Sentencing Council
Attorney General & Justice

Standard Non-parole Periods

A background report by the NSW Sentencing Council

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NSW Sentencing Council

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TABLE OF ACRONYMS

Acronym	Meaning
CSPA	*Crimes (Sentencing Procedure) Act 1999* (NSW)
JIRS	Judicial Information Research System
NPP	Non-parole period
NSW	New South Wales
NSWCCA	NSW Court of Criminal Appeal
NSW LRC	NSW Law Reform Commission
SNPP	Standard non-parole period

1. INTRODUCTION

Terms of reference

1.1 On 30 March 2009, the Attorney General requested that the Council examine standard non-parole periods (SNPPs) and guideline judgments, in accordance with the following terms of reference:

1. Monitor the rates of offending and sentencing patterns for sexual offences not contained in the Table of SNPPs, with a view to their possible inclusion in the Table at a later date;

2. Give consideration to standardising the SNPPs for sexual (and other) offences within a band of 40–60% of the available maximum penalty, subject to the possibility of individual exceptions, by reference to an assessment of the incidence of offending and special considerations relating thereto;

3. Consider potential additions to the SNPP scheme, involving the level or levels at which the SNPP might be appropriately set;

4. Give consideration to the establishment of a transparent mechanism by which a decision is made to include a particular offence in the Table, and by which the relevant SNPP is set; and

5. Consider the identification of sexual offences that might justify an application for a guideline judgment, following its ongoing monitoring of relevant sentencing patterns.

1.2 In June 2010 the Attorney General requested that, as part of the SNPP reference, the Council review specific dangerous driving offences with a view to their possible inclusion in the SNPP scheme. While this issue falls within the ambit of Term 3, for convenience it was considered as a discrete term of reference, as follows:

6. Consider whether the offences of dangerous driving occasioning death or grievous bodily harm (and the applicable aggravated offences) should be included in the SNPP scheme; if so, at what level should the SNPPs be set, and what, if any, are the implications for the existing guideline judgment in respect of these offences.

Background to the review

1.3 The current terms of reference arose following the Council's 2008 report on *Penalties Relating to Sexual Assault Offences in NSW*.

1.4 In that report, the Council made a number of recommendations in relation to the SNPP scheme.[1] One of those recommendations—that juvenile offenders be excluded from the SNPP scheme—was implemented by an amendment inserting s 54D(3) into the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('the CSPA'), which took effect on 1 January 2009.[2]

1.5 The balance of the recommendations were referred back to the Council, in the form of the terms of reference set out above. Thereafter the Council has been reviewing decisions of the NSW Court of Criminal Appeal ('NSWCCA') in which the application of the SNPP regime arose as a significant issue; and otherwise has been monitoring decisions at sentencing court level and sentencing statistics in order to gain some appreciation in relation to any issues arising out of the use of the scheme. The Council has also invited and received submissions from key stakeholders in relation to the issues identified in the terms of reference.

1.6 In January 2011, the Council published its report, *Standard Non-parole Periods for Dangerous Driving Offences*.

1.7 That report dealt with Term 6 above in recommending that the dangerous driving offences in question not be included in the SNPP scheme. It also provided a brief overview of the SNPP scheme.

1.8 The current report is concerned with the remaining terms of reference, by way of providing a review of the way in which the scheme has been applied; and of the issues that remain for consideration, particularly as the result of the recent decision of the High Court in *Muldrock v The Queen*[3].

NSW LRC review of sentencing laws

1.9 On 23 September 2011, the Attorney General asked the NSW Law Reform Commission (LRC) to review the CSPA, including, specifically, the operation of the SNPP scheme.

1.10 The terms of reference ('the Sentencing Reference') given to the NSW LRC are as follows:

> Pursuant to section 10 of the *Law Reform Commission Act 1967*, the Law Reform Commission is to review the *Crimes (Sentencing Procedure) Act 1999*. In undertaking this inquiry, the Commission should have regard to:
>
> 1. current sentencing principles including those contained in the common law
>
> 2. the need to ensure that sentencing courts are provided with adequate options and discretions
>
> 3. opportunities to simplify the law, whilst providing a framework that ensures transparency and consistency

1. See NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in NSW, Volume 1* (2008), Recommendations 22–27.
2. *Crimes Amendment (Sexual Offences) Act 2008* (NSW) sch 2.4(4).
3. [2011] HCA 39, (2011) 281 ALR 652.

4. the operation of the standard minimum non-parole scheme; and

5. any other related matter.

1.11 By reason of the overlap between the terms of reference given to the Council; and the general responsibility of the Council to review and report on sentencing trends and practices, the Attorney General has invited the two agencies to work in collaboration with each other in relation to the Sentencing Reference.

1.12 That it is appropriate for the agencies to collaborate in this respect is consistent with the advice previously given by the Council concerning the importance of considering the SNPP scheme as part of a broader review of sentencing law, in which it noted the dangers of considering changes to that scheme in the absence of such a review.[4]

1.13 As such, this report functions primarily as a background paper to assist the broader review to be conducted by the NSW LRC. Accordingly, the report will not make any specific recommendations for amendments to the existing SNPP scheme, such matters being deferred to be dealt with as part of the NSW LRC's review. It will, however, identify some relevant issues and options for further consideration.

4. See NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in NSW, Volume 1* (2008).

2. THE SNPP SCHEME

Background to the scheme

2.1 The SNPP scheme was introduced by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW) and took effect on 1 February 2003.[1] In the second reading speech to the Bill, the then NSW Attorney General identified the reasons for the introduction of the SNPP scheme:

> The scheme being introduced by the Government today provides further guidance and structure to judicial discretion. These reforms are primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process.[2]

2.2 The SNPP scheme was presented as an alternative to the approach of mandatory sentencing that was being advocated by the party then in Opposition. As the Attorney General explained when introducing the bill for its creation:

> At the outset I wish to make it perfectly clear that the scheme of sentencing being introduced by the Government today is not mandatory sentencing. … By preserving judicial discretion we ensure that the criminal justice system is able to recognise and assess the facts of an individual case. … In great contrast, the mandatory sentencing scheme proposed by the Opposition is a system that imposes the same penalty on all offenders, no questions asked.
>
> …
>
> By introducing a regime of standard non-parole periods for a specified number of serious offences the Government will ensure not only greater consistency in sentencing but also that proper regard is given to the community expectation that punishment is imposed that is commensurate with the gravity of the crime.[3]

1. The Act was assented to on 22 November 2002 and commenced operation 1 February 2003: NSW, *Government Gazette,* 20 December 2002, No 263, 10741.
2. NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813 (B Debus—Attorney General) 5813.
3. NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813 (B Debus—Attorney General) 5813, 5815.

The operation of the scheme

2.3 The SNPP scheme prescribes the SNPPs for a number of specified serious offences set out in the Table to Division 1A of Part 4 of the CSPA ('the SNPP Table').[4] The scheme currently applies to 35 offences.[5]

Prescribed SNPP levels

2.4 The levels at which the SNPPs were set were said to have taken into account a number of factors, as described in the second reading speech:

> The standard non-parole periods set out in the Table to the bill have been set taking into account the seriousness of the offence, the maximum penalty for the offence and current sentencing trends for the offence as shown by sentencing statistics compiled by the Judicial Commission of NSW. The community expectation that an appropriate penalty will be imposed having regard to the objective seriousness of the offence has also been taken into account in setting standard non-parole periods. The bill provides in section 54A (2) that the standard non-parole period for an offence represents the non-parole period for an offence in the middle of the range of objective seriousness for such an offence.[6]

2.5 The prescribed SNPPs and the maximum penalties for the SNPP offences are shown in the following Table.

4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A.
5. There were originally 24 specified offences. The *Crimes (Sentencing Procedure) Amendment Act 2006* (NSW) added 11 offences. The *Crimes (Sentencing Procedure) Amendment Act 2007* (NSW) added an aggravated form of offence to that included in Item 10.
6. NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813 (B Debus—Attorney General) 5816.

Table 1: SNPPs and maximum penalties for offences in the SNPP Table[7]

Item #	Offence	SNPP (years)	Maximum Penalty (years)	SNPP—% of maximum penalty
1A	Murder—where the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work	25	Life	n/a
1B	Murder—where the victim was a child under 18 years of age	25	Life	n/a
1	Murder—in other cases	20 years	Life	n/a
2	Section 26 of the *Crimes Act 1900* (conspiracy to murder)	10 years	25	40.0
3	Sections 27, 28, 29 or 30 of the *Crimes Act 1900* (attempt to murder)	10 years	25	40.0
4	Section 33 of the *Crimes Act 1900* (wounding etc with intent to do bodily harm or resist arrest)	7	25	28.0
4A	Section 35 (1) of the *Crimes Act 1900* (reckless causing of grievous bodily harm in company)	5	14	35.7
4B	Section 35 (2) of the *Crimes Act 1900* (reckless causing of grievous bodily harm)	4	10	40.0
4C	Section 35 (3) of the *Crimes Act 1900* (reckless wounding in company)	4	10	40.0
4D	Section 35 (4) of the *Crimes Act 1900* (reckless wounding)	3	7	42.9
5	Section 60 (2) of the *Crimes Act 1900* (assault of police officer occasioning bodily harm)	3	7	42.9
6	Section 60 (3) of the *Crimes Act 1900* (wounding or inflicting grievous bodily harm on police officer)	5	12	41.7
7	Section 61I of the *Crimes Act 1900* (sexual assault)	7	14	50.0
8	Section 61J of the *Crimes Act 1900* (aggravated sexual assault—child under 16)	10	20	50.0
9	Section 61JA of the *Crimes Act 1900* (aggravated sexual assault in company)	15	Life	n/a
9A	Section 61M (1) of the *Crimes Act 1900* (aggravated indecent assault)	5	7	71.4
9B	Section 61M (2) of the *Crimes Act 1900* (aggravated indecent assault)	8	10	80.0
10	Section 66A (1) or (2) of the *Crimes Act 1900* (sexual intercourse—child under 10)	15	s 66A(1)—25 s 66A(2)—Life	s 66A(1):60 s 66A(2):n/a
11	Section 98 of the *Crimes Act 1900* (robbery with arms etc and wounding)	7	25	28.0
12	Section 112 (2) of the *Crimes Act 1900* (breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation)	5	20	25.0
13	Section 112 (3) of the *Crimes Act 1900* (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation)	7	25	28.0
14	Section 154C (1) of the *Crimes Act 1900* (taking motor vehicle or vessel with assault or with occupant on board)	3	10	30.0
15	Section 154C (2) of the *Crimes Act 1900* (taking motor vehicle or vessel with assault or with occupant on board in circumstances of aggravation)	5	14	35.7
15A	Section 154G of the *Crimes Act 1900* (organised car or boat rebirthing activities)	4	14	28.6
15B	Section 203E of the *Crimes Act 1900* (bushfires)	5	14	35.7

7. Updated from a table provided to the Council in 2003 by the Office of the Director of Public Prosecutions.

Item #	Offence	SNPP (years)	Maximum Penalty (years)	SNPP—% of maximum penalty
15C	Section 23 (2) of the *Drug Misuse and Trafficking Act 1985* (cultivation, supply or possession of prohibited plants), being an offence that involves not less than the large commercial quantity (if any) specified for the prohibited plant concerned under that Act	10	Life and/or 5000 penalty units Where offence relates to cannabis plant or cannabis leaf, 20 and/or 5000 penalty units	n/a Or in case of cannabis plant or cannabis leaf—50.0
16	Section 24 (2) of the *Drug Misuse and Trafficking Act 1985* (manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	10	20 and/or 3500 penalty units Where offence relates to cannabis plant, 15 and/or 3500 penalty units	50.0 Or in case of cannabis plant—66.7
17	Section 24 (2) of the *Drug Misuse and Trafficking Act 1985* (manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	15	Life and/or 5000 penalty units Where offence relates to cannabis plant, 20 and/or 5000 penalty units	n/a Or in case of cannabis plant—75.0
18	Section 25 (2) of the *Drug Misuse and Trafficking Act 1985* (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	10	20 and/or 3500 penalty units Where offence relates to cannabis plant, 15 years imprisonment and/or 3500 penalty units	50.0 Or in case of cannabis plant—66.7
19	Section 25 (2) of the *Drug Misuse and Trafficking Act 1985* (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	15	Life and/or 5000 penalty units Where offence relates to cannabis plant or leaf, 20 and/or 5,000 penalty units	n/a Or in the case of cannabis plant—75.0
20	Section 7 of the *Firearms Act 1996* (unauthorised possession or use of firearms)	3	14	21.4
21	Section 51 (1A) or (2A) of the *Firearms Act 1996* (unauthorised sale of prohibited firearm or pistol)	10	20	50.0
22	Section 51B of the *Firearms Act 1996* (unauthorised sale of firearms on an ongoing basis)	10	20	50.0
23	Section 51D (2) of the *Firearms Act 1996* (unauthorised possession of more than 3 firearms any one of which is a prohibited firearm or pistol)	10	20	50.0
24	Section 7 of the *Weapons Prohibition Act 1998* (unauthorised possession or use of prohibited weapon)—where the offence is prosecuted on indictment	3	14	21.4

2.6 It can be seen from Table 1 that the SNPPs are set at different levels—ranging from 21.4% of the maximum penalty (for items 20 and 24) to 80% of the maximum penalty (for item 9B). Even where offences have the same maximum penalty, significant differences emerge in the levels at which the SNPPs are set. For example, items 2, 3, 4, 10, 11 and 13 of the SNPP Table are offences with the same maximum penalty of 25 years imprisonment; however, the SNPPs range from

seven to 15 years, with the SNPP for item 10 more than twice that for items 4, 11 and 13:

Table 2: Differences in SNPPs for offences which carry a maximum sentence of 25 years

Item #	Offence	Maximum Penalty (years)	SNPP (years)
2	Section 26 of the *Crimes Act 1900* (conspiracy to murder)	25	10
3	Sections 27, 28, 29 or 30 of the *Crimes Act 1900* (attempt to murder)	25	10
4	Section 33 of the *Crimes Act 1900* (wounding etc with intent to do bodily harm or resist arrest)	25	7
10	Section 66A (1) of the *Crimes Act 1900* (sexual intercourse—child under 10)	25	15
11	Section 98 of the *Crimes Act 1900* (robbery with arms etc and wounding)	25	7
13	Section 112 (3) of the *Crimes Act 1900* (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation)	25	7

2.7 Similar differences are evident with respect to the offences set out in items 4B, 4C, 9B and 14 in the SNPP Table, each of which carries a maximum penalty of 10 years imprisonment. The SNPP for Item 14 is lower than that for the other three offences, while the SNPP for item 9B is at least double that for each of the other items:

Table 3: Disparity in SNPPs for offences which carry a maximum sentence of 10 years

Item #	Offence	Maximum Penalty (years)	SNPP (years)
4B	Section 35 (2) of the *Crimes Act 1900* (reckless causing of grievous bodily harm)	10	4
4C	Section 35 (3) of the *Crimes Act 1900* (reckless wounding in company)	10	4
9B	Section 61M (2) of the *Crimes Act 1900* (aggravated indecent assault)	10	8
14	Section 154C (1) of the *Crimes Act 1900* (taking motor vehicle or vessel with assault or with occupant on board)	10	3

2.8 On this issue, it has been noted that:

> there are several offences with the same maximum penalty, but differing standard non-parole periods … [this] may serve to demonstrate that some offences are regarded by the legislature as being more serious than others, although these offences have the same maximum penalty. ***Such an approach would involve concepts which are new to the law of sentencing***.[8]

8. P Johnson, 'Reforms to New South Wales Sentencing Law: The Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002' (2003) 6 *Judicial Review* 314, 335 (emphasis added).

