



Sentencing Council
Attorney General & Justice

Standard non-parole periods

Sexual offences against children

An interim report by the NSW Sentencing Council

November 2013

NSW Sentencing Council

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ISBN 978-0-7347-2696-4 (Online)

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Acknowledgements

We acknowledge with gratitude the assistance of the following organisations:

- NSW Bureau of Crime Statistics and Research.
- Judicial Commission of NSW.

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This review

- 1.1 On 11 September 2013, the Attorney General asked us to review the following aspects of the standard non-parole period (SNPP) scheme, and report back by 20 December 2013:
- (a) the offences which should be included in the standard non-parole period Table
 - (b) the standard non-parole periods for those offences, and
 - (c) the process by which any further offences should be considered for inclusion in the Table and any further standard non-parole periods set and advise on options for reform of these aspects of the scheme.
- 1.2 In light of the establishment of the parliamentary select committee inquiry into child sexual assault offences, the Attorney General has asked us to give immediate consideration to SNPPs for child sexual assault offences and to report urgently on the following matters, if at all possible by 31 October 2013:
- (a) identification of child sexual assault offences that should be included in the standard non-parole period Table; and
 - (b) whether there are specific factors that should be taken into account to determine the standard non-parole periods for child sexual assault offences and, if so, what those factors are.
- 1.3 The Attorney General has asked that our review include consultations with stakeholders and the community.
- 1.4 This report is provided in response to the Attorney General's request and should be read with the Consultation Paper which we issued in September 2013.¹ The report is confined to considering sexual offences against children, both those currently subject to the SNPP scheme and those that we consider should be included. In identifying the principles that might be taken into account in selecting offences to be included in the scheme, and in setting appropriate SNPPs, we have been conscious of the need to develop a set of unifying principles that should apply across the scheme. Within those principles we have paid particular regard to the factors that, in our opinion, have a clear relevance for sexual offences against children. This is an

1. NSW Sentencing Council, *Standard Minimum Non-parole Periods: Questions for Discussion*, Consultation Paper (2013).

interim report, however. While we have adopted a set of principles to assist our early consideration of the issues, we have developed these principles cautiously and, at this stage, they should be thought of as provisional only. It will be apparent that we have prepared this interim report as a matter of urgency without the benefit of submissions from all stakeholders² and the wider community.

Objectives of the SNPP scheme

- 1.5 The SNPP scheme is currently set out in Part 4 Division 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA). The CSPA explains its application in the following terms:

For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for offences in the Table to this Division.³

- 1.6 From the time of its introduction, it is apparent that the SNPP scheme was intended to give further guidance and structure to the courts' sentencing discretion. The second reading speech delivered when the scheme was introduced identified the SNPP as being "a further important reference point" when judges sentence offenders for SNPP offences.⁴

- 1.7 The scheme was not intended to introduce a form of "mandatory sentencing". Rather the legislation was aimed at providing "further guidance and structure to judicial discretion". In particular, it was observed that the reforms were "primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process".⁵ Importantly, the SNPP scheme was seen as ensuring "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".⁶

- 1.8 The second reading speech disclosed that the SNPP for each offence was set by "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 New South Wales". Each SNPP was said to take into account the "community expectation that an appropriate penalty will be imposed having regard to the objective seriousness of the offence".⁷ The manner in which these general principles were to be taken into account and applied to each offence was not, however, disclosed. This has led to a general criticism of the scheme as lacking transparency and delivering some anomalous sentencing outcomes.

2. Submissions received to date are listed in Appendix E.

3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).

4. NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5817. The Attorney General cited *Ibbs v R* (1987) 163 CLR 447, 451-452 and *Thorneloe v Filipowski* (2001) 52 NSWLR 60, 69 in support of the principle that a court must identify where in the spectrum of objective seriousness an offence lies.

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

6. NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5815.

7. NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5816.

- 1.9 The SNPP scheme currently applies to the offence categories listed in the table to the Division as set out in Appendix A. The offences included carry maximum penalties ranging from 7 years imprisonment to imprisonment for life. Those of immediate relevance are items 7 to 10.
- 1.10 The NSW Court of Criminal Appeal (CCA) initially determined the manner in which the SNPP scheme was to be applied in practice in *R v Way*.⁸ In substance that decision required a court, when sentencing an SNPP offence, to determine whether the offence was in the midrange of objective seriousness and then, if it did, to ask whether there were reasons for not imposing the SNPP. This required the court to examine with care the subjective circumstances of the offender.
- 1.11 Subsequent decisions of the CCA gave effect to the *Way* approach. However, in *Muldock*, the High Court, in substance, removed the mandatory element of the SNPP scheme that *Way* considered had been intended by Parliament; noted that the SNPP should operate simply as a guidepost to sentencing (along with the maximum penalty); and re-emphasised the need to apply the instinctive synthesis approach rather than one effectively requiring a two-step approach.⁹
- 1.12 Following that decision and the reports of the NSW Law Reform Commission,¹⁰ parliament has passed the *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013* (NSW). The resulting amendments, which commenced on 29 October 2013, redefine the SNPP as follows:

- (2) For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for offences in the Table to this Division.¹¹

and go on to provide:

- (2) The standard non-parole period for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender.
- (3) The court must make a record of its reasons for setting a non-parole period that is longer or shorter than the standard non-parole period and must identify in the record of its reasons each factor that it took into account.
- ...
- (6) A requirement under this section for a court to make a record of reasons for setting a non-parole period that is longer or shorter than a standard non-parole period does not require the court to identify the extent to which the seriousness of the offence for which the non-parole period is set

8. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168.

9. *Muldock v R* [2011] HCA 39; 244 CLR 120.

10. NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-parole Periods*, Report 134 (2012); NSW Law Reform Commission, *Sentencing*, Report 139 (2013) ch 7.

11. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).

differs from that of an offence to which the standard non-parole period is referable.¹²

- 1.13 Essentially, the amendment confirms the High Court's approach in *Muldrock*. In particular, it enshrines the SNPP as a guidepost in aid of the sentencing process.

Has the SNPP scheme achieved its aims?

- 1.14 A study by the Judicial Commission of NSW published in 2010 compared the proportion of convicted offenders imprisoned specifically for SNPP offences by the NSW higher courts before the introduction of the SNPP scheme (3 April 2000 to 31 January 2003) and after the introduction of the SNPP scheme (1 February 2003 to 31 December 2007).¹³
- 1.15 In overall terms, the Judicial Commission observed:
- The findings "support the conclusion that the greater the proportion of the standard non-parole period to the maximum penalty, the greater the increase in the sentences imposed".
 - Sentences tended to become relatively more severe for offenders who pleaded not guilty compared to those who pleaded guilty.
 - In terms of consistency of sentencing, "[g]enerally it can be said that where the statutory scheme did not have a significant effect on the severity of sentences, there is evidence that sentencing outcomes became more uniform".
- 1.16 The impact of the High Court's 2011 decision in *Muldrock* on the trends noted in the study has not, however, been evaluated. It is too early as yet for that to be done in a helpful manner. *Muldrock* may have altered these trends by overruling the approach to the SNPP scheme that the CCA had developed since the 2004 decision in *Way*.¹⁴
- 1.17 Changes in levels of sentencing as a result of the SNPP scheme, particularly for high volume offences, have implications for the prison population.¹⁵ A change to the current scheme that would increase the time spent in custody for certain offences and the time spent under supervision would have resource implications for Corrective Services NSW. Similarly, including further sexual offences against children in the scheme, with a likely increase in sentencing levels for those offences, would have resource implications. However, as we note later in this report, we recognise that the number of convictions for these further offences is not high.

12. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B.

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

14. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168.

15. For example, in a sentencing guideline application the CCA received statistics on the likely negative effect that increases in the NPP for break, enter and steal would have on the total inmate population: *R v Ponfield* [1999] NSWCCA 435; 48 NSWLR 327 [33]-[36].

Existing sexual offences against children

- 1.18 The Judicial Commission of NSW has provided us with tables showing in more detail the sentencing profile for sexual offences against children that are currently included in the SNPP scheme and for the additional offences that we consider in this report. These tables are set out in Appendix B. They show figures for offences where sufficient cases have been dealt with by the courts to provide useful statistics. These indicate that, post-*Muldrock*, non-parole periods have continued to rise for some SNPP offences such as aggravated sexual assault (under s 61J where the victim is a child) and sexual intercourse with a child under 10 (under s 66A).
- 1.19 The table in Appendix C shows all sexual offences against children and their counterparts where committed against an adult. It displays some obvious anomalies in the current arrangements, particularly in relation to maximum penalties and penalty structures. Examples include:
- some offences have maximum penalties that are graded according to the age of the victim, while others apply generally to victims who are under 18 or 16 years.
 - some offences have harsher maximum penalties for aggravating circumstances where the victim is under 16 years, while for others, the victim being under 16 years is just one of the aggravating circumstances for the offence.
 - the maximum penalty for sexual intercourse against a child aged 14 to 16 years is less than that for the basic offence of sexual assault.
- 1.20 We note the existence of these and other anomalies, but will not make any recommendations for change as this lies outside our terms of reference. The Joint Select Committee on sentencing of child sexual assault offenders would be an appropriate forum to consider these issues.

