

STANDARD MINIMUM NON-PAROLE PERIODS
A consultation paper by the NSW Sentencing Council

Legal Aid NSW submission to the
NSW Sentencing Council, Attorney General & Justice

October 2013

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW criminal law practice provides legal assistance and representation in criminal courts at each jurisdictional level throughout the State, including proceedings in Local Court and Children's Court, committals, indictable sentences and trials, and appeals. Our specialist criminal law services include the Children's Legal Service, Prisoners' Legal Service and the Drug Court.

Legal Aid NSW has recently developed a particular expertise in standard minimum non-parole periods (SNPPs). As a result of the High Court of Australia decision in *Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 25, we established the Standard Non-Parole Period Review team to systematically review relevant cases and identify appeals arising from the judgment.

As a result of identifying cases where the SNPP had been given determinative significance contrary to the High Court decision in *Muldrock*, as at the present date Legal Aid NSW has filed 39 applications for leave to appeal against the severity of sentence, 27 of which are listed for hearing in the Court of Criminal Appeal, and a further 29 applications in the Supreme Court under Part 7 *Crimes (Appeal and Review) Act* (for clients who had appeals determined in the CCA before the decision in *Muldrock*) seeking referral to the CCA for a fresh sentence appeal.

The imminent publication of 27 decisions from the CCA, and up to 68 decisions in the next six months involving SNPP offences will most likely further develop the law on SNPPs. Legal Aid NSW expects that stakeholders will be in a better position to comment on the operation of SNPPs and the questions in the Consultation Paper when these matters have been finalised but values the opportunity to make a submission to the Sentencing Council in response to the consultation paper on Standard Minimum Non-Parole Periods.

Should you require any further information, please contact Annmarie Lumsden, Executive Director, Strategic Policy and Planning on 9219 6324 or at annmarie.lumsden@legalaid.nsw.gov.au.

Introduction

Sentencing is a highly complex exercise that calls for the judiciary to consider many different factors to arrive at an appropriate and just outcome in all of the circumstances. Any legislative intervention to limit or restrict the discretion of the sentencing judge or magistrate should be carefully reasoned, be capable of being applied clearly and consistently with reference to determined factors and be justified in all of the circumstances.

In his Second Reading Speech of the Bill that introduced the SNPP scheme, the then Attorney General Bob Debus identified the rationale for the scheme as:

- promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process, and
- ensuring that proper regard is given to the community expectation that punishment is imposed that is commensurate with the gravity of the crime¹.

With regard to the first rationale, it is the experience of our frontline practitioners that the scheme has in fact added great complexity to sentencing. This complexity means that the reasons for decisions of the Court in relation to SNPP offences are not readily comprehensible to parties or the public generally.

The second rationale has the risk of unjustifiably politicising the administration of justice and runs counter to the exercise of judicial discretion appropriate to the circumstances of a particular case and the notion of "individualised justice".

Legal Aid NSW remains of the view that the SNPP system "needs to be reviewed with an option to abolish the scheme if it is found to detract from the principles underlying it".²

Questions

Chapter 2: What offences should be part of the SNPP scheme?

Question 2.1

(1) What offences should be SNPP offences?

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

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

If the scheme is retained, Legal Aid NSW is of the view that criteria for a SNPP offence should be that the offence:

- a) carries a maximum penalty of 20 years imprisonment or more, and
- b) is prevalent, but
- c) does not encompass a wide range of offending behavior, and
- d) is not subject to a guideline judgment.

¹ NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813.

² Legal Aid NSW Preliminary submission to NSW Law Reform Commission on Crimes (Sentencing Procedure) Act 1999, Nov 2011 (NSW Law Reform Commission Report 139, Reference PSE18).

Legal Aid NSW would welcome the amendment of the scheme to include only offences that satisfy all of these criteria.

Rationalising SNPPs in this way would at once narrow and expand those offences covered under the scheme.

Question 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?

As set out in our response to Question 2.1, Legal Aid NSW considers that the maximum penalty for an offence should be one, but not the only, criterion for inclusion in the SNPP scheme. The scheme should be reserved for the most serious offences, reflected by a maximum penalty of 20 years imprisonment or more.

Restricting SNPPs to offences that have a maximum penalty of 20 years or more would serve Parliament's objective that SNPPs apply to serious offences. It would also make the scheme more logical by including quite a number of serious offences which are not currently included in the scheme.

Legal Aid NSW notes that the proposed criteria are in line with the NSW Law Reform Commission recommendation that the scheme *"be confined to offences of the "more or most serious" kind, for which there is a sufficient incidence of their occurrence to justify their inclusion in the scheme"* (Report 134: Interim report on standard minimum non-parole periods, May 2012, at 2.92).

Question 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?