2.9 The process by which Table offences were selected and relevant SNPPs set remains somewhat opaque. So far as the Council is aware it did not follow a consultation process, or depend on a defined set of criteria. It is evident that there are other offences in the criminal calendar attracting equivalent or higher maximum penalties that have not been included in the Table; while it is similarly evident that the SNPPs were not set by reference to any consistent percentage of the maximum sentence. Even within the context of sexual assault offences, the ratio between the SNPP and the maximum sentence varies between 50% and 80%. In its report *Penalties Relating to Sexual Assault Offences in NSW*,[9] the Council drew attention to the apparent anomalies that exist regarding the impact of the scheme in relation to this category of offences; and to the existence of several sexual assault offences that remain outside the scheme.

2.10 It has been suggested that despite the statement in the Second Reading Speech that sentencing trends were considered when setting the SNPPs, the periods set 'appear not to reflect sentencing trends for the offence as recorded by the Judicial Commission'.[10] For example, at the time the scheme came into operation, the midpoint NPP in relation to the offence of aggravated indecent assault recorded in JIRS (which it is understood was taken into account as reflecting the NPP historically imposed for mid-range offences) was one year.[11] Despite this, and despite the maximum penalty for the offence being imprisonment for 7 years, the SNPP for that offence was set at 5 years.

2.11 The SNPP scheme needs to be understood in the context of the remaining provisions of the CSPA concerning the fixing by the court of a NPP. In brief, the CSPA in its terms provides that unless imposing an aggregate sentence of imprisonment, 'when sentencing an offender to imprisonment, the court is first to set a NPP for the sentence'.[12] It then provides that 'the balance of the term of that sentence must not exceed one-third of the NPP … unless the court decides that there are special circumstances for it being more'.[13] As was pointed out in the Council's Sexual Assault Penalties report, for some offences, if the NPP was set at the SNPP, then that would significantly curtail the balance of the term that could be set; and potentially elevate such cases to the band reserved for the worst cases.[14]

2.12 It is noted additionally that the words within the brackets in the description of the Table items do not identify or limit the offence to which the SNPP applies. Rather, that is to be found by reference to the section of the statute opposite the relevant Table item.[15]

9. *Volume 1* (2008), 54–62.
10. SNPP10C, *Office of the Director of Public Prosecutions*, 6.
11. NSW Sentencing Council, *Report on Sentencing Trends and Practices 2006–2007* (2008), 41.
12. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(1).
13. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2).
14. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales, Volume 1* (2008), 54–57. See Chapter 3 at [3.9]–[3.11] for further discussion.
15. *Hosseini v R* [2009] NSWCCA 52; (2009) 193 A Crim R 444, [41]–[48].

Applying SNPPs

Limitations on applicability

2.13 The SNPP scheme applies to SNPP Table offences committed on or after 1 February 2003,[16] when a court imposes a sentence of imprisonment.[17]

2.14 Under the CSPA, the SNPP scheme does not apply to:

- offences committed prior to 1 February 2003;[18]
- offences dealt with summarily;[19]
- offenders sentenced to life imprisonment or any other indeterminate period, or detention under the *Mental Health (Forensic Provisions) Act 1990* (NSW);[20]
- offenders aged under 18 years at the time of the offence.[21]

2.15 It has been held, additionally, that the SNPP scheme does not apply to an attempt to commit an SNPP Table offence,[22] or an offence of conspiracy to commit an SNPP Table offence.[23] There is a question as to whether it applies to the offence of aiding and abetting an SNPP Table offence.[24] While the NSWCCA has proceeded on the basis that the SNPP scheme applied to such an offence, it has expressly stated that the issue 'remains to be authoritatively determined'.[25]

2.16 Following the decision in *R v Way*,[26] it was accepted that the SNPP scheme was directed to the sentencing of an offender who had been convicted after trial, although it was also held to be relevant as providing a guidepost or reference point, in the case of sentencing following a plea of guilty.[27]

Sentencing procedure

2.17 Section 54B of the CSPA provides, relevantly, in relation to the imposition of a sentence of imprisonment for an SNPP Table offence:

16. *Crimes (Sentencing Procedure) Act 1999* (NSW) sch 2 cl 45. SNPPs do not apply to offences committed before 1 February 2003 and therefore must not be taken into account when sentencing for offences committed before that date: *R v Ohar* [2004] NSWCCA 252, (2004) 59 NSWLR 596, [85]; *R v Wilkinson* [2004] NSWCCA 468, [24].
17. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(1).
18. *R v Lane* [2011] NSWSC 289, [60]–[61].
19. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(2).
20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(1); in such a case the SNPP is to be disregarded entirely: *BP v R* [2010] NSWCCA 159, (2010) 201 A Crim R 379.
21. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(3).
22. Other than attempted murder: *DAC v The Queen* [2006] NSWCCA 265, [9]–[10].
23. *Diesing v The Queen* [2007] NSWCCA 326.
24. *SAT v The Queen* [2009] NSWCCA 172, [45]–[56].
25. *SAT v The Queen* [2009] NSWCCA 172, [56].
26. *R v Way* [2004] NSWCCA 131, (2004) 60 NSWLR 168.
27. *R v Simon* [2005] NSWCCA 123, [30]; *R v Stambolis* [2006] NSWCCA 56, (2006) 160 A Crim R 510, [17]; *R v Knight* [2007] NSWCCA 283, (2007) 176 A Crim R 338, [47].

> (2) When determining the sentence for the offence (not being an aggregate sentence), the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period.
>
> (3) The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in section 21A.
>
> (4) The court must make a record of its reasons for increasing or reducing the standard non-parole period. The court must identify in the record of its reasons each factor that it took into account.
>
> (4A) When determining an aggregate sentence of imprisonment for one or more offences, the court is to indicate, for those offences to which a standard non-parole period applies, the standard non-parole period (or a longer or shorter non-parole period) that it would have set in accordance with subsections (2) and (3) for each such offence to which the aggregate sentence relates had it set a separate sentence of imprisonment for that offence.
>
> (4B) If the court indicates that it would have set a longer or shorter non-parole period for an offence under subsection (4A), it must make a record of the reasons why it would have increased or reduced the standard non-parole period. The court must identify in the record each factor that it would have taken into account.

2.18 When introducing the Bill for the creation of the SNPP scheme, the Attorney General noted, in respect of the concept of the sentencing spectrum that courts need to bear in mind:

> The first important point of reference which must be considered in the sentencing exercise is the maximum penalty for an offence [which] is said to be reserved for the "worst type of case falling within the relevant prohibition" … At the other end of the sentencing spectrum lie cases which might be described as the least serious or trivial.

and added:

> The new sentencing scheme proposed in the bill introduces a further important reference point, being a point in the middle of the range of objective seriousness for the particular offence. The identification of a further reference point within the sentencing spectrum will provide further guidance and structure to the exercise of the sentencing discretion.[28]

2.19 The section made it clear that the sentencing court was required to make a record of its reasons for increasing or reducing the SNPP, where it determined that it was appropriate to do so, and to identify in the record of its reasons each factor that was taken into account.[29]

28. NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813 (B Debus—Attorney General) 5816–5817.

29. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(4); *R v Thawer* [2009] NSWCCA 158, [39]–[41]; and see *R v El-Chammas* [2009] NSWCCA 154, [25]; *R v Mills* [2005] NSWCCA 175, (2005) 154 A Crim R 40, [49].

2.20 It has been held that a court cannot impose a fixed term of imprisonment for a Table offence,[30] even in a case where the offender has pleaded guilty.[31] This arises by reason of the terms of s 45(1) of the CSPA:

> (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:
>
> (a) because of the nature of the offence to which the sentence, or of each of the offences to which an aggregate sentence relates, or the antecedent character of the offender, or
>
> (b) because of any other penalty previously imposed on the offender, or
>
> (c) for any other reason that the court considers sufficient.

2.21 The court can, however, impose a non-custodial sentence in relation to a Table offence, including a community service order, a good behaviour bond, a suspended sentence, a fine, or any other sentencing disposition referred to in Division 3 of Part 2 of the CSPA, although reasons must be given for doing so that identify each mitigating factor taken into account.[32]

Application of the SNPP—*Way's* case

2.22 The application of the SNPP was considered by the NSWCCA in *R v Way*.[33] In summary, the Court held that when sentencing an offender for an SNPP Table offence, a sentencing judge must give consideration to whether there are reasons for not imposing the SNPP.[34] That question, it held, was to be answered by reference to:

- an assessment of the objective seriousness of the offence in the light of the acts that related directly to its commission, including those that may explain why it was committed, so as to determine whether it answers the description of an offence of mid-range seriousness; and
- the circumstances of aggravation and of mitigation that are present, or that apply to the particular offender, as specified or incorporated by reason of the provisions of s 21A of the CSPA.[35]

2.23 The Court observed that the SNPP scheme operated to provide a 'reference point, or benchmark, or sounding board, or guidepost',[36] against which the case at hand could be compared, and did not require a departure from the intuitive or instinctive

30. *Houssenloge v R* [2010] NSWCCA 9, [3].
31. *Aguirre v R* [2010] NSWCCA 115, [32].
32. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54C; *R v Thawer* [2009] NSWCCA 158, [38]-[39].
33. *R v Way* [2004] NSWCCA 131, (2004) 60 NSWLR 168—since overruled by *Muldrock v The Queen* [2011] HCA 39, (2011) 281 ALR 652.
34. *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168, [117].
35. *R v Way* [2004] NSWCCA 131, (2004) 60 NSWLR 168, [118].
36. *R v Way* [2004] NSWCCA 131, (2004) 60 NSWLR 168, [122], [130].

synthesis approach to sentencing or resort to a rigid two-tiered assessment.[37] Relevantly it pointed out that the SNPP scheme does not stand alone, but takes its place alongside guideline judgments, the prescribed maximum sentence and the provisions elsewhere contained in the CSPA, as well as any applicable common law factors.[38]

2.24 It did, however, construe s 54B(2) as having been framed in 'mandatory terms'; subject to the presence of reasons for a departure from the SNPP;[39] and that it was intended to provide a guidepost for a case where sentencing occurred after conviction at trial.[40]

2.25 Significantly, as subsequent events have turned out, it observed:

> What is not appropriate, in our view, is for a sentencing judge to commence the process for every offence (irrespective of its seriousness, and irrespective of whether the offender's guilt was established after trial or by a plea), at the standard non-parole period, and then to oscillate about it by reference to the aggravating and mitigating factors. The problem with that approach is that the standard non-parole period will tend to dominate the remainder of the exercise, thereby fettering the important discretion which has been preserved by the Act.[41]

2.26 In finding that there had been error by the sentencing judge in adopting an approach that involved firstly ascertaining where the subject offence fell within the range of objective seriousness; and then noting the applicable NPP; and then taking into account the s 21A factors, the Court observed:

> In substance this involved a three-tiered arithmetic approach of the kind which was criticised by McHugh J in *AB v The Queen* (at Paras 16 to 18), so far as it resulted in an objectively determined non-parole period which was then examined for potential adjustments, so as to take account of the s 21A factors.
>
> As such it elevated a provision which was intended as providing a reference point, or benchmark or guidepost, into a rigid rule of sentencing practice, which, to use the words of McHugh J, would "allow the first step in the sentencing process to dominate the remainder of the exercise.
>
> It departs from the approach that we consider to be appropriate, which permits the judge to give consideration to all of the relevant objective and subjective factors which are properly to be taken into account, including those which fall within s 21A (1)(a), (b) and (c), and which otherwise would apply as a matter of settled sentencing law, to arrive at a sentence which also takes into account the guidance which is provided by the existence of a standard non-parole period for a midrange offence, of the kind for which the offender is to be sentenced.[42]

2.27 It was assumed in *R v Way* that in order to determine whether an offence is one to which the SNPP applies, it was necessary for the sentencing judge to assess where

37. *R v Way* [2004] NSWCCA 131, (2004) 60 NSWLR 168, [127].
38. *R v Way* [2004] NSWCCA 131, (2004) 60 NSWLR 168, [104], [130].
39. *R v Way* [2004] NSWCCA 131, (2004) 60 NSWLR 168, [62].
40. *R v Way* [2004] NSWCCA 131, (2004) 60 NSWLR 168, [68]; and see *R v Knight* [2007] NSWCCA 283; (2007) 176 A Crim R 338, [47]; and *R v Mouloudi* [2004] NSWCCA 96.
41. *R v Way* [2004] NSWCCA 131, 60 NSWLR 168, [131]; and see *Mulato v R* [2006] NSWCCA 282 [13], [17]–[18].
42. *R v Way* [2004] NSWCCA 131, (2004) 60 NSWLR 168, [152]–[154]

an offence lies in the scale of objective seriousness—in particular, whether it falls in the middle of the range of objective seriousness for the given offence. In that respect it considered that there would need to be a focus not only upon the objective seriousness of the offence before the Court, but also upon a putative or abstract offence in the middle of the range of seriousness for that offence.[43]

2.28 In this regard, the Court noted that a mid-range offence is not necessarily represented by a 'typical' or 'common' case, because such a case only indicates the numerical frequency of its occurrence, and not the objective criminality or the consequences of the offence.[44]

2.29 Further, it observed, the 'mid-range' does not necessarily constitute a narrow band in the continuum between the least and the most serious cases—although it may be that for a given offence a significant number of cases occupy the mid-range of seriousness.[45]

2.30 The objective seriousness of an offence, it held, is to be assessed by reference to factors that are directly or causally related to its commission:[46]

> Some of the relevant circumstances which can be said "objectively" to affect the "seriousness" of the offence will be personal to the offender at the time of the offence but become relevant because of their causal connection with its commission. This would extend to matters of motivation (for example duress, provocation, robbery to feed a drug addiction), mental state (for example, intention is more serious than recklessness), and mental illness, or intellectual disability, where that is causally related to the commission of the offence, in so far as the offender's capacity to reason, or to appreciate fully the rightness or wrongness of a particular act, or to exercise appropriate powers of control has been affected … Such matters can be classified as circumstances of the offence and not merely circumstances of the offender that might go to the appropriate level of punishment. Other matters which may be said to explain or influence the conduct of the offender or otherwise impinge on her or his moral culpability, for example, youth or prior sexual abuse, are more accurately described as circumstances of the offender and not the offence.
>
> …
>
> it is necessary to reflect the distinction between circumstances which go to the seriousness of the offence considered in a general way, and matters that are more appropriately directed to the objectives of punishment.
>
> …
>
> For instance, while the antecedent criminal history, or the fact that the offender has reoffended while on conditional liberty can be relevant for a determination of an appropriate level of punishment … considerations of this kind are more relevant to the measure of *punishment* for the individual offender, than they are

43. *R v Way* [2004] NSWCCA 131, (2004) 60 NSWLR 168, [72], [76]; and see *R v Knight* [2007] NSWCCA 283, (2007) 176 A Crim R 338, [39].
44. *R v Way* [2004] NSWCCA 131, (2004) 60 NSWLR 168, [101].
45. *R v Way* [2004] NSWCCA 131, (2004) 60 NSWLR 168, [102].
46. *R v Way* [2004] NSWCCA 131, (2004) 60 NSWLR 168, [91].

> to a consideration of where the offence before the Court falls within the spectrum of conduct which may constitute the offence in the abstract. [47]

2.31 Until the decision of the High Court in *Muldrock v The Queen*,[48] sentencing courts in NSW, including the NSWCCA, applied the principles declared in *Way* when sentencing offenders for SNPP Table offences, and in some respects gave further content to these principles.

2.32 For example, in *MLP v The Queen*, Kirby J summarised the issues to be addressed in applying the SNPP scheme, noting that they need not be considered in any particular order:[49]

- First, what term of imprisonment is appropriate having regard to the offence and the circumstances of the offender? Guidance may be provided by the maximum penalty, statistics from the Judicial Commission and the collective wisdom emerging from a range of sentences involving similar conduct (cf *R v Trevenna* (2004) 149 A Crim R 505, per Barr J; *R v George* (2004) 149 A Crim R 38).

- Secondly, should the offence be characterised as being in the mid-range of objective seriousness? That task should be approached in the manner suggested by Simpson J, intuitively evaluating the objective seriousness of the offence and looking to those matters in s 21A, aggravating or mitigating, that relate to the offence (including the offender's state of mind). Matters in s 21A which form part of what is usually termed "the subjective case" of the offender are not relevant to the issue of whether the offence falls within the mid-range. If the offence falls within the mid-range, the standard non parole period should apply, subject to the remaining issues.