The approach of this interim report

- 1.21 In this interim report we proceed on the basis that the role of the SNPP scheme is to provide a guidepost in accordance with the High Court's decision in *Muldrock* and the amendments introduced by the *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013* (NSW).
- 1.22 We do wish to emphasise that while we identify some principles that are potentially of general application for identifying SNPP offences and for setting an appropriate SNPP, the sentencing of offenders for child sexual abuse has a special complexity that is not necessarily shared by other forms of offending. That complexity is in part attributable to the way in which these offences are currently drafted. In our view what is necessary for any general review of sexual offences against children is a reconsideration of the current categories and hierarchy of seriousness of offending behaviour and of the current maximum penalties.

- 1.23 We also note that several stakeholders identified objections in principle to an SNPP scheme and, hence, its retention, while at the same time offering suggestions as to how the scheme should apply if retained.¹⁶ In basic terms the objections relate to the complexity that SNPPs add to the sentencing process and to the fetter imposed on the exercise of judicial discretion.

16. The Public Defenders, *Submission SNPP8*; Law Society of NSW, *Submission SNPP11, SNPP15*; NSW Young Lawyers, Criminal Law Committee, *Submission SNPP5, SNPP16*; NSW Bar Association, *Submission SNPP10*.

2. Preliminary principles to identify SNPP offences

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The offence covers a wide range of offending behaviour	15

- 2.1 This chapter considers the principles to be applied in identifying offences that should be included in the standard non-parole period (SNPP) scheme. The principles we outline here can apply generally. However, our focus on sexual offences against children in this interim report requires a particular recognition of the special harm such offending causes, and its special seriousness.
- 2.2 We have identified a list of factors that could be considered in deciding whether an offence should be an SNPP offence. These factors should be taken as provisional, since we have yet to receive and consider final submissions from stakeholders. The factors are whether the offence:
- has a significant maximum penalty
 - is triable on indictment only
 - involves elements of aggravation
 - involves a vulnerable victim
 - involves special risk of serious consequences to the victim and the community
 - is prevalent
 - is subject to a pattern of inadequate sentencing, and
 - is subject to a pattern of inconsistent sentences.
- 2.3 We have also identified a circumstance that may justify exclusion: the fact that the offence potentially encompasses a wide range of offending behaviour. Some stakeholders identified the fact that the offence is subject to a guideline judgment as another circumstance that may justify exclusion, since a guideline judgment is likely to provide a more precise guide to sentencing.¹ This issue does not arise in the context of sexual offences against children and will be discussed in more detail in the final report.

1. Legal Aid NSW, *Submission SNPP14*; NSW Young Lawyers, Criminal Law Committee, *Submission SNPP16*; Law Society of NSW, *Submission SNPP15*; NSW, Office of the Director of Public Prosecutions, *Submission SNPP17*.

- 2.4 The factors need to be applied flexibly and with careful judgement when determining whether an offence is suitable for the SNPP scheme. None of them is by itself necessary or sufficient to include an offence in the SNPP scheme. It is not necessary for all of the factors to be present. A combination of some but not all of the factors will usually need to be taken into account. For example, a low prevalence offence with high risk of harm may be a candidate, whereas a high prevalence offence with a low risk of harm might not be a candidate.
- 2.5 Some of the identified factors will often be present in the case of sexual offences against children. These always have vulnerable victims, they are serious and the significant and long lasting harm they cause gives rise to a special risk of serious consequences to the victim and the community.
- 2.6 On this basis, there was support in some submissions for including all sexual offences against children in the SNPP scheme.² On the other hand, some submissions did not agree that it was appropriate to include any sexual offences against children in the SNPP scheme or to add further such offences. Their reasons are based on the potentially broad forms of conduct that can constitute such an offence, and on the complexity of the sentencing exercise involved, including the difficulty in those cases of determining what constitutes an offence of midrange seriousness.³ This argument is addressed later in the chapter and elsewhere in the report.
- 2.7 We note that both as a general proposition, and specifically for sexual offences against children, some stakeholders have proposed that the SNPP scheme be confined to those offences which:
- carry a maximum penalty of 20 years imprisonment or more
 - are prevalent
 - do not encompass a wide range of offending behaviours, and
 - are not subject to a guideline judgment.⁴

The offence has a significant maximum penalty

- 2.8 The maximum penalty is an indication of parliament's view of the seriousness of an offence. A high maximum penalty tends to show parliament's expectation that the courts, in appropriate cases, will impose a significant prison term.
- 2.9 Several stakeholders supported including a high maximum penalty in the criteria for identifying an SNPP offence.⁵ However, views varied as to what constituted a high

2. Police Association of NSW, *Submission SNPP2*; Mental Health Coordinating Council, *Submission SNPP6*; NSW, Victims Services, *Submission SNPP9*.

3. Legal Aid NSW, *Submission SNPP7*, NSW Bar Association, *Submission SNPP10*, Law Society of NSW, *Submission SNPP11*.

4. Legal Aid NSW, *Submission SNPP14*; NSW Young Lawyers, Criminal Law Committee, *Submission SNPP16*; Law Society of NSW, *Submission SNPP15*.

5. Bravehearts Inc, *Submission SNPP3*; Mental Health Coordinating Council, *Submission SNPP6*; Legal Aid NSW, *Submission SNPP7*; NSW, Victims Services, *Submission SNPP9*; NSW Bar

maximum penalty. Some stakeholders favoured a threshold of 10 years imprisonment,⁶ while others argued for a threshold of 20 years imprisonment.⁷ We do not consider a mechanical cut-off point is desirable. A high maximum penalty should, in our view, be considered alongside other factors in determining seriousness and, accordingly, as a factor properly taken into account in determining whether an offence should be included in the SNPP scheme.

- 2.10 We note that the current list of SNPP offences includes 3 offence categories attracting a maximum penalty of 7 years imprisonment, one of which is the offence of aggravated indecent assault.⁸ The inclusion of aggravated indecent assault can be justified on a combination of other grounds including the circumstances of aggravation that are necessary for its commission, the likely serious consequences for the victim and the fact that the majority of charges for this offence are dealt with in the higher courts.
- 2.11 As a general proposition we accept that the SNPP scheme should be concerned with offences that involve serious offending including aggravated offences that represent a high degree of public mischief, danger to the community or significant harm to victims.

The offence is triable on indictment only

- 2.12 That the offence is triable only on indictment provides a further indication of its assumed seriousness. It shows that parliament considers it inappropriate for the offence to be prosecuted and punished in the Local Court, which cannot impose a sentence of imprisonment in excess of 2 years for a single offence. On that basis this is a factor that can appropriately be taken into account.
- 2.13 Three submissions supported this factor as a ground for including an offence in the SNPP scheme.⁹
- 2.14 This raises a related argument, identified in some submissions, that would see indictable offences that can be tried summarily excluded from the SNPP scheme as being of insufficient seriousness.¹⁰
- 2.15 A number of existing SNPP offences, in addition to the aggravated indecent assault offences mentioned above,¹¹ are currently triable summarily and have an SNPP that

Association, *Submission SNPP10*; Law Society of NSW, *Submission SNPP11*; NSW Young Lawyers, Criminal Law Committee, *Submission SNPP16*. See also Police Association of NSW, *Submission SNPP2*.

6. Bravehearts Inc, *Submission SNPP3*; NSW, Victims Services, *Submission SNPP9*; NSW, Office of the Director of Public Prosecutions, *Submission SNPP17*.
7. Legal Aid NSW, *Submission SNPP7*; Law Society of NSW, *Submission SNPP11*.
8. *Crimes Act 1900* (NSW) s 35(4), s 60(2) and s 61M(1).
9. Police Association of NSW, *Submission SNPP2*; Mental Health Coordinating Council, *Submission SNPP6*; NSW, Victims Services, *Submission SNPP9*.
10. NSW Bar Association, *Submission SNPP10*; NSW, Office of the Director of Public Prosecutions, *Submission to the NSW Law Reform Commission SES7, 5*; Legal Aid NSW, *Submission SNPP14*; NSW Young Lawyers, Criminal Law Committee, *Submission SNPP16*; Law Society of NSW, *Submission SNPP15*.
11. Para [2.10].

is beyond the jurisdiction of the Local Court.¹² Some of these offences, depending on the objective facts of their commission, can be quite serious. In 2012, 213 charges of indecent assault of a child under 16 years were finalised on indictment in the higher courts, while 252 charges were finalised summarily in the Local Court.