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

Legal Aid NSW does not support the inclusion of offences in the SNPP scheme based on type/grouping. This introduces an element of subjectivity into the assessment of seriousness. The scheme was intended to apply to serious offences and the maximum penalty is Parliament's expression of the seriousness of an offence.

Question 2.4

What child sexual assault offences should be SNPP offences?

Please refer to our Priority Consideration Submission.

Question 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?

Offences that encompass a wide range of offending behavior should be excluded from the scheme as it is impossible to identify what a middle of the range offence might be. It is for this reason that manslaughter is currently omitted from the scheme but there are other offences which likewise should be omitted, including *but not limited to*:

- a) Offences contrary to sections 111, 112 and 113 of the *Crimes Act 1900* involving variants of entering/breaking into houses and committing, or intending to commit, serious indictable offences in circumstances of aggravation.

The breadth of offences covered by these provisions arises on account of the fact that any serious indictable offence can be particularised, for example, ranging from stealing, to cause grievous bodily harm with intent to do so, to sexual intercourse. Similarly, the circumstance of aggravation particularised can greatly affect the seriousness of the offence, ranging from the perhaps less serious criteria of being in company to the criteria of intentionally inflicting actual bodily harm.

We further note the above offences would be excluded pursuant to our proposal that SNPP table offences have a maximum penalty of at least 20 years.

- b) Supply prohibited drug on an ongoing basis contrary to section 25A(1) *Drug Misuse and Trafficking Act 1985*.

Unlike all other drug offences, this offence does not prescribe a range of quantities encompassed by the offence against which the quantity involved in the subject offence can be assessed. Thus, the offence might involve the ongoing supply by a street dealer of just over the indictable quantity of a prohibited drug or the ongoing supply of up to a quantity greater than the large commercial quantity.

- c) Persistent sexual abuse of a child contrary to section 66EA of the *Crimes Act 1900*.

As discussed in our Priority Consideration submission, the offence of s 66EA can encompass a wide range of offending behaviour, from three acts of indecency to continuous penetrative sexual acts over a period of years.

- d) Solicit and conspiracy to murder contrary to section 26 of the *Crimes Act 1900*.

Soliciting a person to kill a third party is of course fundamentally abhorrent and serious. However, this offence encompasses a broad range of offending behaviour, from no harm done to the intended victim due to factors beyond the offender's control, through to the victim not being harmed due to the offender voluntarily withdrawing from the enterprise. This charge also captures a range of matters where the intended victim suffers harm; sometimes where the offender is the ringleader and at other times where the offender is a small player in a much broader plan.

The wide range of offending encompassed by these offences is evident in the current JIRS statistics, which shows a broad spread of sentences with no clearly discernible grouping around a middle range.

The JIRS statistics also suggest that it is not a prevalent offence.

Question 2.6

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

Aggravated offences should only be included if they meet the criteria we have proposed in response to Question 2.1. We note, however, that in many cases aggravated offences encompass a wide range of offending behaviour and would be excluded on this basis.

Question 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?

Legal Aid NSW adopts the view that offences must be sufficiently prevalent to reliably determine inconsistency or inappropriate sentencing patterns, the rationale behind the scheme, to warrant inclusion as a SNPP offence.

Question 2.8

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

Offences which are triable summarily should be excluded from the scheme as such offences are not of sufficient seriousness. The fact that they can be dealt with to finality in the Local Court is also an indicator that a broad range of offending is encompassed by the offence such that it is difficult to specify the middle of the objective range.

Question 2.9

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

As stated at 2.1, offences which carry a guideline judgment should be excluded from the scheme as the Courts already have sufficient guidance in relation to sentencing for these offences, as previously highlighted by the Judicial Commission.

Question 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

(b) how should it be used?

Although community concern, expressed through elected Parliament, may be a relevant consideration for the setting of criminal penalties generally it is very difficult to identify and measure informed community opinion for the reasons outlined in 1.24 and 1.25 of the Consultation Paper.

Legal Aid NSW therefore does not support community concern as a specific criterion for assessing whether an offence should be a SNPP offence.

Question 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?

(2) How should that disparity be measured?

Mathematical disparity should not be used as a criterion for inclusion of a SNPP offence. Legal Aid NSW concurs with the words of caution expressed by the Judicial Commission in relation to the appearance of uniformity³.

Similarly, Legal Aid NSW notes the High Court's comments from *Hili v R; Jones v R*⁴:

"Consistency is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were..."

The consistency that is sought is consistency in the application of the relevant legal principles. And that requires consistency in the application of Pt IB of the Crimes Act. When it is said that the search is for "reasonable consistency", what is sought is the treatment of like cases alike, and different cases differently. Consistency of that kind is not capable of mathematical expression."

Only a case by case analysis can shed light on any perceived disparities.

Question 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?