- Thirdly, are there other reasons in the matters identified in s 21A (relating to the offender) for departing from the standard non parole period? The subjective case of the offender (issues such as youth or prospects of rehabilitation (s 21A(3)(h)) may furnish reasons for departing from the standard non parole period. It should be noted that s 21A(1) provides that the matters specifically identified in the subparagraphs of s 21A are in addition to any other matter that the Court is required or permitted to take into account under any Act or rule of law. The fact that the offender may need to serve his sentence in protection, for instance, although not mentioned in s 21A(3), may be taken into account in determining whether there should be a departure from the standard non parole period.

- Fourthly, there is the issue of special circumstances. Ordinarily, the non parole period bears a relationship to the term of the sentence defined by s 44(2) of the *Crimes (Sentencing Procedure) Act*, that is, the non parole period must not be less than three quarters of the term, unless there are special circumstances. The sentencing Judge is therefore required to address that issue. If there is to be an adjustment, then it must not so deplete the non parole period that it is reduced below the minimum term which justice requires the offender to serve (*Power v The Queen* (1974) 131 CLR 623 at 628; *Bugmy v The Queen* (1990) 169 CLR 525; 47 A Crim R 433).

2.33 Subsequent decisions of the NSWCCA, applying *Way* in relation to the 'objective seriousness' issue, accepted that it was relevant for such assessment to take into

47. *R v Way* [2004] NSWCCA 131, (2004) 60 NSWLR 168, [86]–[92].

48. [2011] HCA 39, (2011) 281 ALR 652.

49. *MLP v The Queen* [2006] NSWCCA 271, (2006) 164 A Crim R 93, [33]–[34], approved in *Mencarious v R* [2008] NSWCCA 237; (2008) 189 A Crim R 219 and applied in *Louizos v R* [2009] NSWCCA 71, (2009) 194 A Crim R 223, [97].

account both the actus reus constituting the bare elements of the offence;[50] and matters that bear on the offender's mens rea, such as intoxication,[51] and mental illness or intellectual disability where causally related to the commission of the offence;[52] as well as the nature of the weapon used to inflict injury and the consequences of its use for the victim.[53] Excluded matters have been held to concern factors such as the offender's criminal antecedents;[54] the offender's youth;[55] and the fact that the offender was at conditional liberty when the offence was committed.[56]

2.34 The expression 'objective seriousness' of an offence, as employed in respect of the SNPP scheme, has been distinguished from the expression 'seriousness' of an offence; the assessment of which is relevant to the determination of the total sentence, including the NPP.[57]

2.35 In *Way* it was noted that no statutory definition or guide was provided as to what constitutes an offence in the mid-range of objective seriousness.[58] Subsequently, the NSWCCA described the process that is involved in assessing the objective seriousness of an offence in the following way:

> The sentencing exercise required to be undertaken for Table offences involves a critical focus upon, not only the objective seriousness of the particular offence before the Court, but also upon the abstract, or putative, offence in the middle of the range of objective seriousness, in respect of which the standard non-parole period is specified.
>
> A comparative exercise is required to be undertaken in relation to such offences between the offence at hand and the offence for which the standard non-parole period is prescribed. A sentencing judge will be required to hypothesise what is an abstract offence in the middle of the range of objective seriousness in order to determine where the subject offence lies in relation to such an offence.[59]

2.36 Subsequent events have shown that the assessment, which was assumed to have been required in this respect, had given rise to error and consequently led to correction on appeal.[60]

2.37 In a number of cases, the error found related to the inadequacy of the reasons that were supplied in relation to the finding concerning the objective seriousness of the

50. *SKA v R* [2009] NSWCCA 186, (2011) 276 ALR 423, [134].
51. *R v Fryar* [2008] NSWCCA 171, (2008) 187 A Crim R 8, [41].
52. *Connelly v R* [2009] NSWCCA 293, [35].
53. *R v Fryar* [2008] NSWCCA 171, (2008) 187 A Crim R 8, [21]–[23]
54. *R v McNaughton* [2006] NSWCCA 242, (2006) 66 NSWLR 566, [24]–[25].
55. *IE v R* [2008] NSWCCA 70, (2008) 183 A Crim R 150, [20].
56. *R v Martin* [2011] NSWCCA 188, [17].
57. *Sivell v R* [2009] NSWCCA 286, [4]–[5].
58. *R v Way* [2004] NSWCCA 131, (2004) 60 NSWLR 168, [73].
59. *Vu v R* [2006] NSWCCA 188, [30]–[31].
60. For example, *R v Fryar* [2008] NSWCCA 171, (2008) 187 A Crim R 8, [23]; *R v Shi* [2004] NSWCCA 135; *Yun v R* [2008] NSWCCA 114; (2008) 185 A Crim R 58; *R v Reyes* [2005] NSWCCA 218; *R v AJP* [2004] NSWCCA 434; (2004) 150 A Crim R 575, *Corby v R* [2010] NSWCCA 146; *R v King* [2009] NSWCCA 117; *Whiley v R* [2010] NSWCCA 53.

offence before the Court, or in relation to the reasons given for the imposition of a NPP that differed from the SNPP.[61]

The impact of the SNPP scheme consequent upon *Way*

2.38 The NSWCCA commented in *R v Way* that, while the introduction of the scheme did not necessarily indicate any dissatisfaction with the general level of sentencing for SNPP Table offences, or convey a legislative intention to increase sentences for the Table offences, the scheme could result in upward changes in sentencing patterns for some offences.[62]

2.39 Simpson J in *R v AJP* noted in relation to offences under s 66A of the *Crimes Act* that:

> In my opinion, the legislature having fixed 60% of the statutory maximum as the standard non-parole period for s66A offences, it is inevitable that sentences for these offences will increase. Since the statutory maximum has always been acknowledged to be reserved for the worst offences of their kind, and since non-parole periods have (at least since the introduction of the Sentencing Act 1989) been benchmarked (prior to consideration of special circumstances justifying variation) at three quarters of the total term, a worst category s66A offence could ordinarily be expected to carry a non-parole period of eighteen and three quarter years. And yet, under the new provision, and absent reasons for departure, a mid range offence carries a standard non-parole period of 15 years, that is 80% of what the non-parole period that might previously have been expected to be imposed in relation to a worst case: that represents a remarkable increase. However, that is what the legislature has decreed, and it is for this Court to implement the dictates of the legislature.[63]

2.40 In 2007, the Sentencing Council observed that, subsequent to the introduction of the scheme:[64]

- there was no obvious change in the percentage of offenders sentenced to full-time imprisonment, with the exception of Items 9A and 9B, which respectively had a 15 and 20% increase in the percentage of offenders sentenced to prison;[65]
- there was some increase in the NPPs for Table offences;[66]

61. For example, *R v Zegura* [2006] NSWCCA 230; *R v Cheh* [2009] NSWCCA 134; *R v Sellars* [2010] NSWCCA 133; *Corby v R* [2010] NSWCCA 110.
62. *R v Way* [2004] NSWCCA 131, (2004) 60 NSWLR 168,[141]–[142].
63. R v AJP [2004] NSWCCA 434, (2004) 150 A Crim R 575, [34].
64. Figures relate to Table offences where more than 10 sentences were imposed between 1 February 2003 and 31 March 2007: NSW Sentencing Council, *Report on Sentencing Trends and Practices 2006–2007* (2008), 25. The Council's report was based on observations and not a full statistical analysis: NSW Sentencing Council, *Report on Sentencing Trends and Practices 2006–2007* (2008), 25. Readers seeking a more in-depth analysis should refer to the 2010 Judicial Commission of NSW Bulletin: *The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales.*
65. NSW Sentencing Council, *Report on Sentencing Trends and Practices 2006–2007* (2008), 28–29.
66. NSW Sentencing Council, *Report on Sentencing Trends and Practices 2006–2007* (2008), 32.

- there was greater consistency in sentences imposed for Table offences;[67]
- the majority of cases have been assessed as falling below the mid-range of criminality, as the NPP applied generally fell below the SNPP;[68]
- for the majority of Table offences, there was no significant difference between the median NPP imposed for all cases and that imposed for cases where there had been a guilty plea.[69]
- excluding murder, the overall term and the NPP for offenders under 18 years-of-age decreased, in most cases quite significantly. However, the limited number of Table offences committed by youths made it difficult to draw any satisfactory conclusions;[70] and
- of the 62 matters appealed to the NSWCCA between 1 September 2006 and 31 August 2007 on the basis of error in the application of the SNPP scheme, 41 were defence appeals, of which 18 (44%) were successful; and 21 were brought by the Crown, of which 17 (81%) were successful.[71] This represented an increase from the 73% success rate of relevant Crown appeals for the preceding year.[72]

2.41 A 2005 study by the Judicial Commission of NSW considered the impact of SNPPs on the use of suspended sentences. Although it noted that generally there was little impact, there was a noticeable reduction in the use of suspended sentences in relation to aggravated indecent assault, aggravated indecent assault with a child under 10, and unauthorised possession or use of firearm subsequent to the introduction of the SNPP scheme.[73]

2.42 In May 2010, the Judicial Commission of NSW released a further report on the impact of the SNPP scheme on sentencing patterns.[74] The study compared sentencing data between the pre-SNPP period (April 2000–January 2003) and the post-SNPP period (February 2003–December 2007) to determine the impact of the scheme on sentence severity and consistency.

2.43 The study confirmed that the scheme had led to an increase in severity of sentence for some Table offences.

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67. NSW Sentencing Council, *Report on Sentencing Trends and Practices 2006–2007* (2008), 33.
68. NSW Sentencing Council, *Report on Sentencing Trends and Practices 2006–2007* (2008), 33.
69. NSW Sentencing Council, *Report on Sentencing Trends and Practices 2006–2007* (2008), 40.
70. NSW Sentencing Council, *Report on Sentencing Trends and Practices 2006–2007* (2008), 43.
71. NSW Sentencing Council, *Report on Sentencing Trends and Practices 2006–2007* (2008), 46.
72. Between July 2005 and 30 August 2006, 47 appeals were made on the basis of error in the imposition of the SNPP. Fifteen of these appeals were brought by the Crown, of which 11 were successful: NSW Sentencing Council, *Report on Sentencing Trends and Practices 2005–2006* (2006), 16.
73. The study found that the use of suspended sentences for aggravated indecent assault reduced from 21.9% to 16.7%, and that the use of such sentences for both aggravated indecent assault with a child under 10, and unauthorised possession or use of firearm reduced from 22.2% to nil: Judicial commission of NSW, *Trends in the Use of s 12 Suspended Sentences,* Sentencing Trends & Issues 34 (2005).
74. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010).

2.44 Further, the study found that, where the SNPP scheme did not result in a significant change in sentence lengths, consistency in sentencing had generally increased. However, the study was unable to conclude whether this increase was appropriate, that is, whether it resulted from like cases being treated consistently, as opposed to dissimilar cases being treated uniformly in order to comply with the scheme.[75]

2.45 It was noted that where the SNPP and the maximum penalty were relatively high, there was more scope for variation in sentence lengths and therefore potentially less uniformity in sentencing.[76]

2.46 Key findings of the study included:

- The guilty plea rate for what are now SNPP offences increased from 78.2% to 86.1% after the commencement of the scheme, while the guilty plea rate for non-SNPP offences remained relatively stable.[77]
- While most SNPP offences already had a high rate of imprisonment before the introduction of the scheme, there was a substantial increase in the use of full-time imprisonment for Items 9A and 9B in the SNPP Table, increasing from 37.3% to 59.3% for aggravated indecent assault, and from 57.1% to 81.3% for aggravated indecent assault (child under 10).[78]
- Where offenders pleaded not guilty, data was sufficient to compare severity of sentence in the pre and post SNPP period in relation to four offences—namely, Item 1 (murder), Item 4 (wounding etc with intent to do bodily harm or resist arrest), Item 7 (sexual assault) and Item 8 (aggravated sexual assault). For those offences, the median lengths of the NPP and the head sentence both increased in cases where the offender pleaded not guilty.[79]
- In cases where there was a guilty plea, 12 SNPP offences had sufficient data available to make comparisons between both periods. Of those, severity of sentence—both the median NPP and the median head sentence—increased for 11 offences,[80] with the largest increases relating to Item 10 (sexual intercourse of a child under 10), Item 9A (aggravated indecent assault), Item 18 (supplying a commercial quantity of prohibited drug) and Item 8 (aggravated sexual assault).[81]
- Increases in sentence severity were greater for offences where the SNPP was set at a high proportion of the maximum penalty.[82]

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75. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 60–61.
76. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 60.
77. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 19, 55.
78. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 56.
79. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing, Scheme on Sentencing Patterns in New South Wales,* Monograph 33 (2010), 57.
80. The exception was Item 9B (aggravated indecent assault – child under 10).
81. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 58–59.
82. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 59.

- There was an increase in the number of findings of special circumstances under s 44(2) of the CSPA.[83]

2.47 The study also revealed that Crown appeals increased while severity appeals decreased following the introduction of the scheme. Although Crown appeals have always had, and continue to have, a higher success rate than severity appeals, the success rate of severity appeals increased from 37.6% to 47.4% after the scheme commenced.[84]

2.48 It has been judicially noted that the application of the SNPP scheme has been causing problems; and has been one of the causes of an increase in Crown appeals against sentence in recent years.[85] The annual *Sentencing Trends & Practices* reports of this Council since its 2005–2006 report have drawn attention to the incidence of errors and appeals in relation to the application of the SNPP scheme.

2.49 Anecdotally, the Council has been informed that those who represent defendants have noticed that very often a client has elected to plead guilty to an SNPP Table offence, rather than defend the charge, in order to provide a reason for the imposition of a NPP less than the SNPP.

The decision in *Muldrock v The Queen*

2.50 In October 2011, the High Court handed down its decision in the matter of *Muldrock v The Queen,*[86] in which it held that *Way's* case had been wrongly decided. Earlier it had refused special leave to appeal in relation to a ground of appeal based on the alleged unconstitutionality of the SNPP scheme.[87]

2.51 The Court rejected the Appellant's submission that the SNPP has no role in sentencing for an offence in the low (or high) range of objective seriousness. It noted the Respondent's acceptance that the effect of section 54B(2) is not to 'mandate a particular non-parole period for a particular category of offence rather it preserves the full scope of the judicial discretion to impose a non-parole period longer or shorter than the [standard non-parole period]'.[88]

2.52 It observed:

> It follows from that acceptance that *Way* was wrongly decided. As will appear, it was an error to characterise s 54B(2) as framed in mandatory terms. The court is not required when sentencing for a Div 1A offence to commence by asking

83. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 55.
84. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 53.
85. *R v Knight* [2007] NSWCCA 283, (2007) 176 A Crim R 338, [2]; and see also *Apps v R* [2006] NSWCCA 290, [3] where Hunt AJA referred to the 'many difficulties' facing sentencing judges when considering the application of the SNPP scheme.
86. *Muldrock v The Queen* [2011] HCA 39, (2011) 281 ALR 652.
87. *Muldrock v The Queen* [2011] HCATrans 147 (8 June 2011). It is noted that on 11 March 2011 the High Court had refused an application by Way for special leave to appeal from the decision of the NSWCCA in *R v Way*: *Muldrock v The Queen* [2011] HCATrans 55 (11 March 2011).
88. *Muldrock v The Queen* [2011] HCA 39, (2011) 281 ALR 652, [24].