- 2.16 At this stage we do not consider that the fact that an indictable offence can be tried summarily should of itself determine whether it should or should not be included in the SNPP scheme. We therefore do not see a justification for removing the s 61M(1) and (2) offences, although, as explained later, we do consider the current SNPPs for those offences to be disproportionately high.¹³
- 2.17 We previously recommended that there be a review of the *Crimes Act 1900* (NSW) to determine whether any more offences should be identified as indictable offences triable summarily and whether any indictable offences that are currently triable summarily should be recategorised as strictly indictable offences.¹⁴ We understand this is currently underway. This may resolve some of the difficulties.

The offence involves elements of aggravation

- 2.18 There are a number of offences that involve circumstances of aggravation, that is, they include elements that make the offence objectively more serious than a “basic” version of the offence. The existence of these circumstances has led parliament to impose a higher maximum penalty than it has for the basic offence. In turn, the higher penalty expresses parliament’s intention that the courts should treat the aggravated form of the offence more seriously. For example, of immediate relevance for this report, the offence of aggravated sexual assault is established if the offence of sexual assault is proved and the case is one in which:
- the offender intentionally or recklessly inflicts actual bodily harm on the victim, or threatens to inflict such harm with an offensive weapon or instrument
 - the offender is in the company of another person or other people
 - the offender breaks or enters into any building with the intention of committing the offence or some other serious indictable offence
 - the offender deprives the victim of his or her liberty before or after the offence, or
 - the victim is under 16 years of age, under the authority of the offender, or has a serious physical disability or cognitive impairment.¹⁵

12. Examples of offences in the *Crimes Act 1900* (NSW) falling into this category include: s 61O(2) act of indecency with a child under ten (7 years imprisonment); s 66EB grooming and procuring children for unlawful sexual activity (10-15 years imprisonment); s 91J-91L aggravated voyeurism and filming offences (5 years imprisonment).

13. Para [4.18].

14. NSW Sentencing Council, *An Examination of the Sentencing Powers of the Local Court in NSW* (2010) 49.

15. *Crimes Act 1900* (NSW) s 61J. Similar circumstances of aggravation apply for the SNPP offences *Crimes Act 1900* (NSW) s 61JA and s 66A(2) and, in part, to s 61M(1) and s 61M(2).

Aggravated sexual assault attracts a maximum penalty of 20 years imprisonment compared with 14 years imprisonment for the basic offence of sexual assault.¹⁶

- 2.19 In the context of sexual offences against children, a number of other offences contain elements of aggravation based solely on the age of the victim. For example, the maximum penalty for sexual intercourse increases according to the age of the victim. For example, in the case of the offence of sexual intercourse with a child (without other circumstances of aggravation) the maximum penalties are as follows:
- a child under 10 years - 25 years imprisonment
 - a child between 10 and 14 years - 16 years imprisonment
 - a child between 14 and 16 years – 10 years imprisonment.
- 2.20 Having regard to the parliamentary intention that these offences attract significant sentences, and that the aggravating circumstances identified add to the seriousness of the offence, we accept that this factor should be relevant to selecting suitable offences for the SNPP scheme.

The offence involves a vulnerable victim

- 2.21 This criterion can be seen as a subset of the elements of aggravation outlined above. However, we consider that it should be retained as a separate category because, in some cases, the vulnerability of victims does not expressly give rise to an aggravated form of the offence. For example, an SNPP of 25 years imprisonment is currently specified for murder where the victim was under 18 years of age, although that fact does not, of itself, constitute an aggravated form of the offence.¹⁷ This can be compared with an SNPP of 20 years imprisonment for an offence of murder in some other circumstances.¹⁸
- 2.22 The class of vulnerable victims can be seen in the present context as including children or people under authority or care, or those with a cognitive impairment or a serious physical disability; or more generally those whose employment exposes them to a special vulnerability, for example, police and emergency services workers, and the other workers referred to in item 1A of the SNPP table.¹⁹
- 2.23 A higher SNPP applies in the case of murder where the victim occupies certain offices, is exercising public or community functions and the offence arises because of that occupation. Voluntary workers were added to this list as part of a set of amendments that were intended to recognise explicitly the aggravating factor that applies where a person is murdered in the course of performing “frontline occupations”.²⁰ Murder, where the victim was a child under 18 years of age was

16. *Crimes Act 1900* (NSW) s 61I.

17. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A Table, item 1B. Compare with *Crimes Act 1900* (NSW) s 19B which provides for a mandatory life sentence for the murder of a police officer in specified circumstances.

18. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A Table, item 1.

19. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A Table, item 1A.

20. NSW, *Parliamentary Debates*, Legislative Assembly, 6 April 2006, 22255.

included because “this most serious category of murder recognises the terrible loss when the victim is both a vulnerable and valuable member of the community”.²¹

- 2.24 We consider it appropriate to include this factor in the criteria to identify SNPP offences.

The offence involves a special risk of serious consequences to the victim or the community

- 2.25 The matters to be considered in determining whether an offence involves a special risk of serious consequences to the victim or the community will obviously depend on the nature of the offence and the context within which it is likely to be committed.
- 2.26 As noted above, sexual offences against children are offences of particular gravity and harm in both the short and long-term. Of particular concern is the significant and long lasting harms that arise for victims of such offences.²²
- 2.27 We accept that it is a relevant factor of significant weight in determining whether a sexual offence against children should be included in the SNPP scheme.
- 2.28 This factor can also be applied more generally to offences that have a wide ranging impact on the community such as the commercial manufacture or supply of illegal drugs, offences involving outlaw motorcycle gangs and some offences related to organised criminal activities. The offence of recklessly causing grievous bodily harm and wounding (both individually and in company) was included in the list of SNPPs²³ in order to:

send a clear message to the community that the Government will not tolerate crimes of personal violence, which are especially abhorrent when done in company. Crimes of this nature destroy lives and tear at the fabric of our community.²⁴

The offence is prevalent

- 2.29 Although not determinative by itself, prevalence or frequency of offending may provide some assistance in identifying potential SNPP offences. A higher prevalence may, amongst other things, indicate a measure of public concern about a particular category of offending and also lead the courts to consider the need to make particular provision for specific and general deterrence in a sentence. On the

21. NSW, *Parliamentary Debates*, Legislative Council, 17 October 2007, 2668.

22. See, eg, D Fergusson and P Mullen, *Childhood Sexual Abuse: An Evidence Based Perspective* (Sage Publications, 1999) ch 5; P Mullen and others, “Childhood Sexual Abuse and Mental Health in Adult Life” (1993) 163 *British Journal of Psychiatry* 721; M Cutajar, and others, “Suicide and Fatal Drug Overdose in Child Sexual Abuse Victims: A Historical Cohort Study” (2010) 192(4) *Medical Journal of Australia* 184; K J Zwi, and others “School-based Education Programmes for the Prevention of Child Sexual Abuse” (2009) 1 *The Cochrane Library* (online) 1, 3. See also *R v MJR* [2002] NSWCCA 2002; 54 NSWLR 368 [57].

23. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A Table, items 4A-4D.

24. NSW, *Parliamentary Debates*, Legislative Council, 17 October 2007, 2668.

other hand, an offence of low or no prevalence may suggest that its inclusion in the SNPP scheme is unnecessary.

- 2.30 Some stakeholders supported adopting prevalence or frequency of offending as a factor to be considered in determining whether an offence should be an SNPP offence,²⁵ while one stakeholder expressly rejected its relevance on the ground that “the most prevalent offences are minor offences, such as assaults, shoplifting, and offensive language”.²⁶
- 2.31 A variety of different measures can assess prevalence, including crime rates, the number of charges for the relevant offence, or the number of successful prosecutions in the higher courts. However, in the case of sexual offences against children, these measures may not provide a full picture given the likely degree of non-disclosure of offences, particularly where they occur within a family or other setting that involves continuing contact between the victim and offender, and the level of attrition for such offences once they enter the criminal justice system.²⁷
- 2.32 There are a range of factors that contribute to victims, in particular children, not reporting sexual offences. These include:
- shame;
 - fear of retribution by the offender or the offender’s family and friends;
 - fear of having to give evidence and be cross-examined;
 - fear of being identified in the media;
 - fear of not being believed;
 - a belief that the matter is too trivial or inappropriate to report, that it is not a real crime or that harm was not intended; and
 - lack of knowledge and access to help.²⁸

In the case of sexual offences within a family, the victim or the offender’s partner may fear the consequences for the family if the offender, who may be the sole source of income, is imprisoned.

- 2.33 Figures provided by the NSW Bureau of Crime Statistics and Research on the progress of sexual offences against children through the NSW criminal justice system in 2010 showed that 4886 sexual offence incidents involving a victim aged under 16 years were reported to police. Yet in the same year, only 603 people

25. Police Association of NSW, *Submission SNPP2*; Mental Health Coordinating Council, *Submission SNPP6*; Legal Aid NSW, *Submission SNPP7*; NSW Bar Association, *Submission SNPP11*; NSW Young Lawyers, Criminal Law Committee, *Submission SNPP16*; NSW, Office of the Director of Public Prosecutions, *Submission SNPP17*.