Legal Aid NSW opposes the inclusion of additional attempt, accessory or aiding and abetting offences in the SNPP scheme as such offences are often of a very broad range of seriousness and the harm caused is often not of sufficient seriousness to warrant inclusion.

As noted in the Consultation Paper, the SNPP scheme already applies to a person who is liable as a principal for an offence by virtue of the doctrine of joint criminal enterprise.

³ P Poletti and H Donnelly, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (Judicial Commission of NSW, 2010) 59-61.

⁴ *Hili v R; Jones v R* [2010] HCA 45; (2010) 242 CLR 520, [48]–[49]

Chapter 3: At what level should the SNPPs be set?

Question 3.1

At what level should the SNPPs be set?

Question 3.2

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

Question 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?

Question 3.4

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?

It is an extremely difficult, if not nearly impossible, task to rationally determine and justify an appropriate level at which an SNPP ought to be set. Legal Aid NSW supports "individualised justice" and cannot sensibly suggest a way to approach this question which would not directly conflict with the role of sentencing judges in properly exercising their discretion to arrive at a fair and rational sentence.

That said, if the scheme is retained, Legal Aid NSW recommends that SNPP offences be set at between 25-40% of the maximum penalty.

Legal Aid NSW does not support a fixed percentage nor do we think that SNPPs should be set on an offence by offence basis.

Question 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?

There are no circumstances in which a high proportion of SNPP to maximum penalty (for example 80%) would be appropriate for a SNPP offence. Consistent with the views expressed in its 2009 submissions to the Sentencing Council Legal Aid NSW, which adopted the reasoning in the 2009 submission of the NSW Bar Association, Legal Aid NSW opposes any proposal to adopt SNPPs greater than 40% of the available maximum penalty.

Of the cases identified by the Legal Aid NSW Standard Non-Parole Period Review team where the SNPP had been given determinative significance contrary to the High Court decision in *Muldrock*, approximately 75% involve offences where the SNPP is a relatively high proportion of the maximum penalty (at least 50%) or where a high SNPP has been set for an offence carrying life imprisonment. A relatively large proportion of the matters involve sexual assault offences.

Assuming judges now apply *Muldrock* and use the SNPP only as guidepost or marker, further sentencing decisions are far less likely to give rise to appellable error. However, it remains possible that some judges will use the SNPP, perhaps inadvertently, as more than a guidepost. If judges were to use the SNPP as more than a guidepost, then particularly where the SNPP is a high proportion of the maximum penalty, this may lead to imposition of a sentence that is unjust or manifestly excessive, requiring appellate intervention.

Legal Aid NSW is of the view that no new offences should be added to the SNPP regime until a transparent mechanism for setting the SNPP has been developed and made public.

Question 3.6

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

Legal Aid NSW agrees with the observations in the Consultation Paper at paragraph 3.30 that nominating a numerical SNPP for such offences involves a policy decision that takes into account the potential seriousness of the offence, sentencing patterns and community expectations. As noted above, the SNPP should fall within the range of 25-40% of the maximum penalty.

Chapter 4: How should future SNPP offences be identified?

Question 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?

There should be only minimal need to review the offences included in the SNPP scheme if our proposed criteria were to be accepted, as it is rare that additional offences carrying 20 years imprisonment or more are created.

Further, BOSCAR research shows that crime rates remain stable or in decline in relation to all but one offence category,⁵ indicating that the prevalence of serious offences is unlikely to increase dramatically.

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?

(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?

Legal Aid NSW would support the Sentencing Council making recommendations for inclusion of offences relying upon evidence provided by agencies within the justice cluster.

⁵ Bureau of Crime Statistics and Research, NSW Recorded Crime Statistics 2012 (2013) available from http://www.bocsar.nsw.gov.au/bocsar/bocsar_crime_stats/bocsar_latest_quarterly_and_annual_reports.html; and Bureau of Crime Statistics and Research, NSW Recorded Crime Statistics June 2013 Quarterly Report, available from http://www.bocsar.nsw.gov.au/bocsar/mr_rcs_jun13.html.

Conclusion

Legal Aid NSW remains opposed to the retention of the SNPP scheme for the reasons outlined above. If, however, the scheme is retained, it should be amended to include only offences which:

- a) carry a maximum penalty of 20 years imprisonment or more, and
- b) are prevalent, but
- c) do not encompass a wide range of offending behavior, and
- d) are not subject to a guideline judgment.

Legal Aid NSW is concerned that this consultation may be premature given the special fixture hearings in the Court of Criminal Appeal that will consider the SNPP scheme and its application in the coming months. It is expected that stakeholders will be in a better position to comment on the operation of SNPPs and the questions in the Consultation Paper when these matters have been finalised. Legal Aid NSW would be happy to provide further comments once those outcomes are known.