> whether there are reasons for not imposing the standard non-parole period nor to proceed to an assessment of whether the offence is within the midrange of objective seriousness.[89]

2.53 Importantly, the Court observed:

> Section 54B applies whenever a court imposes a sentence of imprisonment for a Div 1A offence. The provision must be read as a whole. It is a mistake to give primary, let alone determinative, significance to so much of s 54B(2) as appears before the word "unless". Section 54B(2), read with ss 54B(3) and 21A, requires an approach to sentencing for Div 1A offences that is consistent with the approach to sentencing described by McHugh J in *Markarian v The Queen*:
>
> > "[T]he judge identifies *all* the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case." (emphasis added)
>
> Section 54B(2) and s 54B(3) oblige the court to take into account the full range of factors in determining the appropriate sentence for the offence. In so doing, the court is mindful of two legislative guideposts: the maximum sentence and the standard non-parole period. ***The latter requires that content be given to its specification as "the non-parole period for an offence in the middle of the range of objective seriousness". Meaningful content cannot be given to the concept by taking into account characteristics of the offender. The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending.***
>
> Nothing in the amendments introduced by the Amending Act requires or permits the court to engage in a two-stage approach to the sentencing of offenders for Div 1A offences, commencing with an assessment of whether the offence falls within the middle range of objective seriousness by comparison with an hypothesized offence answering that description and, in the event that it does, by inquiring if there are matters justifying a longer or shorter period.[90]

2.54 In relation to the requirement that sentencing judges state fully the reasons for arriving at the sentence imposed, the Court stated:

> The reference in s 54B(4) to “mak[ing] a record of its reasons for increasing or reducing the standard non-parole period" is not to be understood as suggesting either the need to attribute particular mathematical values to matters regarded as significant to the formation of a sentence that differs from the standard non-parole period, or the need to classify the objective seriousness of the offending. It does require the judge to identify fully the facts, matters and circumstances which the judge concludes bear upon the judgment that is reached about the appropriate sentence to be imposed. The obligation applies in sentencing for all Div 1A offences regardless of whether the offender has been convicted after trial or whether the offence might be characterised as falling in the low, middle or high range of objective seriousness for such offences.

89. *Muldrock v The Queen* [2011] HCA 39, (2011) 281 ALR 652, [25]
90. *Muldrock v The Queen* [2011] HCA 39, (2011) 281 ALR 652, [25]–[28] (emphasis added).

Issues arising

2.55 On one view, the decision could have the effect of simplifying the application of the SNPP scheme, by requiring judges, when sentencing for a Table offence:

- to acknowledge the existence of two guideposts: the maximum sentence and the SNPP for a mid-range offence;
- with those guideposts in mind, to form a conclusion as to the appropriate sentence in accordance with the approach approved in *Markarian v The Queen*;[91] and then
- to give reasons why the NPP that was fixed differed from the SNPP.

2.56 However, a question does arise, as a consequence of the passage in *Muldrock* highlighted at paragraph 2.53 above, as to the content of the putative mid-range offence for which the SNPP is to be a guidepost. Unless some assessment is made of the content of a putative mid-range offence, it is difficult to determine its relevance or value as a guidepost, or to determine what needs to be provided by way of reasons in compliance with s 54B(2) of the CSPA.

2.57 For example, the bare elements of an offence of armed robbery convey little in relation to its objective seriousness. The nature of the weapon used and of the threat presented, the amount of property or cash stolen, the place at which the offence occurred and the identity or position occupied by the victim, are all relevant to an assessment of the objective seriousness of the offence. A bare reference to its elements discloses very little as to its objective seriousness, unless their presence, without more, is now to be taken as giving rise to a mid-range offence.

2.58 Similarly, insofar as some form of comparison between the case at hand, and a putative mid-range offence, needs to be made in order to give the necessary reasons, a question remains as to whether *Way* was correctly decided in requiring attention to be given to the factors personal to the offender that were causally connected to the commission of the offence, such as matters of motivation, the presence of provocation or duress, as well as cognitive or mental impairment, and so on. The observation of the High Court that the objective seriousness of an offence is to be assessed without reference to matters personal to 'a particular offender or class of offenders', but is to be determined 'wholly by reference to the nature of the offending' raises this as an issue for further consideration.

2.59 In *MDZ v R*,[92] the NSWCCA held that there had been an error on the part of the Sentencing Judge in assessing the objective seriousness of the offence by reference only to the physical aspects of that offence. The extent to which the combination of the offender's underlying personality disorder, low intellect, cannabis dependence and drug intoxication operated on his ability to engage in rational thinking was held to have been relevant to the assessment of that issue.[93]

91. *Markarian v The Queen* [2005] HCA 25; (2006) 228 CLR 357.
92. *MDZ v R* [2011] NSWCCA 243.
93. Ibid, at [74].

2.60 It is likely that the decision in *Muldrock* will lead to a number of appeals in cases where sentencing courts have applied the decision in *Way's* case since 2004; and possibly also in cases where the NSWCCA has allowed Crown appeals against leniency on the basis of an assumed incorrect application of *Way's* case at first instance. An issue accordingly arises, in relation to the way in which they should be the subject of further review. One possible solution, in relation to those cases that have been subject to decided appeal, would be to allow a review by a single Justice, pursuant to Part 7 of the *Crimes (Appeal and Review) Act 2001* (NSW), followed by referral of appropriate cases back to the NSWCCA.

2.61 A broader issue arises as to whether the SNPP scheme should be:

- maintained as presently enacted;
- amended so as to adjust the relative proportions that have currently been set between the SNPP and the maximum available sentence for each offence; or
- repealed and replaced by a different scheme.

2.62 These issues are considered in more detail in Chapter 4 of this Background Report.

3. SNPP AND NON-SNPP SEXUAL OFFENCES

Introduction

3.1 The Council's terms of reference required an analysis of sexual offences not contained in the SNPP Table. In particular, the Council was required to monitor offending and sentencing patterns for non-SNPP sexual offences, with a view to their possible inclusion in the Table at a later date; and to establish whether an application for a guideline judgment was justifiable.

3.2 Table 4 below set out sexual offences under the *Crimes Act 1900* (NSW) that are included in the SNPP Table, and those that are not.

Table 4: Sexual offences subject to and not subject to SNPPs

	Crimes Act 1900 (NSW) section	Offence description
SNPP Offences	61I (Item 7)	Sexual Assault
	61J (Item 8)	Aggravated Sexual Assault
	61JA (Item 9)	Aggravated Sexual Assault in company
	61M(1) (Item 9A)	Aggravated Indecent Assault
	61M(2) (Item 9B)	Aggravated Indecent Assault – child under 10
	66A(1) or (2) (Item 10)	Sexual Intercourse with child under 10
Non-SNPP Offences	61K	Assault with intent to have sexual intercourse
	61L	Indecent Assault
	61N	Act of Indecency
	61O	Aggravated Act of Indecency
	61P	Attempt to commit offence under section 61I–61O
	66B	Attempting, or assaulting with intent, to have sexual intercourse with child
	66C	Sexual Intercourse – child between 10 and 16
	66D	Attempting, or assaulting with intent, to have sexual intercourse with a child
	66EA	Persistent sexual abuse of a child
	66EB	Procuring or grooming child under 16 for unlawful sexual activity
	66F	Sexual offences - Cognitive impairment
	73	Sexual Intercourse with child between 16 and 18 under special care
	78A	Incest
	78B	Incest attempts
	79	Bestiality
	80	Attempt to commit bestiality
	80A	Sexual assault by forced self-manipulation
	80D	Causing sexual servitude
	80E	Conduct of business involving sexual servitude
	80G	Incitement to commit sexual offence
	81C	Misconduct with regard to corpses
	91A	Procuring (for the purposes of prostitution)
	91B	Procuring by drugs (for the purposes of prostitution)
	91D	Promoting or engaging in acts of child prostitution
	91E	Obtaining benefit from child prostitution
	91F	Premises not to be used for child prostitution
	91G	Use of child for production of child abuse material
	91H	Production, dissemination or possession of child abuse material
	91J	Voyeurism
	91K	Filming a person engaged in private act
	91L	Filming a person's private parts
	91M	Installing device to facilitate observation or filming

Rates of offending for sexual offences

3.3 The Council was specifically asked to monitor rates of offending for sexual offences that were not included in the SNPP scheme.[1] In order to do so, the Council has considered how many sexual offences were proven in NSW courts between 2006 and 2010, as set out in Table 5 below.

Table 5: Number of sexual offences proven in NSW Local Court, District Court and Supreme Court, 2006–2010[2]

	Crimes Act 1900 (NSW) section	2006	2007	2008	2009	2010
SNPP Offences	61I	64	48	65	74	85
	61J	86	101	87	103	175
	61JA	8	14	3	0	7
	61M(1)	183	199	238	249	214
	61M(2)	64	65	78	122	113
	66A(1) or (2)	46	29	67	80	114
Non-SNPP Offences	61K	4	1	2	2	8
	61L	153	191	199	217	241
	61N	84	73	105	135	125
	61O	30	32	24	34	61
	66B	1	1	2	1	5
	66C	57	62	129	126	199
	66D	1	2	1	1	1
	66EA	2	7	2	4	5
	66EB	2	7	3	7	12
	66F	9	4	2	1	1
	73	0	4	1	11	18
	78A	1	2	3	3	7
	79	0	0	0	2	0
	80	0	0	1	0	0
	81C	0	0	0	3	1
	91A	1	0	1	0	0
	91D	0	1	5	4	2
	91E	0	0	0	0	1
	91G	3	11	7	4	26
	91H	52	100	225	207	161
	91J	0	0	0	1	0
	91K	0	0	0	3	14
	91L	0	0	0	3	9
	91M	0	0	0	1	6

1. Term of reference 1.
2. This table shows the number of offences, not the number of cases—an individual may be charged with more than one offence.

3.4 As Table 5 shows, the incidence of proven non-SNPP offences under the following provisions of the *Crimes Act 1900* (NSW) is significant:

- section 61L–Indecent Assault;
- section 61N–Act of Indecency;
- section 61O–Aggravated Act of Indecency;
- section 66C–Sexual Intercourse – child between 10 and 16;
- section 91H– Production, dissemination or possession of child abuse material.

Sentencing patterns for SNPP sexual offences

3.5 The Judicial Commission of NSW examined sentencing practices for all SNPP offences in May 2010.[3] In relation to sexual offences, the Commission found the following:

Item 7–s 61I, Sexual assault[4]

- Between 1 February 2003 and 31 December 2007, there were 95 cases involving charges under s 61I that met the conditions for inclusion in the Judicial Commission's study.
- Of those sentenced during that period, **93.7%** were sentenced to full-time imprisonment.
- For offenders who pleaded not-guilty, the median full term was **6 years**, with a median NPP of **4 years**. In terms of consistency, the middle 50% of full terms were within 3 years of one another and the middle 50% of NPPs were within 2 years of one another.
- For offenders who pleaded guilty, the median full term was 4 years, 6 months, with a median NPP of 2 years, 6 months. The middle 50% of full terms were within 2 years of one another and the middle 50% of NPPs were within 1 year of one another.

Item 8–s 61J, Aggravated sexual assault[5]

- Between 1 February 2003 and 31 December 2007, there were 83 cases involving charges under s 61J that met the conditions for inclusion in the Judicial Commission's study.
- Of those sentenced during that period, **97.6%** were sentenced to full-time imprisonment.

3. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010).
4. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 29–31.
5. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 31–33.

- For offenders who pleaded not-guilty, the median full term was **7 years, 3 months**, with a median NPP of **4 years, 6 months**. In terms of consistency, the middle 50% of full terms were within 4 years, 7.5 months of one another and the middle 50% of NPPs were within 3 years, 3.75 months years of one another.
- For offenders who pleaded guilty, the median full term was 8 years, with a median NPP of 4 years, 1.5 months. The middle 50% of full terms were within 4 years of one another and the middle 50% of NPPs were within 3 years of one another.

Item 9–s 61JA, Aggravated sexual assault in company

3.6 There were only 9 cases involving this offence between 2003 and 2007. As such, there was insufficient data to enable analysis of this offence for the purposes of the Judicial Commission's report.[6]

Item 9A–s 61M(1), Aggravated indecent assault[7]

- Between 1 February 2003 and 31 December 2007, there were 54 cases involving charges under s 61M(1) that met the conditions for inclusion in the Judicial Commission's study.
- Of those sentenced during that period, **59.3%** were sentenced to full-time imprisonment.
- There were insufficient cases to analyse not-guilty pleas.
- For offenders who pleaded guilty, the median full term was 2 years, 10 months, with a median NPP of 18 months. In terms of consistency, the middle 50% of full terms were within 18 months of one another and the middle 50% of NPPs were within 14 months of one another.

Item 9B–s 61M(2), Aggravated indecent assault (child under 10)[8]

- Between 1 February 2003 and 31 December 2007, there were 32 cases involving charges under s 61M(2) that met the conditions for inclusion in the Judicial Commission's study.
- Of those sentenced during that period, **81.3%** were sentenced to full-time imprisonment.
- There were insufficient cases to analyse not-guilty pleas.
- For offenders who pleaded guilty, the median full term was 3 years, with a median NPP of 18 months. In terms of consistency, the middle 50% of full terms were within 21 months of one another and the middle 50% of NPPs were within 17.25 months of one another.

6. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 20, 22.
7. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 33–34.
8. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 35–36.

Item 10–s 66A, Sexual intercourse (child under 10)[9]

- Between 1 February 2003 and 31 December 2007, there were 30 cases involving charges under s 66A that met the conditions for inclusion in the Judicial Commission's study.
- Of those sentenced during that period, **96.7%** were sentenced to full-time imprisonment.
- There were insufficient cases to analyse not-guilty pleas.
- For offenders who pleaded guilty, the median full term was 8 years, with a median NPP of 4 years, 3 months. In terms of consistency, the middle 50% of full terms were within 6 years, 9 months of one another and the middle 50% of NPPs were within 6 years, 0.75 months of one another.

Standardisation of SNPPs for sexual offences

3.7 The Council's terms of reference required consideration of whether SNPPs for sexual offences should be standardised within a band of 40–60% of the available maximum penalty.

3.8 Currently, as shown in Table 1, the SNPPs for sexual offences range from 50–80% of the available maximum penalty.

3.9 The relationship between SNPPs and the statutory ratio set out in s 44 of the CSPA, (which provides that a court is first required to set a NPP, and that the balance of the term is not to exceed one third of the NPP, unless there are special circumstances) can lead to disproportionate outcomes.

3.10 For example, Item 9B—s 61M(2), aggravated indecent assault—attracts a maximum penalty of 10 years and a SNPP of 8 years. If a case fell in the worst possible category (attracting the maximum possible sentence) and there were no special circumstances justifying departure from the statutory ratio set out in s 44(2), the NPP would be expected to be in the order of 7 years and 6 months—6 months less than the SNPP which was specified in s 54B(2) as applicable to cases in the mid-range of objective seriousness. If the ratio contemplated in s 44(2) were applied to a mid-range case attracting an SNPP of 8 years, the full term of the sentence, at 10 years and 8 months, would exceed the maximum available penalty and could not be imposed.

3.11 As a result of this disproportionality, the Council recommended, in its 2008 review,[10] that consideration be given to standardising SNPPs within a band of 40–60% of the available maximum penalty. However, the Council recognised that:

> any substantial revision of the Table at this stage could have the effect of unsettling current trends in sentencing, and lead to possible inequities in sentencing outcomes for those sentenced prior to any amendment of the Table and those sentenced at a subsequent date. For this reason it recognizes that

9. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 36–37.
10. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales, Volume 1* (2008), 66.

> any such revision would need to await a substantial review of the *Crimes (Sentencing Procedure) Act 1999* (NSW)[11]

3.12 As such, the Council's recommendation in the 2008 review was made on the proviso that consideration of standardisation be deferred until such time as a wholesale review was made of the CSPA.[12]

3.13 The Council notes that this issue will now be addressed by the NSW LRC in its review of sentencing laws.

Sentencing patterns for non-SNPP sexual offences

3.14 As set out above, the most commonly proven sexual offences not subject to SNPPs are:

a) section 61L–Indecent Assault;

b) section 61N–Act of Indecency;

c) section 61O–Aggravated Act of Indecency;

d) section 66C–Sexual Intercourse – child between 10 and 16;

e) section 91H– Production, dissemination or possession of child abuse material.