26. NSW Bar Association, *Submission SNPP10*.

27. K Gelb, *Recidivism of Sex Offenders*, Research Paper (Victoria, Sentencing Advisory Council, 2007) 3-7; J Fitzgerald, *The Attrition of Sexual Offences from the New South Wales Criminal Justice System*, Crime and Justice Bulletin No 92 (NSW Bureau of Crime Statistics and Research, 2006).

28. VicHealth, *Two Steps Forward, One Step Back: Community Attitudes to Violence Against Women* (2006) 60.

appeared in NSW courts charged with at least one child sex offence (2354 individual charges in all). Of these people, 367 were found guilty in relation 1096 charges.

- 2.34 We accept that prevalence (whether high or low and however measured) is not necessarily a measure of the potential harm caused by an offence; or of the extent of community concern about its commission; or of the adequacy or consistency of the sentences imposed.²⁹ Nevertheless we consider that it is a factor that can properly be taken into account along with the other factors mentioned, in particular the seriousness of the offence.

There is a pattern of inadequate sentences for the offence

- 2.35 Patterns of inadequate sentences could be measured by reference to public opinion, views formed by the government or other indicators such as the number of successful Crown appeals against sentences imposed for the offence.
- 2.36 The courts currently accept that parliament represents the community's expectation about the appropriate punishment for particular offences when it sets the maximum penalty. Parliament is also capable of responding to community concerns about the level of sentencing for any given offence by introducing an aggravated form of the offence or by increasing the maximum penalty for the offence. Consistently with this approach, parliament should also have the role of reflecting the community's views in selecting offences for the SNPP scheme and its expectation in setting the levels of the SNPPs.³⁰
- 2.37 If a wider measure of community concern is to be taken into account, however, a question arises as to how it should be identified and measured, and as to how to respond to it when determining which offences should be SNPP offences.
- 2.38 There is some difficulty in gauging informed public opinion on sentencing. In our background report, we noted that a commonly expressed view was that the SNPP scheme was founded on a "flawed premise" that the community expected there to be higher penalties for serious crimes.³¹
- 2.39 Research by the Victorian Sentencing Advisory Council, like other similar studies, has found that, when members of the public were given more complete information about all the facts of a case, sometimes there was a "strong mitigating effect on severity", for example, in instances of young offenders or first time offenders.³²
- 2.40 For this reason, considerable care would need to be exercised in determining whether community opinion about the adequacy of a sentencing pattern is informed

29. That is, unless there is sufficient prevalence to measure the consistency of sentencing patterns: Legal Aid NSW, *Submission SNPP14*.

30. See *Muldock v R* [2011] HCA 39 [31].

31. NSW Sentencing Council, *Standard Non-parole Periods: A Background Report* (2011) [4.10]-[4.14].

32. K Gelb, *More Myths and Misconceptions* (Victoria, Sentencing Advisory Council, 2008) 4-7.

and justified. A better guide is likely to be provided by a pattern of successful Crown appeals, and by reference to the views of those involved in the justice system.

- 2.41 However, we note that one of the reasons for establishing the SNPP scheme was to ensure that appropriate sentences were imposed for offences included in the scheme. Accordingly we consider that a pattern of inadequacy can be included as a factor that, in certain cases, will justify including an offence in the scheme, although this would need to be taken into account along with the other factors. For example, it may be of limited weight for offences that have a low prevalence or that do not give rise to significant harm.

There is a pattern of inconsistent sentences

- 2.42 One of the stated aims of the SNPP scheme has been to achieve consistency in sentencing. Disparity in sentencing levels for a particular offence may, therefore, be a relevant factor to be taken into account with the other factors when determining whether an offence should be an SNPP offence.
- 2.43 The Judicial Commission's review of SNPPs assessed consistency in sentencing by measuring the spread or range of sentences around the median point,³³ with a narrower range indicating a greater degree of consistency and a wider range indicating a lesser degree of consistency.³⁴ The results of this review are analysed in chapter 1.³⁵
- 2.44 We recognise that there may be cases where an appearance of disparity does not give rise to concern. For example, disparity can be expected and justified where an offence covers a wide range of offending behaviour with significant differences in terms of its consequences, particularly where its prevalence is infrequent.
- 2.45 While disparity should remain a factor, care must be taken in using it. Comparison between sentences is only meaningful where there is like offending, which means that attention needs to be given to the facts of each relevant case. We also note that care needs to be taken to ensure that too much weight is not given to mathematical disparity in sentencing statistics alone.³⁶

The offence covers a wide range of offending behaviour

- 2.46 If consistency is one of the aims of the scheme, then it could be argued that the list of SNPP offences should not include offences that are basic offences and that can

33. The Judicial Commission used two measures of spread – the interquartile range and the median absolute deviation.

34. P Poletti and H Donnelly, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Research Monograph 33 (Judicial Commission of NSW, 2010) 17.

35. Para [1.14]-[1.15].

36. Legal Aid NSW, *Submission SNPP14*; NSW Young Lawyers, Criminal Law Committee, *Submission SNPP16*; Law Society of NSW, *Submission SNPP15*. See *Hilli v R* [2010] HCA 45; 242 CLR 520 [48]-[49].

cover a wide range of offending behaviours with significant potential differences in the degree of their objective seriousness.

- 2.47 The 2003 review of the law of manslaughter in NSW considered that manslaughter was properly omitted from the list of SNPP offences because the courts had consistently identified it as an offence “involving such a wide range of conduct that it is not possible to describe a ‘typical’ or ‘middle of the range’ offence”.³⁷ Manslaughter presents a particular problem because of the “defences” to murder that will reduce that crime to one of voluntary manslaughter arising out of provocation, excessive self defence or substantial impairment by abnormality of mind which can impact to a varying degree on the objective gravity of the offending. Similarly, involuntary manslaughter can encompass a variety of offending including an unlawful and dangerous act and gross negligence, which do not require proof of an intention to kill or to cause serious harm.
- 2.48 In 2004, we observed that a wide variety of circumstances in which a particular offence may be committed should not be a *decisive* reason for excluding that offence from the SNPP scheme. However, our view was that such facts could nevertheless be taken into account when deciding whether to include an offence in the SNPP list.³⁸
- 2.49 Five submissions identified the existence of a narrow range of objective criminality as being a ground for making an offence an SNPP offence or, conversely, identified the existence of a wide range of offending behaviour as a reason for excluding an offence from the list of SNPPs.³⁹ In each case the concern related to the difficulty in identifying a midrange offence.
- 2.50 We favour treating the fact that an offence potentially encompasses a wide range of objective criminality as a factor to be taken into account in determining whether it should be excluded from the SNPP scheme. We do not consider that it should inevitably constitute a barrier to inclusion, for example, where it is possible to rank offending behaviour of the same type across a range of seriousness.
- 2.51 However, we accept that there may be offences that embrace a wide variety of behaviour with a clear differentiation in their seriousness that makes it inappropriate to specify a single SNPP. The existence of an SNPP in such a case may inappropriately limit the proper exercise of judicial discretion.⁴⁰
- 2.52 In some cases the preferable approach may be to break up a widely expressed offence into subcategories of conduct that reflect different levels of offending and to use the principles proposed above to decide whether to include some or each of

37. M D Finlay, *Review of the Law of Manslaughter in New South Wales*, Report (NSW Attorney General's Department, 2003) [6.1].

38. NSW Sentencing Council, *Whether ‘Attempt’ and ‘Accessory’ Offences Should be Included in the Standard Non-parole Sentencing Scheme*, Report (2004) [8.5].

39. Legal Aid NSW, *Submission SNPP7*; NSW Bar Association, *Submission SNPP10*, Law Society of NSW, *Submission SNPP11*; NSW Young Lawyers, Criminal Law Committee, *Submission SNPP16*; Law Society of NSW, *Submission SNPP15*; NSW, Office of the Director of Public Prosecutions, *Submission SNPP17*.

40. NSW Young Lawyers, Criminal Law Committee, *Submission SNPP16*.

those subcategories in the SNPP scheme. The offence of producing, disseminating or possessing child abuse material,⁴¹ might be a candidate for such an approach.

41. *Crimes Act 1900* (NSW) s 91H(2).

3. Sexual offences against children suitable for an SNPP

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- 3.1 In this chapter we draw on the principles that we identified in chapter 2 to identify the sexual offences against children that should be retained in, or added, to the standard non-parole period (SNPP) scheme.

General observations about sexual offences against children

- 3.2 Stakeholders expressed a wide variety of opinions about which sexual offences against children, if any, should be included in the SNPP scheme. One stakeholder supported including all sexual offences against children.¹ Some stakeholders supported including only those sexual offences against children with maximum penalties of 10 years or more,² or a variety of specific offences,³ or only one or two specific offences.⁴ Other stakeholders opposed including any sexual offences against children, principally on the grounds that the complex circumstances and

1. NSW Health Education Centre Against Violence, *Submission SNPP1*.

2. Bravehearts Inc, *Submission SNPP3*.

3. NSW, Victims Services, *Submission SNPP9*.

4. Police Association of NSW, *Submission SNPP2*; NSW, Office of the Director of Public Prosecutions, *Submission SNPP4*; Mental Health Coordinating Council, *Submission SNPP6*.

range of behaviours involved in such offences make them unsuitable subjects for the SNPP scheme.⁵

- 3.3 We accept that in some instances, as discussed below, the range of behaviours potentially encompassed by an offence may make it unsuitable for inclusion in the SNPP scheme. However, we do not consider that this is a reason for the generic exclusion of all sexual offences against children. Their potential for serious harm and the need for appropriate legislative direction is such that a number of such offences are properly the subject of an SNPP.

