non-parole offence should apply in the Local Court, despite the scheme in Division 1A not being applicable. In circumstances where the jurisdictional limit of a two-year total sentence applies to a sentence for a single offence, this creates an anomalous situation between SNP offences and other offences dealt with in the Local Court.

By way of example, it is possible for the Local Court to impose a sentence of 2 years imprisonment without parole for an offence of indecent assault under s 61L of the *Crimes Act 1900* (which carries a maximum penalty at law of 5 years imprisonment). A fixed sentence of this length would typically would involve the application of *R v Doan* (2000) 50 NSWLR 115. That decision confirmed the legislative limits upon the Local Court's sentencing powers are jurisdictional limits rather than maximum penalties that must be reserved for worst-case offences.

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<sup>11</sup> Law Reform Commission of NSW, Report 139 *Sentencing* (July 2013), recommendation 20.3

This may be contrasted with a case of aggravated indecent assault of a child under 16 under s 61M(2), which carries a maximum penalty at law of 10 years imprisonment. Although the penalty is higher than that for indecent assault, they carry the same jurisdictional limit of 2 years imprisonment where a sentence is imposed in the Local Court. However, because aggravated indecent assault is a SNP offence, it is impermissible to impose a fixed term sentence. Although the reasoning in *Doan* may be applicable, a parole period must nonetheless be built into the sentence.

The anomalous net result is that a serious case of indecent assault may receive a fixed term of 2 years imprisonment, but a serious case of aggravated indecent assault must always receive a non-parole period of less than 2 years imprisonment in sentences imposed in the Local Court.

The Law Reform Commission's report on sentencing includes the general recommendation that a court should be able to impose a fixed sentence for a SNP offence. Adoption of that recommendation, or otherwise removing the prohibition in s 45 where an offender is sentenced in the Local Court, would address the discrepancy described above.

Thank you for the opportunity to contribute to this inquiry. Please do not hesitate to contact my office on [REDACTED] should I be able to provide any further assistance.

Yours sincerely,

[REDACTED]  
Judge Graeme Henson  
Chief Magistrate

**Local Court sentences for particular child sexual assault offences**  
 Period 1: Oct 2009 - Sep 2011  
 Period 2: Oct 2011 - Sep 2013

	Total sentences		Full-time imprisonment		Other custodial sentences		Total custodial sentences		Median FTI sentence		Term at juris limit								
	1	2	1	2	1	2	1	2	1	2	1	2							
61M(2) agg indecent assault - person <16*	68	101	48.5%	32	47.1%	40	39.6%	19	27.9%	25	24.8%	51	75.0%	65	64.4%	14	15	2	4
61N(1) act of indecency - person <16	29	27	6.9%	12	41.4%	12	44.4%	2	6.9%	4	14.8%	14	48.3%	16	59.3%	12	12	0	0
61O(1) agg act of indecency - person <16	4	5	25.0%	0	0.0%	2	40.0%	1	25.0%	1	20.0%	1	25.0%	3	60.0%	0	6	0	0
61O(2) agg act of indecency - person <10	4	5	25.0%	2	50.0%	1	20.0%	0	0.0%	1	20.0%	2	50.0%	2	40.0%	22	7	1	0
<b>TOTAL</b>	<b>105</b>	<b>138</b>	<b>31.4%</b>	<b>46</b>	<b>43.8%</b>	<b>55</b>	<b>39.9%</b>	<b>22</b>	<b>21.0%</b>	<b>31</b>	<b>22.5%</b>	<b>68</b>	<b>64.8%</b>	<b>86</b>	<b>62.3%</b>	<b>12</b>	<b>10</b>	<b>3</b>	<b>4</b>

	1				2				All				
	Cust	All	At JL	% Cust	Cust	All	At JL	% Cust	Cust	All	At JL	% Cust	% All
Sentences at jurisdictional limit (2 yrs)	51	68	2	3.9%	65	101	4	6.2%	116	169	6	5.2%	3.6%
61M(2) agg indecent assault - person <16	14	29	0	0.0%	16	27	0	0.0%	30	56	0	0.0%	0.0%
61N(1) act of indecency - person <16	1	4	0	0.0%	3	5	0	0.0%	4	9	0	0.0%	0.0%
61O(1) agg act of indecency - person <16	2	4	1	50.0%	2	5	0	0.0%	4	9	1	25.0%	11.1%
61O(2) agg act of indecency - person <10	68	105	3	4.4%	86	138	4	4.7%	154	243	7	4.5%	2.9%
<b>TOTAL</b>													

Source: Judicial Commission of NSW Judicial Information Research System

\* SNPP offence when dealt with on indictment  
 \*\* Data on offences under s 61M(1) not included due to no detail on age of victim