3.15 Sentencing information in relation to these offences is set out below.[13] Data on the NPPs is not included. This is because, where an offender is sentenced for more than one offence, the NPP is typically adjusted downwards to take account of special circumstances and the principal of totality. Further, judges are not required to stipulate a separate NPP for an offence that does not appear in the SNPP Table where an aggregate sentence is imposed.[14] In such a case, one NPP can be set for all of the offences to which the sentence relates, although the court is required to indicate, in respect of those offences to which a SNPP applies, the SNPP or the NPP that it would have set for those offences had it set separate sentences of imprisonment in relation to them.[15] As such, the NPP for the principal offence may not be a reliable indicator of sentencing patterns.[16]

11. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales, Volume 1* (2008), 66.
12. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales, Volume 1* (2008), 68, Recommendation 24.
13. Data provided by Bureau of Crime Statistics and Research.
14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2A), (2C).
15. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54b(4A)
16. See the Judicial Commission's discussion of non-parole periods for consecutive sentences at Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 22–23.

Section 61L–Indecent Assault

- Between July 2003 and June 2010, there were 86 cases in the District Court where s 61L was the principal offence prosecuted.[17]
- Of those sentenced during that period, **34.3%** were sentenced to full-time imprisonment.
- For offenders who pleaded guilty, the median full term was 1 year, 8 months. In terms of consistency, the middle 50% of full terms were within 1 year, 2 months of one another.

Section 61N–Act of Indecency

- Between July 2003 and June 2010, there were 9 cases in the District Court where an offence under s 61N was the principal offence prosecuted.
- Of those sentenced during that period, **55.6%** were sentenced to full-time imprisonment.
- There were insufficient cases where s 66N was the principal offence to analyse sentencing patterns, however, full-term sentences ranged from 2 months to 18 months.[18]

Section 61O–Aggravated Act of Indecency

- Between July 2003 and June 2010, there were 14 cases in the District Court where an offence under s 61O was the principal offence prosecuted.
- Of those sentenced during that period, **50%** were sentenced to full-time imprisonment.
- There were insufficient cases where s 66O was the principal offence to analyse sentencing patterns, however, full-term sentences ranged from 18 months to 3 years.[19]

Section 66C–Sexual Intercourse – child between 10 and 16

- Between July 2003 and June 2010, there were 96 cases in the District Court where a strictly indictable offence under s 66C(1),(2) or (4) was the principal offence prosecuted.[20]
- Of those sentenced during that period, **72.9%** were sentenced to full-time imprisonment.
- In the same period, there were 82 cases in the District Court where s 66(3) was the principal offence prosecuted.[21]
- Of those sentenced during that period, **62.2%** were sentenced to full-time imprisonment.
- For offenders who pleaded guilty, the median full term for each subsection was as follows:

  S 66C(1): 3 years

  S 66C(2): 5 years

17. Excludes one case that was the result of a finding of guilty to the statutory alternative.
18. Bureau of Crime Statistics and Research, *Unpublished Statistics*, (2009) and (2011).
19. Bureau of Crime Statistics and Research, *Unpublished Statistics*, (2009) and (2011).
20. Excludes one case that was the result of a finding of guilty to the statutory alternative.
21. Excludes one case that was the result of a finding of guilty to the statutory alternative.

S 66C(3): 2 years, 6 months

S 66C(4): 3 years

- In terms of consistency, the middle 50% of full terms for each subsection were as follows:

S 66C(1): within 1 year, 8 months of one another

S 66C(2): within 4 years, 7 months of one another

S 66C(3): within 1 year, 9.5 months of one another

S 66C(4): within 1 year, 7 months of one another.

Section 91H– Production, dissemination or possession of child abuse material

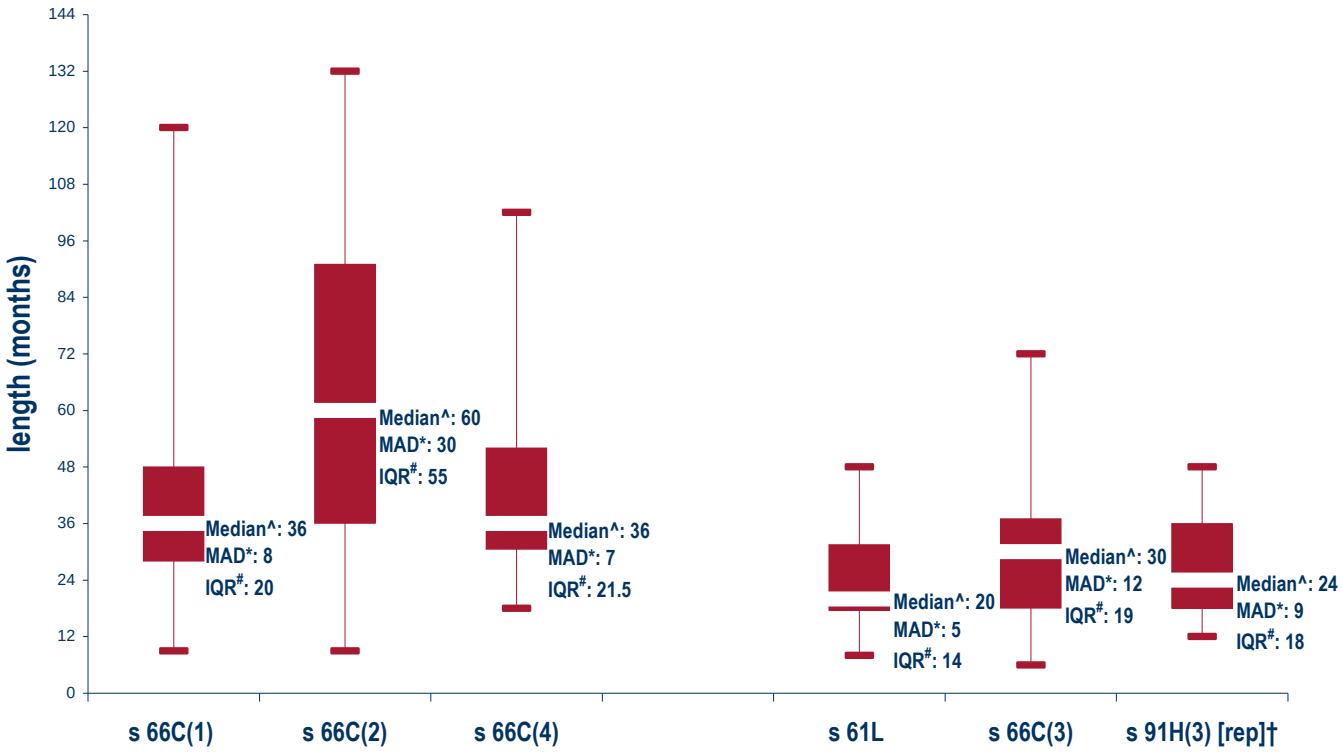
- Between July 2003 and June 2010, there were 50 cases in the District Court where an offence under s 91H was the principal offence prosecuted.[22]
- Of those sentenced during that period, **78%** were sentenced to full-time imprisonment.
- In relation to s 91H(3) (now repealed), for offenders who pleaded guilty, the median full term was 2 years. In terms of consistency, the middle 50% of full terms for s 91H(3) were within 1 year, 6 months of one another.[23]

3.16 Figure 1 below presents sentencing data for s 66C, s 61L and s 91H offences. Section 61N and s 61O offences were not included in the Figure, because a minimum sample size was required to enable statistical analysis; and there were insufficient cases where these offences were the principal offence.[24]

3.17 The Figure separates offending rates for each of the offences that fall within s 66C, as those included in s 66C(1), (2) and (4) are strictly indictable offences, whereas the offence included in s 66C(3) is a Table 1 offence.

22. These figures include cases where the principal offence was an offence under the current section, as well as under the old s 91H(2) and the repealed s 91H(3). On 1 January 2009, s 91H(3) was repealed and re-enacted in s 91H(2), which now encompasses the production, dissemination or possession of child pornography. The maximum penalty for possession of child pornography doubled from 5 years to 10 years when the amendment was made.
23. There were insufficient cases under both the old and the new s 91H(2) to enable statistical analysis.
24. Figure 1 relates to cases where there was a guilty plea and the offence referred to was the principal offence in the case. Although rates of offending under s 61N and s 61O were relatively high, they rarely constituted the principal offence.

Figure 1: Severity and consistency of full-time prison sentences for offenders who pleaded guilty to selected sexual offences not subject to SNPPs[25]



^ *The median refers to the midpoint value in the distribution of sentences where 50% of sentences lie above and 50% of sentences lie below the midpoint value.*

* *The median absolute deviation (MAD) is a measure of the extent to which sentences deviate from the median. It is calculated by measuring how far each sentence deviates from the median; and then finding the midpoint of that set of values. It shows the point at which 50% of sentences are closer to the median than the MAD and 50% are further away.*

\# *The interquartile range (IQR) refers to the middle 50% range of sentences. It measures the variability of values near the median, excluding the lower 25% of values and the upper 25% of values. A smaller IQR indicates greater consistency in sentencing as sentences are more closely clustered around the median.*

† *On 1 January 2009, s 91H(3) was repealed and re-enacted in s 91H(2) which now encompasses the production, dissemination or possession of child pornography. The maximum penalty for possession of child pornography doubled from 5 years to 10 years.*

3.18 The two measures of consistency represented in Figure 1, the MAD and the IQR, range from 5–30 and from 14–55 respectively.

3.19 By way of comparison, the MAD for SNPP sexual offences where there was a guilty plea ranges from 8–36 and the IQR ranges from 18–81.[26] It is noted, however, that these figures do not relate to the same period.

3.20 It is not immediately apparent from the foregoing that there is sufficient disparity in sentencing trends for non-SNPP sexual offences as to require statutory intervention for the sole purpose of improving consistency.

25. Judicial Commission of NSW, *Unpublished statistics* (2011).
26. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 29–37.

Inclusion of additional sexual offences in the SNPP Table

Inclusion of offences listed in Table 1 and Table 2 of Schedule 1 to the *Criminal Procedure Act 1986* (NSW)

3.21 All but one of the more commonly occurring non-SNPP sexual offences that are identified above are included in either Table 1 or Table 2 of Schedule 1 to the *Criminal Procedure Act 1986* (NSW).[27]

3.22 The *Criminal Procedure Act* contains a presumption that the indictable offences listed in Tables 1 and 2 will be dealt with summarily, unless either the prosecution or the defendant elect to proceed on indictment.[28]

3.23 Twelve of the 35 offences included in the SNPP table, some of which are not sexual offences, are also included in either Table 1 or Table 2. These offences are:

- Items 4A–4D, offences under s 35(1)–(4) of the *Crimes Act* (Table 1);
- Item 5, offences under s 60(2) of the *Crimes Act* (Table 1);
- Items 9A–9B, offences under s 61M(1) and (2) of the *Crimes Act* (Table 1);
- Items 14–15, offences under s 154C(1) and (2) of the *Crimes Act* (Table 1);
- Item 15B, offences under s 203E of the *Crimes Act* (Table 1)
- Item 20, offences under s 7 of the *Firearms Act* (Table 2);
- Item 24, offences under s 7 of the *Weapons Prohibition Act* (Table 2).

3.24 The stated purpose of the SNPP scheme was to introduce 'standard non-parole periods for a number of specified serious offences'.[29]

3.25 The second reading speech for the bill which introduced Tables 1 and 2 to the *Criminal Procedure Act* discussed the inclusion of certain offences in the Tables, noting that certain offences were not amenable to summary jurisdiction because they were 'sufficiently serious to warrant the consideration of a higher court'.[30]

3.26 The implication that Table 1 and 2 offences are not necessarily 'sufficiently serious to warrant the consideration of a higher court' might, at first glance preclude their inclusion in a SNPP scheme that was established with one objective of ensuring

27. Offences under s 66C of the *Crimes Act 1900* (NSW) (except under subsection 3) are not included in Table 1 or 2, so are strictly indictable offences.
28. *Criminal Procedure Act* 1986 (NSW) s 260. Only the prosecution may make the election to proceed on indictment if the offence is listed in Table 2.
29. NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813 (B Debus—Attorney General), 5814.
30. NSW, *Parliamentary Debates*, Legislative Council, 24 May 1995, 118 (J Shaw–Attorney General)

that penalties for *serious* offences are 'commensurate with the gravity of the crime'.[31]

3.27 In its 2010 paper examining the sentencing powers of the Local Court, the Sentencing Council made the following recommendation:

> The Council recommends that a general review of the Crimes Act be undertaken to determine whether any additional offences should be included in the Tables, and whether any offences currently included in the Tables should be re-categorised as strictly indictable offences.[32]

3.28 In that report, the Council noted concerns in relation to the inclusion of SNPP offences in Tables 1 and 2, having regard to the fact that the applicable SNPP for these offences if dealt with on indictment would exceed the jurisdictional sentencing limit of the Local Court.[33] Although the SNPP scheme does not apply where a case is dealt with summarily, the apparent discrepancy between the SNPP for these offences and the jurisdictional limit of the Local Court (the imposition of imprisonment not exceeding 2 years for a single offence) is somewhat incongruous.

3.29 The Council assumes that this issue will be addressed by the NSW LRC, but in the meantime, it recommends against inclusion of further Table 1 and 2 offences in the SNPP scheme.

Inclusion of strictly indictable offences

3.30 Of those sexual offences which have relatively high rates of offending (compared to other sexual offences), the only offences that are not included in either Table 1 or Table 2, are offences under ss 66C(1), (2) and (4) of the *Crimes Act 1900* (NSW). Those offences relate to sexual intercourse with a child.

3.31 In light of the NSW LRC review of sentencing laws, and the issues set out in Chapter 1, the Council makes no recommendations at this time in relation to the inclusion of additional sexual offences in the SNPP Table.

3.32 If, following that review, SNPPs are retained, a question does seem to exist as to whether offences under ss 66C(1), (2) and (4) should be added to the table, due to the frequency of offending under these subsections, and the fact that these are strictly indictable offences, attracting a maximum penalty analogous to SNPP offences. However, given the absence of data to suggest that sentencing trends for these offences are currently inconsistent, their inclusion in the SNPP scheme may only be appropriate if a review of the entire scheme reveals other valid grounds for that course.

3.33 The Council also notes that, notwithstanding the relatively low number of offences proven under the section, there may be policy reasons for inclusion of s 66EA of the

31. NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813 (B Debus—Attorney General), 5814.
32. NSW Sentencing Council, *An Examination of the Sentencing Powers of the Local Court in NSW* (2005), 54.
33. NSW Sentencing Council, *An Examination of the Sentencing Powers of the Local Court in NSW* (2005), 48.

Crimes Act 1900 (NSW) in the SNPP Table, as was noted in its earlier report on sentencing in relation to sexual offences.[34]

Consideration of the need for a guideline judgment

3.34 In its submission to this review, the ODPP submitted that a possible benefit of a guideline judgment in the area of sexual offences would be to identify typical cases and their place in the range of objective seriousness. Clarification by reference to factual scenarios, it suggested, is a benefit of guideline judgments that cannot be achieved under statute.[35]

3.35 The NSW Bar Association and Law Society of NSW did not consider that there was a compelling reason for a guideline judgment in relation to any sexual offences.[36]

3.36 The Hon James Spigelman AC has described guideline judgments as 'a mechanism for structuring discretion, not for restricting discretion'.[37] He adds, '[g]uideline judgements are preferable to the constraints of mandatory minimum terms or grid sentencing' and have been well received by the public.[38]

3.37 John Anderson has similarly suggested that the re-establishment of guideline judgments is a preferred method of achieving consistency in sentencing outcomes. Their success in reducing disparity and enhancing consistency in sentencing was preferable to legislative action.[39]

3.38 In its 2008 report, *Penalties Relating to Sexual Assault Offences in NSW*, the Council did not consider that a need had been established, by the time of that Report, for a guideline judgment. However, it noted that ongoing monitoring of sentencing trends might identify offences that would justify such an application 'either because of the incidence of their commission, or apparent significant and inexplicable divergences in sentencing outcomes'.[40]

3.39 The data above provides an updated snapshot of sentencing trends and rates of offending in relation to certain sexual offences.

3.40 The Council considers that this issue is better left for further examination in the course of the NSW LRC review of sentencing laws, in the course of which a more detailed study can be made of sentencing trends and practices in relation to this category of offending; and to the effect of the decision in *Muldrock*.