Existing offences

- 3.4 The sexual offences against children in the *Crimes Act 1900* (NSW) that are contained in the SNPP scheme are:
- Aggravated indecent assault, child <16 (s 61M(2)).
 - Sexual intercourse, child <10 (s 66A(1)).
 - Sexual intercourse, child <10, aggravated offence (s 66A(2)).
- 3.5 At this stage, we are not persuaded of the need to remove any of these offences from the SNPP scheme, although we provisionally favour adjusting the SNPPs downwards for the s 61M(2) and s 66A(1) offences where the SNPP presently sits above 50% of the maximum sentence.⁶

Offences suitable for inclusion

- 3.6 We have considered adding some further sexual offences against children to the SNPP scheme. Our provisional conclusion is that the following offences in the *Crimes Act 1900* (NSW) should be included:
- Attempt or assault with intent to have sexual intercourse with a child <10 (s 66B).
 - Sexual intercourse with a child 10<14 (s 66C(1)).
 - Sexual intercourse with a child 10<14, aggravated offence (s 66C(2)).
 - Sexual intercourse with a child 14<16, aggravated offence (s 66C(4)).
 - Use (or allow) child <14 to produce child abuse material (s 91G(1)).
 - Procuring or grooming a child <16 for unlawful sexual activity (s 66EB(2), (2A), (3)).
 - Promoting or engaging in acts of child prostitution [*for child <14 only*] (s 91D).

5. Legal Aid NSW, *Submission SNPP7*; NSW Bar Association, *Submission SNPP10*; Law Society of NSW, *Submission SNPP11*.

6. Para [4.18].

- Obtaining benefit from child prostitution [*for child < 14 only*] (s 91E).
- 3.7 We note that an assessment of “consistency” is an important factor in the decision whether or not to include an offence in the SNPP scheme since that was one of the scheme’s stated purposes. In the time frame available we have been unable to assess the data that might relate to consistency. We also note that the prevalence figures referred to in this chapter relate to charges finalised and do not necessarily reflect the actual incidence of offending due to under reporting. The median sentence figures are drawn from statistics covering the period from 2006, and provide some limited guidance concerning the adequacy of sentencing for the offences listed. These are set out in Appendix B.

Attempt or assault with intent to have sexual intercourse with a child <10 – s 66B

- 3.8 Our reasons for proposing the inclusion of the offence of attempting or assaulting with intent to have sexual intercourse with a child under 10 years⁷ include the following:
- The very high maximum penalty of 25 years imprisonment means that it is treated as seriously as the basic offence of sexual intercourse with a child under 10 years,⁸ which is already an SNPP offence.
 - It is an indictable only offence.
 - Children under 10 are particularly vulnerable.
 - The offence carries with it a special risk of serious ongoing harm for victims.
- 3.9 The fact that only 5 charges were finalised in 2012 may suggest that the offence is not prevalent. However, we note that this is an offence that is particularly likely to be under reported. For this reason we do not have adequate data on sentencing practice for this offence.

Sexual intercourse with a child 10<14 – s 66C(1)

- 3.10 Our reasons for proposing the inclusion of the offence of sexual intercourse with a child under 10⁹ include the following:
- It has a high maximum penalty of 16 years imprisonment, which suggests that it is considered more serious than the “basic” offence of sexual assault¹⁰ which carries a maximum penalty of 14 years imprisonment and is already an SNPP offence.
 - It is an indictable only offence.
 - Children under 14 years are particularly vulnerable.

7. *Crimes Act 1900* (NSW) s 66B.

8. *Crimes Act 1900* (NSW) s 66A(1).

9. *Crimes Act 1900* (NSW) s 66C(1).

10. *Crimes Act 1900* (NSW) s 611.

- The offence carries with it a special risk of serious ongoing harm for victims.
- 3.11 The offence appears to be reasonably prevalent: 66 charges were finalised in 2012, resulting in 16 convictions.
- 3.12 We note that the offence has a median non-parole period (NPP) of 1.7 years imprisonment and a median head sentence of 3.25 years imprisonment against a maximum penalty of 16 years imprisonment; and that some 34% of offenders did not receive a sentence of imprisonment.

Sexual intercourse with a child 10<14, aggravated offence – s 66C(2)

- 3.13 Our reasons for proposing the inclusion of the aggravated offence of sexual intercourse with a child between 10 and 14 years¹¹ include the following:
- Its very high maximum penalty of 20 years imprisonment suggests that it is considered more serious than the “basic” offence of sexual assault,¹² which carries a maximum penalty of 14 years imprisonment and is already an SNPP offence.
 - It is an indictable only offence.
 - The offence specifies circumstances of aggravation (in addition to the age of the victim).
 - Children aged between 10 and 14 years are particularly vulnerable.
- 3.14 The offence has a relatively high prevalence with 87 charges finalised in 2012. This was the highest number of finalised charges of all sexual intercourse offences in 2012.
- 3.15 We also note the offence has a median NPP of 4 years imprisonment and a median head sentence of 6 years imprisonment compared with a maximum penalty of 20 years; and that some 14% of offenders did not receive a sentence of imprisonment.

Sexual intercourse with a child 14<16, aggravated offence – s 66C(4)

- 3.16 Our reasons for proposing the inclusion of the aggravated offence of sexual intercourse with a child between 14 and 16 years¹³ include the following:
- It has a relatively high maximum penalty of 12 years imprisonment.
 - It is an indictable only offence.
 - The offence specifies circumstances of aggravation (in addition to the age of the victim).
 - Although the vulnerability of children aged between 14 and 16 years is less than for younger children, they still fall into a class of vulnerable victims.

11. *Crimes Act 1900* (NSW) s 66C(2).

12. *Crimes Act 1900* (NSW) s 611.

13. *Crimes Act 1900* (NSW) s 66C(4).

- The offence carries with it a special risk of serious ongoing harm for victims.
- 3.17 The offence seems not to be particularly prevalent: 17 charges were finalised in 2012, resulting in only 1 conviction. This may reflect the fact that some instances of this form of offending will involve an offender who is near in age to the victim, an issue that we discuss below in relation to the basic offence of sexual intercourse with a child between 14 and 16.¹⁴
- 3.18 We note that the offence has a median NPP of 2 years imprisonment and a median head sentence of 3.75 years imprisonment compared with a maximum penalty of 12 years imprisonment and that 25% of offenders did not receive a sentence of imprisonment.

Use (or allow) child <14 to produce child abuse material – s 91G(1)

- 3.19 Our reasons for proposing the inclusion of the offence of using (or allowing) a child under 14 to produce child abuse material¹⁵ include the following:
- It has a relatively high maximum penalty of 14 years imprisonment.
 - It is an indictable only offence.
 - It presents a special risk of serious consequences to the victim and the community in that:
 - It promotes and encourages the market for child abuse material leading to increased demand for more images and harm to other vulnerable victims.
 - Long term harm may result for victims who grow up with the knowledge that such material may remain in circulation and be available to a wide variety of observers for their sexual gratification, on a long term basis as part of the body of child pornography permanently available on the internet.
 - The actual abuse and its recording in circumstances that emphasise powerlessness and degradation may give rise to psychological harm to victims.
 - The offence can be difficult to detect since technology allows offenders to conceal the identity of victims and make it difficult to trace those responsible.
 - The material may encourage offenders, who find it normalising, to move on to direct abuse of children themselves.
 - The material can also be used for grooming other potential victims.¹⁶
 - Children under 14 years of age are particularly vulnerable.
- 3.20 The offence seems not to be particularly prevalent with 12 charges finalised in 2012. This may reflect the fact that the offence is difficult to detect.

14. Para [3.30]-[3.31].

15. *Crimes Act 1900* (NSW) s 91G(1).

16. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Report (2008) vol 1 [4.1]-[4.6].

- 3.21 We note that the offence has a median NPP of 1.9 years imprisonment and a median head sentence of 2.6 years imprisonment compared to a maximum penalty of 14 years imprisonment; and that only around 8% of offenders did not receive a sentence of imprisonment.

Procuring or grooming a child <16 for unlawful sexual activity – s 66EB

- 3.22 Our reasons for proposing the inclusion of the offences of procuring, grooming and meeting after grooming, a child under 16 for unlawful sexual activity¹⁷ include the following:

- They have high maximum penalties ranging from 10 to 15 years imprisonment.
- Children under 16 years are particularly vulnerable. The proliferation of social networking on the internet has led to increased opportunities to access this group of potential victims.
- The offences carry with them a special risk of serious ongoing harm for victims, especially since their commission can expose children to damaging materials and, if successfully carried out, can lead to actual sexual abuse.