3.41

34. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales, Volume 1* (2008), 18–20.
35. SNPP10A, *NSW Director of Public Prosecutions*, 4.
36. SNPP2, *NSW Bar Association*, 2; SNPP4, *Law Society of NSW*, 1.
37. J Spigelman, 'Sentencing guideline judgments' (1999) 73 *ALJ* 876, 877.
38. J Spigelman, 'Sentencing guideline judgments' (1999) 73 *ALJ* 876, 876–877.
39. J Anderson, 'Standard minimum sentencing and guideline judgments: An uneasy alliance in the Way of the future' (2006) 30 *Crim LJ* 203, 219, 223.
40. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales, Volume 1* (2008), 67.

4. ISSUES ARISING FROM THE SCHEME—VIEWS OF STAKEHOLDERS AND COMMENTATORS

Benefits of the scheme

4.1 As set out in Chapter 2, the Judicial Commission's 2010 study on the impact of SNPPs on sentencing practices revealed an increase in consistency of sentencing in the District and Supreme Courts. It did not examine sentencing patterns for Table 1 and 2 SNPP offences dealt with in the Local Court. Further, even within the District and Supreme Courts, the study was unable to determine whether:

> the statutory scheme has only resulted in a benign form of consistency or uniformity whereby like cases are being treated alike and dissimilar cases differently. To put it another way, it is not possible to tell whether dissimilar cases are now being treated uniformly in order to comply with the statutory scheme.[1]

4.2 Despite this increase in sentencing consistency in higher courts, the submissions of stakeholders received by the Council before the decision of the High Court in *Muldrock v The Queen*[2] were, on the whole, critical of the scheme. Likewise, pre-*Muldrock* commentary on the scheme has tended to criticise, amongst other things, its role in fettering judicial discretion. By way of background to assist the NSW LRC review, the Council summarises, in this Chapter, the criticisms and submissions received, while recognising that some of the views expressed may no longer have the same relevance in the light of the *Muldrock* decision.

1. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 60–61.
2. [2011] HCA 39, (2011) 281 ALR 652.

Criticism of the scheme

4.3 The Submission by the Office of the Director of Public Prosecutions states that:

> Imposing a scheme on judges which requires them to apply a standard non-parole period that is at odds with the mid point of the … maximum relevant penalty is confusing and increases the scope for error on the part of both Crown and defence. It has the capacity to turn a sentence into an exercise which strains both logic and common sense.[3]

4.4 Former DPP Nicholas Cowdery AM QC, who supports the abolition of the scheme and opposes any extension of mandatory sentencing in substitution,[4] has criticised the scheme as being 'unnecessary and undesirable', noting that excessive attempts to provide guidance to judges and magistrates in how they should exercise their discretion can have the result of unreasonably restricting or eliminating that discretion altogether.[5]

4.5 The difficulties faced by prosecutors as a result of the scheme had been raised earlier by Mr Cowdery. In particular, he stated that prosecutors were required to undertake the 'extraordinarily difficult exercise' of assessing where in the range of objective seriousness a matter falls and deciding the undefined point at which offences cross into the middle of the range and must be dealt with on indictment. He stated that although the safest option would be to always elect for indictable proceedings, this would increase the cost and inconvenience of disposing the matter; and that prosecutors may in fact be tempted to negotiate lesser and perhaps less appropriate charges in order to dispose of matters in the Local Court.[6]

4.6 The Hon Rodney Madgwick QC noted the increase in the jurisdiction of the Local Court and the fact that, in relation to Table 1 and Table 2 offences, the determination as to whether to proceed on indictment may largely depend on variable prosecutorial discretion. As such, he suggested that there is a potentially large disparity in the sentencing outcome between like or very nearly like offences, depending on whether they are dealt with summarily or in the District Court.[7]

4.7 The Chief Magistrate has remarked on the frequency of Table 1 or 2 SNPP offences being heard in the Local Court, despite the fact that the maximum sentence available in the Local Court does not approach the prescribed SNPP.[8] He has provided the following Table, which indicates the number of offences finalised in 2010, for those offences which appear both in the SNPP Table and in either Table 1 or Table 2.

3. SNPP10A, *NSW Director of Public Prosecutions*, 6 (Attachment).
4. N Cowdery, 'Reforming the criminal justice system' (Paper presented at Public Defenders Criminal Law Conference, Sydney, 26 February 2011), 11.
5. N Cowdery, 'Minimum Sentencing: The Australian Prosecutorial Experience' (Paper presented at OSF-SA Sentencing Conference, Cape Town, South Africa, 25–26 October 2006), 8.
6. N Cowdery, 'Minimum Sentencing: The Australian Prosecutorial Experience' (Paper presented at OSF-SA Sentencing Conference, Cape Town, South Africa, 25–26 October 2006), 9.
7. SNPP11, *R Madgwick,* 5.
8. G Henson, *Preliminary submission to the NSW Law Reform Commission review of sentencing law* (2011), 14.

Offence	Table	SNPP	Matters finalised in Local Court	Matters finalised in higher courts
Reckless grievous bodily harm in company (*Crimes Act* s 35(1))	1	5 years	88	44
Reckless grievous bodily harm (*Crimes Act* s 35(2))	1	4 years	407	83
Reckless wounding in company (*Crimes Act* s 35(3))	1	4 years	56	43
Reckless wounding (*Crimes Act* s 35(4))	1	3 years	393	79
Assault police officer (*Crimes Act* s 60(2))	1	3 years	178	8
Aggravated indecent assault (*Crimes Act* s 61M(2))	1	5 years	247	272
Aggravated indecent assault—victim under 16 (*Crimes Act* s 61M(2))	1	8 years	156	124
Causing bushfire (*Crimes Act* s 203E)	1	5 years	88	2
Unauthorised possession/use of prohibited firearm/pistol (*Fire arms Act 1996* s 7)	2	3 years	114	113
Unauthorised possession/use of prohibited weapon (*Weapons Prohibition Act 1998* s 7)	2	3 years	652	105

4.8 Judge Henson states:

> Although it may be argued that an election may be made by the prosecuting authority to proceed on indictment where appropriate, with the result that offences should only remain in the Local Court where they are below the middle of the range of objective seriousness, the practical experience of magistrates is otherwise. Indeed, the frequency with which the majority of these offences are dealt with in the Local Court, as outlined in the table above, militates against such an argument.

4.9 Unsurprisingly, the scheme also presents difficulties for defence lawyers. Leonie Flannery, now Judge Flannery, has stated that the scheme:

> introduces a further difficulty for a defence lawyer. Crown Prosecutors are often willing to accept a plea to a lesser charge to avoid the need for the complainant to give evidence. The lesser charge may or may not carry a standard non-parole period. In any event, the accused will be sentenced much more leniently if he or she were to plead guilty. Sometimes it is as stark a choice as a plea of not guilty with a 15 year non-parole period on conviction versus a 0–2 year non-parole

> period on a plea to a lesser charge. For an innocent accused the position is untenable.[9]

4.10 A commonly propounded view expressed to the Council is that the SNPP scheme is founded on a flawed premise—that is, that the expectations of the community in relation to appropriate sentences should inform sentencing law.

4.11 As noted in Chapter 2, community expectations were explicitly listed as a matter taken into account in the establishment of SNPPs.[10]

4.12 Submissions to the QLD Sentencing Advisory Council's review of SNPPs noted that:

> if sentences should be consistent with 'community expectations', there is a need to understand exactly what those expectations are and ensure that they are well informed rather than media driven.[11]

4.13 Evidence from BOCSAR and the Sentencing Council's 2008 study of public perceptions of the criminal justice system indicates that in NSW community expectations are not, in fact, well-informed, but are driven by distorted media portrayal about crime and justice:

> This study also supports previous research showing that the NSW public is generally poorly informed about crime and criminal justice. More than 80 per cent of NSW residents mistakenly believe that property crime has been increasing or has remained stable over the last five years. NSW residents significantly over-estimate the proportion of crimes that involve violence, over-estimate imprisonment rates for assault, under-estimate conviction rates for assault and burglary and under-estimate imprisonment rates for burglary.
>
> This is due in no small measure to the way that crime and criminal justice issues are portrayed in the media. … All too often, media reporting of crime and justice is distorted, selective and sensationalist. This distorted portrayal of crime and criminal justice issues in the media may not always be deliberate. Violent or unusual acts tend to gain media attention because they are more newsworthy and interesting than non-violent or volume crimes. Similarly, acquittals that are perceived to be unwarranted or sentences that are perceived to be unduly lenient tend to make the news more so than expected convictions or sentences that might be seen to be in line with community expectations. However, the net effect of public reliance on the media for information on crime and justice is a set of misconceptions that tends to undermine public confidence in the criminal justice system.[12]

4.14 The Victorian Sentencing Advisory Council's examination of public perceptions of sentencing serves as a cautionary tale of the reliance on public sentiment as a basis for sentencing policy. That research identifies a number of well-established findings in relation to community views on sentencing, including the fact that:

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9. L Flannery, 'A Defence Lawyer's Perspective', 28(1) *UNSW Law Journal* 252, 254.
10. NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813 (B Debus—Attorney General) 5816.
11. Sentencing Advisory Council (QLD), *Minimum standard non-parole periods*, Final Report (2011), 23.
12. NSW Bureau of Crime Statistics and Research and NSW Sentencing Council, *Public confidence in the New South Wales criminal justice system*, Crime and Justice Bulletin 118 (2008), 13.

> politicians, policymakers and the media have concluded that the public is substantially punitive and would therefore support increasingly punitive penal policies, [however] … [p]unitive attitudes are underpinned by inaccurate knowledge and beliefs about crime and the criminal justice system.

Yet, consistently with many similar studies:

> …[P]roviding people with detailed information on a case has a strong mitigating effect on severity – participants given a complete case study are much less punitive than those whose judgment is based on a typical newspaper report of the same case.[13]

4.15 In considering whether or not the statutory NPP should be increased in Tasmania, the Tasmania Law Reform Institute noted that:

> The available evidence suggests that increasing the severity of sentences will not alter the widespread view that sentencing tends to be too lenient. And increasing sentence length is not an effective strategy to reduce crime. It could be argued that what is needed is better and more accessible information for the public about how sentencing is supposed to work, better information for sentencers about what the public think and a review of sentencing options to ensure we are using resources efficiently.[14]

4.16 As noted earlier, there has been a great deal of judicial commentary on the difficulties in the application of the scheme as courts have dealt with the complexities of applying SNPPs. Although this report does not synthesise that commentary, the views outlined by Adams J in his separate judgment in the matter of *R v AJP* [2004] NSWCCA 434 provide a useful outline of some of the frustrations that had been faced by courts before the decision in *Muldrock* in applying the scheme.

> I wish to add some remarks of my own about the way in which the recent changes to the *Crimes (Sentencing Procedure) Act* 1999 have impacted on sentencing.
>
> …
>
> Section 54A of the *Crimes (Sentencing Procedure) Act* 1990 provides that the prescribed standard non-parole periods represent "the non-parole period for an offence in the middle of the range of objective seriousness" for the specified offences. Section 54B provides that the court must impose such a non-parole period unless there are reasons for not doing so, which reasons must be confined to the matters specified in s21A. It is unnecessary to set them out. For present purposes it is sufficient to point out that the matters cover, one way or another, all the objective and subjective circumstances that might be present in respect of any offence or any offender. Since any of these, or any combination of them, might justify departure from the standard period, it is difficult to see, as a matter of logic, how any of them can be regarded as part of the hypothetical offence lying in the middle of the range of objective seriousness. Take, for example, an offence that was planned. Since this matter is an aggravating factor by virtue of s21A(2)(n) which could justify increasing the non-parole period beyond the standard term, it seems that planned crimes would be more serious than those falling within the middle of the range of objective seriousness. On the other hand, s21A(3) makes the fact that a crime is unplanned a mitigating factor,

13. Sentencing Advisory Council (Vic), *More Myths and Misconceptions* (2008), 4–7.
14. Tasmania Law Reform Institute, *Sentencing*, Issues Paper 2 (2002), 140.

> so that an impulsive offence might, for that reason, not be in the middle of the range of objective seriousness. Thus the "abstract offence" is neither planned nor unplanned. The same logic applies to any objective feature that might be applied to the "abstract offence". The consequence of this line of reasoning is that an abstract offence in the middle of the range of objective seriousness in terms of s54A is empty of all content except for the elements of the offence itself.
>
> …
>
> Quite apart from the difficulty of constructing a middle of the range abstract offence to which ss54A and 54B refers, arising from its absence of content, since it would be possible – indeed, likely – that a number of hypothetical circumstances of the "abstract offences" could be supposed, with quite different objective features, both aggravating and mitigating, the collective effect of which would nevertheless result in a number of the hypothetical cases falling within the middle of the range of objective seriousness despite their differing circumstances, even if it is allowed that an abstract offence can have content, it would be impossible to determine what that content was.
>
> …
>
> attempting to hypothesise an "abstract offence in the middle of the range of objective seriousness" for the purpose of comparing the instant offence to such a case, with great respect, is very different indeed from the "traditional sentencing exercise".
>
> …
>
> [Assessing whether a case lies in the] "middle-of-the-range-of-objective-circumstances" … is far more difficult an exercise than assessing whether a case falls into the worst category (or, for that matter, the bottom of the range) for the obvious reason that the concept of the "middle of the range" is very much more imprecise, an imprecision that does not arise from any shortcoming in the legislation but from the inherent character of the test itself and the multifarious factual circumstances that each case presents.[15]

4.17 Justice Hunt commented on the difficulties of applying the scheme in *R v Apps;*[16]

> Complaint was made concerning the decision of the sentencing judge that his finding that the applicant had intended to kill the deceased placed his crime above the mid-range of seriousness for the crime of murder—albeit in the context where, because the applicant had pleaded guilty, the judge correctly had regard to the standard non-parole period for murder specified in the Table to Division 1A of the *Crimes (Sentencing Procedure) Act 1999* only as a guidepost or benchmark against which the seriousness of the applicant's crime was to be assessed.
>
> As I understood the complaint, it was that, as an intention to kill is part of the crime charged, it was not appropriate to take that state of mind into account in determining whether the degree of objective seriousness in the particular case was above the mid-range to which the standard non-parole period applied. That complaint highlights one of the many difficulties facing sentencing judges when considering the standard non-parole period specified in that Table.

15. *R v AJP* [2004] NSWCCA 434, (2004) 150 A Crim R 575, [41].
16. [2006] NSWCCA 290.

> The crime of murder has a wide variation in the states of mind which must accompany the act which caused the death of the deceased. That particular state of mind is directly relevant to the determination of the objective seriousness of the crime charged, in that it is related to the commission of the crime itself … Significantly, none of the various standard non-parole periods specified in the Table for the various forms of aggravated crimes relate to the state of mind with which the offender commits the crime. That fact leads me to the conclusion that, for murder, the standard non-parole period relates to a crime in the middle of seriousness relating to *all* the various states of mind which may constitute that crime. The Legislature could not have intended that a sentencing judge impose the same standard non-parole period for a murder involving an intent to kill as one without any such intent but during the commission by an accomplice of the accused of a crime punishable by imprisonment for life or for twenty-five years (*Crimes Act 1900*, s 18).
>
> The intention to kill must therefore be directly relevant to the sentencing judge's assessment of the objective seriousness of the crime, and whether, in the particular case, that crime falls above or below the mid-range of seriousness. Two things should, however, be made clear. First, the judge is required in that exercise to take into account a finding that the murder was committed with an intention to kill not by itself, but only in association with any other states of mind of the accused which were causally related to the commission of the crime, including those which mitigate the seriousness of the crime (such as mental illness). That is where the sentencing judge erred in the present case. Only in this way can the issue be determined by way of the instinctive synthesis which is required in determining the appropriate sentence … Secondly, the intention to kill, because it is an element of the offence, is *not* a matter in aggravation in determining the appropriate sentence pursuant to s 21A of the statute.[17]

4.18 These concerns would appear to have anticipated the potential difficulty in the application of *Muldrock* that was noted in Chapter 2 above.[18]

Report of the Queensland Sentencing Advisory Council

4.19 In its recent report on SNPPs, which also preceded the decision in *Muldrock*, the QLD Sentencing Advisory Council stated that:

> A majority of the Council does not support the introduction of a SNPP scheme in Queensland. In particular, a majority of the Council is concerned that there is limited evidence that SNPP schemes meet their objectives, beyond making sentencing more punitive and the sentencing process more costly and time consuming. Added to this are the possible negative impacts of such a scheme on vulnerable offenders.[19]

4.20 Consultations undertaken in NSW as part of the QLD review revealed that NSW stakeholders had expressed concerns relating to:

- the adoption of overcharging practices by police, for both SNPP and non-SNPP offences, to support successful plea negotiations later in the process;

17. *Apps v R* [2006] NSWCCA 290, [2]–[5]
18. At paragraph [2.55]–[2.58].
19. Sentencing Advisory Council (QLD), *Minimum standard non-parole periods*, Final Report (2011), xv.

- an increase in difficulty for defendants charged with SNPP offences being granted bail;
- an increase in the incidence of offenders pleading guilty to avoid the strict application of the scheme, with concerns that the pressure on offenders to plead guilty, particularly in the case of vulnerable offenders, may be overwhelming;
- the creation of additional work for the Office of the Director of Public Prosecutions in preparing and prosecuting matters – for example, in assessing prosecution briefs to determine whether SNPP offences should be dealt with on indictment or summarily, and preparing sentencing submissions;
- an increase in matters being dealt with on indictment, escalating the cost of dealing with matters in the higher courts
- an increase in the complexity and time required for the hearing of sentences, arising from the need for comprehensive prosecution and defence submissions and delays associated with the work required of judges in drafting detailed sentencing remarks; it being suggested that this has contributed to court backlogs as well as an increase in appeals because of errors made in applying the scheme, and
- to the extent that SNPPs contribute to longer sentences (particularly sentences of three years or more), increased costs to the NSW State Parole Authority for prisoner management.[20]

4.21 The majority of the QLD Council formed the view that an SNPP scheme in QLD was not desirable, as there was limited evidence to show any benefit from existing schemes, other than making sentencing more punitive, costly and time consuming. The majority also considered that SNPP schemes had the potential to have negative impacts on vulnerable offenders.

4.22 If a SNPP scheme was to be introduced, then the QLD Council proposed the introduction of a standard percentage scheme, under which NPPs should be specified as a set proportion of the full-term imposed for certain categories of serious offences. They considered such a scheme would:

> deliver a number of the intended outcomes of a defined term scheme, including the minimum term an offender must spend in prison for a given offence, while preserving the current approach to sentencing in Queensland. It would also largely avoid many problems that have arisen in NSW, including the additional complexity such a scheme has introduced to sentencing in that State, increasing the risks of sentencing errors and appeals, and the need for detailed and broad grounds for departure, which compromise the ability of the scheme to operate as a 'standard' non-parole period scheme.[21]

4.23 The scheme proposed by the QLD Council would apply to serious violent offences and sexual offences where an adult offender was convicted on indictment; and would operate as part of the serious violent offences scheme in that state.[22] The

20. Sentencing Advisory Council (QLD), *Minimum standard non-parole periods*, Final Report (2011), 9.
21. Sentencing Advisory Council (QLD), *Minimum standard non-parole periods*, Final Report (2011), xvi.
22. The Council proposed that the scheme be recast as the 'Serious Offences Standard Non-Parole Period Scheme'; Ibid, xvii.

Council suggested the scheme should apply to 'prescribed offences', which included 'serious offences' (currently classed as serious violent offences) listed in Schedule 1 of the *Penalties and Sentences Act 1992* (QLD); eight additional sexual offences; and an offence of counselling or procuring the commission of, or attempting or conspiring to commit any of these offences.[23]

4.24 Under the Council's proposal, the standard percentages that would constitute the NPP varied according to the category of the offence involved:

- where an offender was sentenced to between 5 and 10 years imprisonment for a prescribed offence (not being a 'serious offence'), the SNPP would be 65% of the term of imprisonment imposed;
- where an offender was sentenced to between 5 and 10 years imprisonment for a prescribed offence that was classed as a 'serious offence' and the court did not make a declaration that the offender was convicted of a 'serious offence', the SNPP would be 65% of the term of imprisonment imposed;
- where an offender was sentenced to a period of imprisonment for a prescribed offence that was classed as a 'serious offence',[24] and the court made a declaration that the offender was convicted of a 'serious offence', the SNPP would be the lesser of 15 years or 80% of the term of imprisonment imposed. A declaration would be mandatory if the offender was sentenced to 10 years imprisonment or more.[25]

4.25 For offences where the 65% SNPP applied, the court would retain discretion not to apply the SNPP if it was of the opinion that it would be 'unjust to do so'.

4.26 The QLD Government has engaged in community consultation in relation to the Council's recommendations and expects to introduce legislation to implement a SNPP scheme by the end of 2011.[26]

Comparable schemes in other jurisdictions

4.27 The QLD Sentencing Advisory Council describes the categories of SNPP schemes operating in Australia as either 'defined term schemes', such as the NSW scheme; or 'standard percentage schemes', which specify that a set proportion of the full sentence imposed by a court should be served without parole.[27]

4.28 South Australia and the Northern Territory each have a number of offences that are subject to minimum NPPs. Those jurisdictions have both defined term SNPPs and standard percentage SNPPs.

23. Ibid, 128.
24. Or an offence capable of being declared a serious offence under s 161B(4) of the *Penalties and Sentences Act 1992* (QLD).
25. Ibid, 38.
26. Queensland Government, *Minimum standard non-parole periods,* (2011) <http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/current-activities/minimum-standard-non-parole-periods> at 10 November 2011.
27. Sentencing Advisory Council (QLD), *Minimum standard non-parole periods*, Final Report (2011), 7.

4.29 In South Australia, the offence of murder is subject to a mandatory minimum NPP of 20 years, while other serious offences against the person have a prescribed mandatory minimum NPP of 80 per cent of the head sentence, where the offence is at the lower end of the range of objective seriousness.[28] The court can decline to set a NPP if it considers that to do so would be inappropriate;[29] or may fix a longer NPP if it considers this is warranted on the basis of any objective or subjective factors affecting the relative seriousness of the offence. The court may only reduce the NPP if it is satisfied, on the basis of a number of limited factors, that there are special reasons for doing so. The relevant factors are:

- that the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct;
- if the offender pleaded guilty to the charge of the offence—that fact and the circumstances surrounding the plea;
- the degree to which the offender has co-operated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of, any such co-operation.[30]

4.30 The Northern Territory also has a SNPP of 20 years for murder—representing the NPP for an offence in the middle of the range of objective seriousness.[31] As in South Australia, Northern Territory courts may fix a longer NPP than the SNPP if this is warranted on the basis of any objective or subjective factors affecting the relative seriousness of the offence.[32] The court may only decline to fix a NPP if 'the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole'.[33]

4.31 Section 53A of the Northern Territory Act provides a discretion to impose a shorter NPP, however, this may only be done in 'exceptional circumstances', that is, where either the victim's conduct or conduct and condition substantially mitigate the conduct of the offender; or where the offender is otherwise of good character and unlikely to re-offend.[34]

4.32 Standard percentage SNPPs apply to offences other than murder in the Northern Territory. Where a court determines to fix a NPP in respect of a sentence of imprisonment which has not been suspended, it must impose a NPP of 70% of the head sentence for certain sexual offences and offences against persons under 16 years of age;[35] and at least 50% of the head sentence for all other offences where a

28. *Criminal Law (Sentencing Act) 1988* (SA), ss 32(5), 32A(1).
29. Such an opinion may be formed because of the gravity of, or circumstances surrounding, the offence; the criminal record of the offender; the behaviour of the offender during any previous period of release; or any other circumstance: *Criminal Law (Sentencing Act) 1988* (SA), s5(c).
30. *Criminal Law (Sentencing Act) 1988* (SA), s 32A(3).
31. *Sentencing Act 1995* (NT), s 53A. Note that if the offence is committed in the circumstances outlined in s 53A(3) of the Act, the minimum NPP will be 25 years.
32. Ibid, s 53A(4).
33. Ibid, s 53A(5).
34. Ibid, s 53A(7)
35. Ibid, ss 55, 55A.

sentence of imprisonment for 12 months or longer is imposed that is not suspended.[36]

4.33 The Victorian Government has committed to the introduction of 'baseline sentences', which have been described by the Attorney General as follows:

> - Baseline sentences will apply for serious offences as defined in the *Sentencing Act 1991* (Vic) and for additional offences such as arson, recklessly causing serious injury, aggravated burglary and major drug trafficking.
>
> - Baseline sentences will provide the starting point for the court in determining the minimum sentence (that is, the non-parole period) to be imposed in cases where a baseline sentence applies, and will indicate the sentence that the parliament expects will be the median or mid-point of minimum sentences imposed for cases involving that offence.
>
> - In determining the non-parole period to be served by the offender, the court will be required to start from the baseline minimum sentence before applying aggravating or mitigating factors that would alter the non-parole period up or down from the baseline.
>
> - Where a baseline sentence applies, the appropriateness of a non-parole period is to be assessed on appeal primarily by reference to the applicable baseline sentence, rather than by reference to current sentencing practice.
>
> - The baseline sentencing regime is to operate so that, over time, the Court of Appeal will be able to determine whether or not the median levels of minimum sentences being handed down are in fact aligned with the baseline sentences specified by parliament and, if not, to require changes accordingly in sentencing practices.
>
> The government has stated by way of example that a 10 year baseline sentence should apply to the offence of trafficking in a large commercial quantity of drugs, and a 20 year baseline sentence should apply to the offence of murder.[37]

4.34 The Victorian Sentencing Advisory Council has been asked to provide advice on the implementation of a baseline scheme, but the terms of reference do not extend to providing advice on the merits of introducing such a scheme. [38]

4.35 The Council is expected to report in early 2012.[39]

Options for reform

4.36 Although the Council makes no recommendations in relation to the reform of the SNPP scheme for the reasons set out in Chapter 1, we note in the remainder of this chapter the potential options for reform that have been identified by stakeholders, or that arise as a result of the decision in *Muldrock v The Queen*.[40]

36. Ibid, s 54(1)
37. Sentencing Advisory Council (Victoria), *Baseline Sentences*, Issues Paper (2011), 3.
38. Ibid, 4.
39. Ibid.
40. [2011] HCA 39, (2011) 281 ALR 652.

Abolish the SNPP scheme

4.37 This option had significant, although not universal, support amongst the stakeholders who provided submissions to the Council before the decision in *Muldrock*.

4.38 The Hon Justice RO Blanch noted that the introduction of SNPPs has increased sentences in NSW to a point beyond that which is appropriate. He also raised concerns regarding the fettering of judicial discretion and the pressure on defendants to plead guilty in order to avoid SNPPs.[41]

4.39 In contrast to the possibility of increasing the number of SNPP Table offences referred to in the Council's terms of reference, Justice Blanch supported removal of offences from the Table, or, ideally, the complete abolition of the SNPP scheme.[42]

4.40 Justice Blanch's apprehension that defendants may be pleading guilty in cases where they should not do so is lent support by the Judicial Commission's finding that there had been a significant increase in the number of guilty pleas for SNPP offences since the scheme commenced.[43]

4.41 The Shopfront Youth Legal Centre submitted that SNPPs are not necessary in order to promote consistency in sentencing, an outcome that could be achieved through legislation, common law and a transparent appeal process.[44]

4.42 The Hon Rodney Madgwick QC agreed that the SNPP scheme should be abandoned and that as an interim measure, until such time as the scheme is abolished, SNPPs should be set at 40% of the maximum penalty, since that represents approximately the statutory proportion (under s 44(2)) of a mid-range sentence (that is, a sentence set at around 50% of the maximum penalty).[45] His submission supported the preservation of maximum judicial discretion in sentencing and for the exclusion of 'needlessly complex, difficult, arbitrary and unreal legal concepts and constructs'.

4.43 As noted above, former DPP Nicholas Cowdery AM QC has also expressed the view that the scheme is unnecessary and should be abolished.[46]

Narrow the SNPP scheme

4.44 Legal Aid NSW submitted that sexual offences are not suitable for inclusion in the SNPP scheme, because sentencing for these offences is a highly complex exercise unsuited to the limitations and restrictions of SNPPs. They noted that sexual assault

41. SNPP1A, *R Blanch,* 1.
42. Ibid; SNPP1B, *R Blanch*, 1.
43. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 55.
44. SNPP5*, The Shopfront Youth Legal Centre*, 1.
45. SNPP11, *R Madgwick*, 1–2.
46. See paragraph [4.4].

offences are already subject to graduated sentencing, which takes into account the circumstances of aggravation as well as the circumstances of the victim.[47]

4.45 The Department of Ageing Disability and Home Care, now Family and Community Services, submitted that people with an intellectual disability should be considered for exemption from SNPPs on the basis of the special considerations that attach to such cases.[48]

4.46 This view is lent some support by the decision in *Muldrock v The Queen,* where the Court noted that the SNPP:

> says little about the appropriate sentence for this mentally retarded offender and this offence. The Court of Criminal Appeal erred by treating the provision of the standard non-parole period as having determinative significance in sentencing the appellant.[49]

Expand the SNPP scheme

4.47 The NSW Police Force submitted that consideration should be given to including a number of additional offences in the SNPP Table, including some sexual offences, on the basis of the nature and extent of criminality involved.[50]

4.48 Although the ODPP agreed with the Bar Association that new offences should not be added in the absence of a transparent mechanism for the identification of offences suitable for inclusion in a SNPP scheme and for the setting of appropriate SNPPS, it did suggest that the offence for which provision is made in the *Crimes Act s* 66C could be considered for inclusion in the future, if a suitably transparent mechanism is developed. The inconsistency of approach in not including the s 66C offence in the SNPP Table was noted by the Court in *R v Dagwell* [2006] NSWCCA 98, where the court observed that while s 61M(1) offences were subject to a SNPP, the more serious s 66C offences were not included.[51]

47. SNPP8A, *Legal Aid NSW*, 1–2.
48. SNPP6*, Department of Ageing Disability & Home Care*, 1.
49. [2011] HCA 39, [32].
50. SNPP9, *NSW Police Force,* 1. The suggested additions were the following sections of the *Crimes Act 1900* (NSW): s 38 (using intoxicating substance to commit an offence, where a sexual offence); s 61K (assault with intent to have sexual intercourse); s 66B (attempting, or assaulting with intent, to have sexual intercourse with a child under 10); s 66EA (persistent sexual abuse of a child); s 66EB (procuring or grooming a child under 16 for unlawful sexual activity); s 80A (sexual assault by forced self-manipulation); s 80D (causing sexual servitude); s 112 (break into any house etc. and commit serious indictable offence, where aggravated offence or specially aggravated offence—although the Council notes that these offences are already contained in the SNPP Table); s 196 (destroy or damage property with intent to injure a person, where damage caused by fire or explosion); s 198 (destroy or damage property with intent of endangering life).
51. At [38].

Establish a transparent mechanism for the inclusion of offences in the SNPP scheme, and for the calculation of the prescribed SNPP

4.49 The NSW Bar Association, with whom the Law Society of NSW and Legal Aid NSW agreed, submitted that a transparent mechanism by which SNPPs are set must be established if the system is to be retained; and added that no further offences should be added to the Table until such a mechanism is developed and made public.[52]

4.50 The NSW DPP also advocated the establishment of a transparent mechanism for determining whether an offence should attract a SNPP, as well as the identification of a clear rationale for the prescribed periods, noting that no clear explanation had ever been provided as to how the existing SNPPs were formulated.[53]

Standardise SNPPs

4.51 The terms of reference contemplate the possible standardisation of SNPPs within a band of 40–60% of the available maximum penalty.