- 3.23 The offences are indictable offences triable summarily, and have a very low prevalence in both the higher courts and the Local Court. This low prevalence is because of the availability of the federal offences of using carriage services to procure and groom children under 16 years that attract penalties of 12-15 years imprisonment.¹⁸ The prevalence of these federal offences is considerably higher than the state offences – with some 150 instances of NSW higher courts sentencing for offences under the *Criminal Code* (Cth) since October 2008. We note that some potential problems with the framing of the federal offences identified recently by the Victorian Court of Appeal¹⁹ may lead to a greater reliance on the state offences.

Promoting or engaging in acts of child prostitution, child <14 – s 91D

- 3.24 Our reasons for proposing the inclusion of the offence of promoting or engaging in acts of child prostitution with a child under 14²⁰ include the following:

- It has a relatively high maximum penalty of 14 years imprisonment.
- It is an indictable only offence.
- Children under 14 are particularly vulnerable.
- There is a special risk of serious consequences to victims and the community – including that it can promote and encourage the market for child prostitution, leading to harm to further vulnerable victims.

- 3.25 The offence has a low prevalence with only 3 charges finalised in 2012.

17. *Crimes Act 1900* (NSW) s 66EB(2), (2A), (3).

18. *Criminal Code* (Cth) s 474.26, s 474.27.

19. *DPP (Cth) v FM* [2013] VSCA 129.

20. *Crimes Act 1900* (NSW) s 91D.

Obtaining benefit from child prostitution, child <14 – s 91E

- 3.26 Our reasons for proposing the inclusion of the offence of promoting or engaging in acts of child prostitution with a child under 14²¹ include the following:
- It has a relatively high maximum penalty of 14 years imprisonment.
 - It is an indictable only offence.
 - Children under 14 are particularly vulnerable.
 - There is a special risk of serious consequences to victims and the community – including that it can promote and encourage the market for child prostitution, leading to harm to further vulnerable victims.
- 3.27 The offence has a low prevalence with no charges finalised in 2012.

Offences potentially suitable for inclusion, subject to concerns

- 3.28 There are some sexual offences against children contained in the *Crimes Act 1900* (NSW) that might be suitable for inclusion subject to certain concerns being addressed. They include the following:
- Sexual intercourse with a child 14<16 (s 66C(3)).
 - Act of indecency with child < 16 aggravated offence and filmed for production of child abuse material (s 61O(2A)).
 - Production, dissemination or possession of child abuse material, child <16 (s 91H).
 - Sexual assault by forced self-manipulation (includes child <16) (s 80A).
 - Sexual intercourse with child 16<18 under special care (s 73).
 - Persistent sexual abuse of a child <18 (s 66EA).

Sexual intercourse with a child 14<16 – s 66C(3)

- 3.29 Reasons supporting the potential inclusion of the offence of sexual intercourse with a child between 14 and 16²² include the following:
- It has a maximum penalty of 10 years imprisonment.
 - Although the vulnerability of children aged between 14 and 16 years is less than for younger children, they still fall into a class of vulnerable victims.
 - The offence carries with it a special risk of serious ongoing harm for victims.
 - It has a relatively high prevalence with 49 charges finalised in the higher courts in 2012. A further 41 charges were finalised in the Local Court.

21. *Crimes Act 1900* (NSW) s 91E.

22. *Crimes Act 1900* (NSW) s 66C(3).

- 3.30 While the predatory offending caught by this section is suitable for inclusion, the offence as it currently stands includes consensual close in age sexual conduct, for example, between teenagers, that arguably should be excluded from the SNPP scheme. This may be the reason why this offence has the lowest percentage of prison sentences imposed of all of the sexual offences under s 66C.
- 3.31 We have considered a range of possible solutions to the issue of close in age sexual conduct, including a statutory exception, the use of prosecution policy to filter out unsuitable cases, or a requirement that the Attorney General give permission for the presentation of an indictment as well as other options, including applying the SNPP only to offenders 21 years of age or older, where the offending is more likely to have a predatory aspect. The parliamentary select committee inquiry should consider these issues.

Act of indecency with child <16 aggravated offence and filmed for production of child abuse material – s 61O(2A)

- 3.32 Reasons supporting the potential inclusion of the aggravated offence of an act of indecency with a child under 16 years that is filmed for the production of child abuse material²³ include the following:
- It has a maximum penalty of 10 years imprisonment.
 - Children under 16 years are particularly vulnerable.
 - It presents a special risk of serious consequences to the victim and the community. These risks are listed above in relation to the offence of using or allowing a child under 14 years to produce child abuse material.²⁴
 - It has a relatively high prevalence with 38 charges finalised in the higher courts in 2012.
- 3.33 However, it is not necessary to include this offence in the SNPP scheme as it is adequately covered by offences that cover the same ground and that are subject to the same, or a higher maximum penalty, that is:
- using a child between 14 and 16 years to produce child abuse material (maximum penalty: 10 years),²⁵ and
 - using a child under 14 years to produce child abuse material (maximum penalty: 14 years).²⁶
- 3.34 We have already proposed including the offence of using a child under 14 years to produce child abuse material in the SNPP scheme.²⁷ We note that this offence, unlike the one in s 61O(2A), is an indictable only offence.

23. *Crimes Act 1900* (NSW) s 61O(2A).

24. Para [3.19].

25. *Crimes Act 1900* (NSW) s 91G(2).

26. *Crimes Act 1900* (NSW) s 91G(1).

27. Para [3.19].

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

- 3.35 Reasons supporting the potential inclusion of the offence of producing, disseminating or possessing child abuse material²⁸ include the following:
- It has a maximum penalty of 10 years imprisonment.
 - Child abuse material depicts children under 16 years. They are particularly vulnerable.
 - The offence carries with it a special risk of serious ongoing harm for victims and the community. These risks are listed above in relation to the offence of using or allowing a child under 14 years to produce child abuse material.²⁹
 - Its detection and prosecution can be frustrated through offenders using actual children and then altering their digital images.
- 3.36 This offence, in its current form, is unsuitable for inclusion because of the complex range of offending behaviours it covers, ranging from producing and disseminating child abuse material to possessing it. In some cases production can involve the creation of pseudo images of children and dissemination can range from a single act of forwarding an image to a single individual to widespread distribution. Similarly, possession can involve a limited number of images or a vast “library” of child abuse material.
- 3.37 The offence may be tried summarily and 269 charges were finalised in the Local Court in 2012. However, we note that 110 charges were finalised in the higher courts in 2012 which is still a high number in the context of sexual offences against children. This raises the question of whether the provision should be revised to separate offences involving production and dissemination from offences involving possession with different maximum penalties, or otherwise to introduce aggravated forms of the offence to be tried on indictment only. If this was to be done, then an SNPP could be fixed to apply to production and dissemination but not to possession or alternatively to specify different SNPPs for each form of the general offence.
- 3.38 We note that the median NPP for this offence in the higher courts is 1.2 years imprisonment and the median head sentence is 2.5 years imprisonment; and that 15.5% of offenders did not receive a custodial sentence.
- 3.39 The issues arising for this offence and the offence in s 61O(2A), suggest there is a need to rationalise the offences that deal with producing, disseminating and possessing child abuse material and using children to produce it.

Sexual assault by forced self-manipulation (circumstance of aggravation: child <16) – s 80A

- 3.40 One of the aggravating factors for the offence of sexual assault by forced self-manipulation is that the victim is a child under 16 years.³⁰ Reasons supporting the

28. *Crimes Act 1900* (NSW) s 91H(2).

29. Para [3.19].

30. *Crimes Act 1900* (NSW) s 80A(2A).

potential inclusion in the SNPP scheme of the offence of sexual assault by forced self-manipulation of a child under 16 years include the following:

- The very high maximum penalty of 20 years imprisonment means that it is treated as seriously as the offence of aggravated sexual assault,³¹ which is already an SNPP offence.
 - It is an indictable only offence.
 - Children under 16 are particularly vulnerable.
 - The offence carries with it a special risk of serious ongoing harm for victims.
- 3.41 This provision is provisionally excluded, subject to a review under which there are proposals to include non-contact elements in the sexual assault/intercourse offences. This may have particular application in the grooming context where a victim is encouraged during an on-line communication to engage in self-manipulation. It might require further legislation and amendments to existing provisions.