4.52 Such a move was strongly opposed by the NSW Bar Association and the Law Society of NSW, who argue that there is no justification for increasing the SNPP for offences that currently have an SNPP that is less than 40% of the maximum sentence. Further, the Bar Association argued that a worst case offence would be expected to have a NPP of 75% of the maximum penalty, which makes it difficult to envisage why a NPP of more than 40% would be appropriate for a mid-range case.[54] The Bar Association, however, supported standardisation of SNPPs within a band of 25–40% of the maximum penalty.[55]

4.53 As noted above, the Hon Rodney Madgwick QC supported the standardisation of SNPPs at 40% of the maximum penalty, but only as an interim measure until the scheme is abolished entirely.[56]

4.54 The Shopfront Youth Legal Centre opposed standardisation, arguing that SNPPs are an unnecessary mechanism and that consistency in sentencing can be achieved through other means.[57]

4.55 The DPP's view was that standardising the SNPPs for sexual offences within a band of 40–60% of the maximum penalty may redress the fact that the scheme has created inconsistencies in the way in which different sexual offences are dealt with.[58]

52. SNPP2, *NSW Bar Association*, 2; SNPP4, *Law Society of NSW,* 1; SNPP8A, *Legal Aid NSW*, 1.
53. SNPP10A, *NSW Director of Public Prosecutions*, 1.
54. SNPP2, *NSW Bar Association*, 1–2; SNPP4, *Law Society of NSW*, 1.
55. SNPP2, *NSW Bar Association*, 1–2.
56. SNPP11, *R Madgwick*, 1–2.
57. SNPP5, *The Shopfront Youth Legal Centre,* 1.
58. SNPP10A, *NSW Director of Public Prosecutions*, 2.

4.56 However, the DPP noted that this approach may not work for non-sexual offences.[59]

Alternatives to a SNPP scheme

4.57 The primary justifications for the introduction of the SNPP scheme were 'promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process'.[60]

4.58 As noted earlier, submissions by stakeholders to the Council described the scheme as complex, difficult to understand and wholly lacking in transparency.

4.59 As is noted in the following paragraphs, there is a difficulty in attempting to secure consistency through any form of numerical guidance, unless it is one that involves the fixing of mandatory terms, irrespective of the objective and subjective circumstances of the case.

4.60 The Council has identified several other ways in which consistency and transparency might be promoted without resort to the rigidity of a statutory regime, such as the SNPP scheme.

The Judicial Information Research System

4.61 The Judicial Information Research System (JIRS) database contains a number of tools to assist judicial officers in the sentencing exercise. The JIRS sentencing statistics that form part of that database have regularly been referred to by sentencing judges as constituting some indication of sentencing patterns, or a range of outcomes for a given offence. However, standing alone, that is, without reference to the facts of the cases included in the database, they can only constitute a crude reference point, the value of which, in any event, also depends on the number of cases surveyed.

4.62 It has long been recognised that, while it is permissible for sentencing judges to refer to statistical data on past sentences for a given offence, they can be of limited utility and they do need to be handled with care.[61] As the High Court observed recently in *Hili v The Queen*:[62]

> 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. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes.

59. SNPP10A, *NSW Director of Public Prosecutions*, 2.
60. NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813 (B Debus—Attorney General) 5813.
61. For example, see *R v Bloomfield* (1998) 44 NSWLR 734, 739.
62. [2010] HCA 45, (2010) 242 CLR 520, [48].

4.63 Although these observations were made in the context of sentencing for a federal offence, they are equally relevant for sentencing in respect of state offences.

4.64 Recent enhancements to JIRS enable users to access, via hyperlink, the reasons for sentencing decisions in relation to the specific cases that contribute to sentencing statistics for any given offence. The new features are intended to provide a greater degree of transparency in the statistics, assist in the identification of comparable cases; and aid courts in achieving consistency by treating like cases alike and different cases differently.[63]

4.65 This added functionality to the JIRS database makes JIRS a key tool in promoting consistency and transparency in sentencing in a way that does not require legislative support or direction. Its availability is also enhanced by the *Sentencing Bench Book* and the *Judicial Officers Bulletin* that are published by the Judicial Commission and issued to judicial officers.

Judicial expertise

4.66 Some critics argue that legislative schemes aimed at consistency will not work in the absence of judicial officers who are experienced in criminal jurisprudence and in the intricacies of sentencing. For example, Fox and Freiberg note that critics have questioned the 'criminological knowledge and skills of the judiciary exhibited by individual sentencers and the disparities revealed when comparative studies are undertaken.'[64]

4.67 In noting the increased numbers of Crown appeals and the increased success rate of severity appeals following the introduction of the SNPP scheme, the Judicial Commission of NSW stated:

> It cannot be assumed that every appeal [since SNPPs were introduced] involved a purported error in the application of the statutory scheme. However, the vast majority of the appeals did involve grounds of appeal that concerned the legislation.[65]

4.68 The Commission's 2005 study on Crown appeals found that there had been incorrect application of sentencing principles by the court of first instance in 65% of all Crown appeal cases in the NSWCCA.[66]

4.69 A number of proposals have been made for reducing the number of judicial errors in relation to the sentencing exercise and, as a consequence, increasing consistency in sentencing. These include the selection of judges with experience in criminal jurisprudence and knowledge of sentencing practice to sit in a specialised criminal division; as well as additional education in relation to sentencing law and practice for judicial officers.

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63. Judicial Commission of NSW, 'JIRS Higher Court sentencing statistics enhanced' (2011) 23(7) *Judicial Officers' Bulletin* 61, 62.
64. R Fox and A Freiberg, *Sentencing State and Federal Law in Victoria* (2nd Ed), 29.
65. Judicial Commission of NSW, *The impact of the standard non-parole period sentencing scheme on sentencing patterns in NSW,* Monograph 33 (2010), 60.
66. Judicial Commission of NSW, *Crown Appeals against Sentence*, Monograph 33 (2005), 26, 31.

Specialisation

4.70 Specialised jurisdictions have been suggested in the past. For example, in its 1998 report, *Access to Justice*,[67] the NSW Law Society suggested the establishment of a single superior trial court, which would have specialised divisions and combine the jurisdiction of the District and Supreme Courts of NSW, handling all matters above the Local Court's jurisdictional limit.

4.71 There are arguments for and against introducing a specialist criminal trial court system that would assign cases for trial by judges of the District and Supreme Courts, depending on their seriousness and public interest significance. The Council takes no position on such a structure, other than to say that such an arrangement, which could bear some similarity to that which was adopted in the UK when the Crown Court system was established in 1971, has the potential to minimise the requirement for judges to hear matters outside their area of expertise by promoting the appointment of individuals with specialised knowledge and experience in the criminal courts.

Education

4.72 Judicial education has also been proposed as a means of increasing judicial expertise and thus promoting consistency in sentencing.[68]

4.73 There are numerous bodies involved in the education of NSW judicial officers, including the National Judicial College of Australia; the Australian Institute of Judicial Administration; and the Judicial Commission of NSW, which is 'recognised and admired throughout Australia as well as overseas' as a 'beacon of educational excellence'.[69]

4.74 The misapplication of sentencing principle in NSW courts, as outlined above, suggests that additional training may be beneficial for NSW judicial officers.

4.75 Under the *Judicial Officers Act 1986* (NSW), the Judicial Commission of NSW has responsibility for assisting the courts in achieving consistency in sentencing; and for continuing judicial education and training.[70] Although the Act envisages that consistency will be achieved through the monitoring of sentencing practices and the dissemination of information about sentences imposed by courts;[71] regular training on how to interpret and use that information, and on sentencing procedure more generally, may assist in achieving more consistent sentencing outcomes.

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67. The Law Society of New South Wales, *Access to Justice*, Final Report (1998), 5, 13.
68. SNPP11, *R Madgwick*, 9–10; Australian Law Reform Commission, *Same Crime, Same Time*, Final Report (2006), 472 noting views expressed in consultation with the Law Society of the Northern Territory.
69. Judicial Commission of NSW, *From controversy to credibility: 20 years of the Judicial Commission of NSW* (2008), 8 quoting D Hunt, *Judicial commission review: submission*, Submission to the Attorney General (2005).
70. Ss 8–9.
71. *Judicial Officers Act 1986* (NSW) s 8.

Sentencing Council promulgated guidelines

4.76 John Anderson has suggested that the Sentencing Council could be utilised more effectively to issue comprehensive and authoritative sentencing guidelines. He notes that 'the New South Wales Sentencing Council has a restricted consultative and advisory role, although it is open to consider whether its powers should be extended … there is clear scope for a more active role in providing effective sentencing guidance.[72]

4.77 Although the Council can advise and consult with the Attorney General in relation to matters which may be suitable for a guideline judgment and the submissions that should be made to the NSWCCA should an application for a guideline judgment be made, it does not have the power to issue sentencing guidance or to initiate guideline proceedings.[73]

4.78 The Sentencing Council for England and Wales provides an example of the ways in which a similar Council can fulfil the expanded role of providing sentencing guidance. The Council was established by the *Coroners and Justice Act 2009* (UK), s 118 and consists of 8 judicial and 6 non-judicial members. Non-judicial members are eligible for appointment if they are experienced in either criminal defence; criminal prosecution; policing; sentencing policy and the administration of justice; the promotion of the welfare of victims of crime; academic study or research relating to criminal law or criminology; the use of statistics; or the rehabilitation of offenders.[74] The Council has, among its roles, the production of guidelines on sentencing.[75]

4.79 The Council can prepare guidelines on its own motion, or at the request of the Lord Chancellor or the Court of Appeal.[76] The Act sets out the desirable features of a sentencing guideline relating to an offence, as follows:

- Where reasonably practicable, the guideline should include a description of different categories of case which illustrate the varying degrees of seriousness with which the offence may be committed, having regard to:
    - the offender's culpability in committing the offence;
    - the harm caused by the offence (or the intended or foreseeable harm);
    - other factors the Council considers relevant to the particular offence in question.
- The guideline should include a range of appropriate sentences for the offence; and, if categories of seriousness are described, a range for each category.

72. J Anderson, 'Standard minimum sentencing and guideline judgments: An uneasy alliance in the Way of the future' (2006) 30 *Crim LJ* 203, 221.
73. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 100J.
74. *Coroners and Justice Act 2009* (UK), sch 15.
75. *Coroners and Justice Act 2009* (UK), s 120.
76. *Coroners and Justice Act 2009* (UK), ss 120, 124.

- The guideline should list aggravating and mitigating circumstances the court is required under law to take into account when assessing the seriousness of the offence; as well as a list of any other factors the Council considers are relevant in mitigation of sentence;
- Guidance should be provided as to the weight to be given to prior convictions and other factors the Council considers to be significant;
- The guideline should nominate a point within the specified range of sentences which the Council considers should be the sentencing start point in a case where the defendant pleads not-guilty, before taking into account aggravating and mitigating factors.[77]

4.80 Once a guideline has been prepared, the Council publishes it as a draft and engages in a process of consultation to inform the preparation of a final guideline.[78] Once a definitive final guideline is issued, it is binding on all courts in England and Wales—courts are required to follow the guideline unless it would be contrary to the interests of justice to do so.[79]

4.81 Justice Graham Panckhurst describes the benefits of having an independent body involved in issuing sentencing guidelines as follows:

> [there was a] fundamental question, whether in this day and age it remained appropriate for sentencing policy to rest largely in the hands of the judiciary. Judges must maintain responsibility for the imposition of sentences in individual cases. In doing so, the constitutional independence of the judiciary is of fundamental importance. It provides the best assurance that sentences are not influenced by political or other considerations. But, the sentencing policy, or sentencing environment, under which individual sentences are imposed, is another matter. I would argue that sentencing policy is the concern of the whole community. Ordinarily this would suggest that Parliament ought to evaluate, establish policy and implement it through legislation. This would still leave judges with the anxious and formidable task of fixing sentences in individual cases.
>
> But at least in the current climate no political party can be seen to have a law and order policy at odds with the mood of the electorate.
>
> With this in mind, the [New Zealand] Law Commission recommended the establishment of an independent statutory body, charged with responsibility for sentencing policy through sentencing guidelines. The choice of this option was linked to … the 'need to change the nature of the law and order debate'. An approach to sentencing policy which left so much to judges, particularly the appellate courts, also stifled the opportunity for informed public debate. … [T]he judiciary left to its own devices developed policy in a piecemeal way, and in the limiting context of deciding individual appeals against sentence. Policy emerged essentially through the judgments of the Court of Appeal. In the meantime sectional lobby groups, the media and political parties were left free to engage in rhetoric about more punitive responses to crime, without any need to heed the consequences of such rhetoric. Soon enough, however, the consequences

77. *Coroners and Justice Act 2009* (UK), s 121.
78. *Coroners and Justice Act 2009* (UK), s 120.
79. *Coroners and Justice Act 2009* (UK), s 125.

> become apparent, through statistical information as to the per capita imprisonment rate and the growth in the prison muster.
>
> Hence, the Law Commission saw the establishment of a Sentencing Council as a possible means to a more rational debate of the policy issues.[80]

4.82 John Anderson has suggested that there is merit in having an independent, transparent authority for issuing sentencing guidelines, arguing that this:

> may avoid the need for further or stricter legislative regulation and allow the appellate courts to decide cases rather than to be increasingly concerned with taking the substantial amount of time needed to formulate and articulate thoroughly considered and complex guideline judgements.[81]

4.83 This would also avoid the delays that are caused in waiting for an appropriate case or series of cases for the court to list a series of appeals, of its own motion, for a guideline judgment; or for the Attorney General to bring an application for a guideline judgment.[82]

4.84 He acknowledges that while the ultimate effectiveness of this added function of the Sentencing Council would depend on the membership of the council and its ability to command the respect of sentencers, the 'English experience shows that it is worth serious consideration'.[83]

Summary

4.85 Although the proposals raised by stakeholders and outlined above were suggested prior to the High Court's decision in *Muldrock*, the potential for some residual uncertainty in relation to the application of the SNPP scheme brings those issues sharply into focus.

4.86 In particular, the decision in *Muldrock* raises questions, if the SNPP scheme is to be preserved, as to whether statutory content should be given to the expression 'mid range of objective seriousness'; or whether s 54B should be amended to give it the mandatory effect that it was previously understood to possess.

4.87 As such, the issues for consideration in relation to potential reform of the scheme are as follows:

a) whether the SNPP scheme should now be repealed; or

b) whether the scheme should be amended—and if so, in what way or ways—to achieve the legislative objectives of consistency and transparency and the imposition of punishment commensurate with the gravity of offences included in the SNPP Table that were behind the introduction of the scheme; and in particular:

80. G Panckhurst, 'A Sentencing Council: Enlightened or Folly?' (2008) 14 *Canterbury Law Review* 191, 201.

81. J Anderson, 'Standard minimum sentencing and guideline judgments: An uneasy alliance in the Way of the future' (2006) 30 *Crim LJ* 203, 222.

82. Ibid.

83. Ibid.

i) whether any of the current offences should be removed; and if so, which ones;

ii) whether any further offences should be added; and if so, which ones;

iii) whether the current SNPP levels should be varied; and if so, which ones and to what extent; and

iv) by reference to what criteria offences should be selected for the scheme and appropriate SNPP levels set.

c) whether any of the other options mentioned above, including JIRS, judicial expertise and Council promulgated guidelines, as well as the standard percentage model identified by the QLD Sentencing Advisory Council, should be adopted.

4.88 It is understood that the NSW LRC will give close consideration to the SNPP scheme in its review of sentencing laws; and as a consequence, these issues have not been determined in this Report.

Appendix 1: Table of Submissions

Submission number	Stakeholder
SNPP01	The Hon Justice RO Blanch, Chief Judge, District Court of NSW
SNPP02	NSW Bar Association
SNPP03	S Thomson
SNPP04	NSW Law Society
SNPP05	The Shopfront Youth Legal Centre
SNPP06	Department of Ageing, Disability and Home Care
SNPP07	Community Relations Commission
SNPP08	Legal Aid NSW
SNPP09	NSW Police Force
SNPP10	Director of Public Prosecutions and Office of the Director of Public Prosecutions, NSW
SNPP11	The Hon RN Madgwick QC