Sexual intercourse with child 16<18 under special care – s 73

- 3.42 We note that the offence of sexual intercourse with a child between 16 and 18 years under special care is an indictable only offence. Children aged between 16 and 18 years fall into a class of vulnerable victims when dealing with a person in authority. There is also reason to think that the offence is under reported.
- 3.43 However, the maximum penalties for this offence of 8 years imprisonment for a 16 year old victim and 4 years imprisonment for a 17 year old victim are currently too low for inclusion in the SNPP scheme.
- 3.44 These cases are difficult to investigate and prosecute. While offences involving lack of consent will presumably be dealt with under the basic sexual assault provisions, we consider that the penalty levels for these offences should be reviewed to reflect adequately the seriousness of the offending in this area where a young person's consent may be overborne by a person in authority. If this is done, then the inclusion of these offences in the SNPP scheme can be reconsidered.

Persistent sexual abuse of a child <18 – s 66EA

- 3.45 A majority of submissions supported including the offence of persistent sexual abuse of a child under 18 years in the SNPP scheme.³²
- 3.46 It has a very high maximum penalty of 25 years imprisonment and is an indictable only offence. However, the offence has a very low prevalence with no charges being finalised in 2012. It would seem that the maximum penalty is not achieving its

31. *Crimes Act 1900* (NSW) s 61J.

32. NSW Health Education Centre Against Violence, *Submission SNPP1*; Police Association of NSW, *Submission SNPP2*; Bravehearts Inc, *Submission SNPP3*; NSW, Office of the Director of Public Prosecutions, *Submission SNPP4*; Mental Health Coordinating Council, *Submission SNPP6*; NSW, Victims Services, *Submission SNPP9*.

purpose, the difficulty being that the substantive offence can be proved by reference to a very wide range of possible offending behaviours attracting a wide range of penalties, including many offences that can be tried summarily. These range from an act of indecency against a child between 16 and 18 years (attracting a maximum penalty of 18 months imprisonment)³³ to the aggravated offence of sexual intercourse with a child under 10 years (attracting a maximum penalty of life imprisonment).³⁴

- 3.47 We have been advised that the provision is generally not used because of the structure of the offence and the fact that it will often be preferable to present an indictment with a series of discrete counts; and also because of the risk that on appeal an attempt will be made to break the offence down into its component parts and to exclude some of these as unsupported on the evidence.
- 3.48 We understand that this section is under review. The revised provision can be considered for inclusion in the SNPP scheme when it has been developed.

Offences that should not be included

- 3.49 We have concluded that the following offences should not be included in the SNPP scheme:
- Act of indecency with child <16, aggravated offence (s 61O(1)).
 - Causing sexual servitude or conducting a sexual servitude business (s 80D, s 80E).
 - Voyeurism and filming offences (circumstances of aggravation, child <16) (s 91J-91L).

Act of indecency with child <16, aggravated offence – s 61O(1)

- 3.50 Our reasons for not proposing the inclusion of the aggravated offence of an act of indecency with a child under 16 years³⁵ include the following:
- The offence has a maximum penalty of 5 years imprisonment.
 - It is triable summarily.
 - While the offence has a reasonable prevalence, we note that a substantial proportion of these offences are dealt with in the Local Court: in 2012, 32 charges were finalised in the Local Court compared with 40 in the higher courts.

33. *Crimes Act 1900* (NSW) s 61N(2).

34. *Crimes Act 1900* (NSW) s 66A(2).

35. *Crimes Act 1900* (NSW) s 61O(1).

Causing sexual servitude or conducting a sexual servitude business – s 80D(2) and s 80E(2)

- 3.51 The aggravated forms of the offences of causing sexual servitude or conducting a sexual servitude business³⁶ include that they involve children under 18 years.
- 3.52 While these offences are both subject to very high maximum penalties of 19 and 20 years imprisonment, we note that the prevalence is very low, with no charges being finalised in 2012. We note that the Commonwealth servitude offences³⁷ also appear to have a very low prevalence, with only two convictions recorded since 2008.

Voyeurism and filming offences (circumstances of aggravation, child <16) – s 91J-91L

- 3.53 The aggravated forms of the voyeurism and filming offences³⁸ include that they involve children under 16 years.
- 3.54 Our reasons for not proposing the inclusion of these offences in relation to a child under 16 years include the following:
- The offences have a maximum penalty of 5 years imprisonment.
 - They are triable summarily.
 - They have low prevalence with only two charges finalised in the higher courts in 2012 for the basic offences against adults and a further two charges finalised for the aggravated offence (with no indication whether the circumstances of aggravation involved children under 16). In the same period, 48 charges were finalised in the Local Court for the basic offences, while 27 charges were finalised for the aggravated forms (again, with no indication whether the circumstances of aggravation involved children under 16).

36. *Crimes Act 1900* (NSW) s 80D(2) and s 80E(2).

37. *Criminal Code* (Cth) s 270.5, s 270.8.

38. *Crimes Act 1900* (NSW) s 91J-91L.

4. Setting the standard non-parole period

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- 4.1 The question of what standard non-parole period (SNPP) to allocate to a given offence is complex and controversial. Our consultation paper called for submissions on this question and identified a range of options.¹ At this stage, we have not received full submissions on the question, and it is difficult to form a concluded view about either the method for setting the SNPP or the actual SNPP that should be set for the sexual offences against children that we have identified as meriting inclusion in the scheme.
- 4.2 In the discussion below we outline some of the current difficulties with the SNPPs set under the current scheme and identify two potential methods for setting SNPPs for new offences, and for reviewing those that are currently included in the scheme. Neither of these methods is without difficulty, and further consideration will be required in order to determine a preferred approach.

Current difficulties

- 4.3 Submissions to this reference have mirrored the concerns that the courts have expressed about the way SNPPs have been set, and the levels at which they have been set. Those concerns are particularly about the lack of transparency in the process by which the SNPPs were determined, and the significant variation in the proportion that the SNPP bears to the maximum available sentences for all of the SNPP offences.

No coherent criteria and considerable variation

- 4.4 The first point is important. No method was stated at the time the SNPP scheme was established. The variation in the SNPPs does not suggest an entirely coherent approach. In a sense, this reference invites us to place the scheme on a stronger conceptual and policy basis. In undertaking this work, we are driven to conclude

1. NSW Sentencing Council, *Standard Minimum Non-parole Periods: Questions for Discussion*, Consultation Paper (2013) ch 3.

that “retro-fitting” a coherent policy basis to the current scheme that will justify the current SNPPs is likely to be fruitless. If a coherent policy basis is to be applied, then a careful review of each of the current SNPPs will be required.

4.5 Table D.1 in Appendix D shows the following variations between the current SNPPs and relevant maximum penalties:

- The lowest ratio is set at 21.4% of the maximum penalty (items 20 and 24).
- The highest ratio is set at 80% of the maximum penalty (item 9B).
- In the case of 18 items the ratio is set at less than 50% of the maximum penalty (items 2, 3, 4, 4A, 4B, 4C, 4D, 5, 6, 11, 12, 13, 14, 15, 15A, 15B, 20 and 24).
- In the case of 7 items the ratio is set at 50% of the maximum penalty (items 7, 8, 16, 18, 21, 22, 23).
- In the case of 3 items the ratio is set above 50% of the maximum penalty (items 9A, 9B and 10).
- In the case of offences carrying a maximum sentence of life imprisonment:
 - for 2 items the SNPP is set at 25 years (items 1A and 1B)
 - for 1 item (murder not within items 1A or 1B) the SNPP is set at 20 years (item 1)
 - for 4 items the SNPP is set at 15 years (items 9, 10, 17 and 19)
 - for 1 item the SNPP is set at 10 years (item 15C).

4.6 There are 6 items (items 2, 3, 4, 10, 11 and 13) which carry a maximum head sentence of 25 years imprisonment, yet the SNPPs for these offences are variously 7 years (items 4, 11 and 12), 10 years (items 2 and 3) and 15 years (item 10 – s 66A(1)).

4.7 Table 4.1 shows that while the ratios for the existing SNPP sexual offences against children are all set between 50% and 80%, even within this band there is a considerable variation.

Table 4.1: Existing SNPPs for sexual offences against children

Item	Section	Offence	SNPP	Max	Percentage
7	s 61I	Sexual intercourse without consent	7 years	14 years	50%
8	s 61J	Sexual intercourse without consent in circumstances of aggravation (inflicts ABH, in company etc)	10 years	20 years	50%
9	s 61JA	Sexual intercourse without consent + in company + inflicts ABH etc or deprives of liberty	15 years	Life	N/A
9A	s 61M(1)	Aggravated (in company, under the authority etc) indecent assault	5 years	7 years	71.4%
9B	s 61M(2)	s 61M where victim under 16 years	8 years	10 years	80%

Item	Section	Offence	SNPP	Max	Percentage
10	s 66A(1)	Sexual intercourse with a child under 10 years	15 years	25 years	60%
10	s 66A(2)	s 66A(1) aggravated (inflict ABH, in company, under authority etc)	15 years	Life	N/A

Anomalies in particular offences

- 4.8 Within this variation some particular offences create significant difficulties for sentencing. Submissions² were particularly critical of the ratio of non-parole period (NPP) to maximum penalty that applies to the SNPP for item 9B.³ If the SNPP for a midrange offence represents 80% of the maximum available sentence then if used as a guidepost (particularly if regard is to be had to the “statutory ratio” between the non-parole period (NPP) and head sentence in accordance with s 44(2) of the *Crimes Act 1900* (NSW)), it tends to suggest the need for a full term or head sentence to be set at or near the maximum available sentence. If used in this way its effect would be to reduce the discretion of the court in setting the balance of the term. In turn this would tend to equate the midrange offence to the worst case for which the maximum sentence is ordinarily preserved. In the case of this offence, courts are simply unable to give effect to all aspects of the sentencing legislation.
- 4.9 The justification for fixing the ratio of a SNPP to the maximum sentence as high as that for item 9B, or as high as that of 71.4% applicable to item 9A,⁴ is not apparent. Nor is it clear which circumstances were taken into account when each offence was initially included in the scheme. What is ascertainable, however, is that while the SNPP for each of items 9A and 9B was originally the same, that is 5 years, the SNPP for item 9B was increased to 8 years from 1 January 2008.⁵ The stated purpose was to reflect the increased seriousness of the offence where the victim was a child aged under 10 years.⁶
- 4.10 The NSW Court of Criminal Appeal identified the difficulty which judges have faced in dealing with an item 9B offence,⁷ in a post-*Muldrock* decision:

It is clear that his Honour was significantly troubled by the standard non-parole period. An offence carrying a maximum sentence of 10 years, with a standard non-parole period of 8 years, presents a particularly difficult sentencing exercise. In the course of argument, his Honour had made it plain that he considered that the specification of a standard non-parole period of 8 years in respect of an offence that carries a maximum penalty of imprisonment for 10 years to be unwieldy and unworkable. This was a case in which, by reason of the applicant's pleas of not guilty, the standard non-parole period legislation (the

2. NSW, Office of the Director of Public Prosecutions, *Submission SNPP4*; *Submission SNPP17*, 4; Legal Aid NSW, *Submission SNPP7*; *Submission SNPP14*, 7-8; Law Society of NSW, *Submission SNPP15*, 8; NSW Young Lawyers Criminal Law Committee, *Submission SNPP16*, 12; NSW Bar Association, *Submission SNPP10*, 6-7.
3. *Crimes Act 1900* (NSW) s 61M(2).
4. *Crimes Act 1900* (NSW) s 61M(1).
5. *Crimes (Sentencing Procedure) Amendment Act 2007* (NSW).
6. NSW, *Parliamentary Debates*, Legislative Council, 17 October 2007, 2668.
7. *Crimes Act 1900* (NSW) s 61M(2).

Sentencing Procedure Act, Pt 4 Div 1A) applied: *R v Way* [2004] NSWCCA 131; 60 NSWLR 168. However, the emphasis to be given to the standard non-parole period is now known to be significantly less than was believed when *Way* was decided: *Muldock v The Queen* [2011] HCA 39; 244 CLR 120. The judge was sentencing before the latter decision was published.

Because of the difficulties he perceived in sentencing in respect of Count (i), the judge determined to impose fully concurrent sentences in respect of the remaining counts. Moreover, he considered himself precluded from giving effect to a finding, that he otherwise would have made, that special circumstances within the meaning of s 44(2) of the Sentencing Procedure Act existed. Such a finding would justify a modification of the non-parole period in relation to the head sentence. Section 44 in effect requires that the non-parole period of a sentence is to be not less than three-quarters of the total sentence, unless the court finds that there are special circumstances justifying departure from that proportion. It does not impose any prohibition, prima facie or otherwise, on structuring a sentence in which the non-parole period is greater than three-quarters of the total sentence. It is generally accepted that a variation in the statutory proportions that results in a non-parole period less than three-quarters of the head sentence is a benefit to the offender. Here, because the standard non-parole period is four-fifths of the maximum available sentence, there was little room for the statutory proportions. That is why the sentence imposed appears to be unbalanced.⁸

- 4.11 A similar, though less extreme, difficulty arises for the s 66A(1) offence of sexual intercourse with a child under 10. This is a very serious offence. However, setting 15 years as the SNPP for the midrange offence would lead to the head sentence logically being in the order of imprisonment for 20 years. This is 5 years shy of the maximum penalty and on this basis is likely to be appropriate for offending at the upper level of seriousness, rather than for a midrange offence. Other apparent anomalies in the quantum of the SNPP to the maximum sentence can be seen. For example the SNPP of 8 years for a s 61M(2) offence of aggravated indecent assault committed on a victim aged under 16 years is not significantly less than the SNPP of 10 years for a s 61J aggravated sexual assault, although the s 61J offence is likely to be considerably more serious and carries a maximum penalty that is twice that for a s 61M(2) offence.

A more general inconsistency with maximum penalties?

- 4.12 More generally, some cases have suggested that judges face a dilemma in balancing the relationship between the SNPP and the maximum penalty. This has been identified in several pre-*Muldock* decisions concerned with item 12 (aggravated break and enter to commit a serious indictable offence),⁹ but is not confined to that item. The issue is about whether, in sentencing an offender for an SNPP offence, the court is to give more regard to the guidepost provided by the SNPP or to that provided by the maximum sentence. In *Marshall v R*, Justice Howie observed:

However, it is not an easy task to make sense of, and apply, the standard non-parole period provisions in relation to s 112(2) offences. Firstly, the standard non-parole period is 5 years as against a head sentence of 20 years. One would

8. *KW v R* [2013] NSWCCA 31 [28]-[29].

9. *Crimes Act 1900* (NSW) s 112(2).

expect as a matter of logic and the application of ordinary sentencing principles that, if an offence was hypothetically of the mid-range of seriousness, it would carry a sentence of half the maximum penalty, that is a total term of ten years and, according to the statutory proportion under s 44 of the Crimes (Sentencing Procedure) Act, a non-parole period of seven and a half years. What then is to be made of the fact that the standard non-parole period is only 5 years? Does this disclose the intention of Parliament that the courts should take a more benign view of an offence under s 112(2) than the maximum penalty would seem to suggest? How does a court determine the sentence where the seriousness of the offence is somewhere above the mid-range of seriousness but below the most serious category of an offence under the section: by having more regard to the standard non-parole period or to the maximum penalty?¹⁰

- 4.13 Although the observations in this case were made in the context of an offence for which the SNPP was set at less than 50% of the maximum sentence (5 years SNPP against a maximum sentence of 20 years), the point made is also applicable where the SNPP is significantly higher than 50% of the maximum penalty.
- 4.14 This argument proceeds on the basis that for offending at the midrange level of objective seriousness, the appropriate head sentence is in the order of 50% of the maximum penalty. While this has an attractive simplicity, it is not clear that this is logically justified in all cases. The maximum penalty for offences indicates parliament's view of the penalty required for the worst or most serious case. It does not necessarily imply that the seriousness of offending will be evenly distributed over the penalty range, or that the midrange should be 50% of the maximum. The seriousness of levels of offending might be distributed differently for different offences, depending on the nature and consequences of the offending behaviour.
- 4.15 On this view, the SNPP could be taken as an indication from parliament as to how it views the appropriate distribution of offences within the limits of the maximum penalty, and whether that distribution is likely to be skewed toward the upper or lower range of seriousness.
- 4.16 The SNPP for offences in the scheme were all set considerably higher than the median and mean sentences for those offences. Research has shown that, generally speaking, NPPs and head sentences increased after the SNPP regime was established.¹¹ But the mean and median penalties have continued to fall short of the SNPP. This could reflect the distribution of seriousness of actual offending being lower than that which would occupy a hypothetical midrange, and/or the presence in most cases of favourable subjective factors that justified a lowering of the head sentence and NPP. We do not regard this as necessarily revealing a general failure of judges to apply the regime, or as a problem in sentencing law.
- 4.17 In the case of sentences for sexual offences against children, the sentencing statistics summarised in Table 4.2 show, both pre and post *Muldrock*, that the median and mean head sentences and NPPs imposed have fallen well short of the maximum available penalty and the SNPP.

10. *Marshall v R* [2007] NSWCCA 24 [34]. The dilemma has been discussed in relation to s 112(2) offences: *Maxwell v R* [2007] NSWCCA 304 [26]; *R v Merrin* [2007] NSWCCA 255 [44]; *R v Mitchell* [2007] NSWCCA 296 [36]-[38]; *XY v R* [2007] NSWCCA 72 [56]-[57].

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

Table 4.2 SNPP offences: Sexual offences against children, pre and post *Muldrock*

Crimes Act 1900	s 61M(2)	s 66A(1)	s 66A(2)
Offence description	<i>indecent assault child <16</i>	<i>sexual intercourse child <10</i>	<i>sexual intercourse child <10, aggravated offence</i>
Maximum penalty	120 months	300 months	life
SNPP	96 months	180 months	180 months
% of maximum penalty	80%	60%	NA
Number of cases	26	6	3
	21	10	15
Number sentenced to imprisonment	21	6	3
	12	10	15
% sentenced to imprisonment	80.80%	100%	100%
	57.10%	100%	100%
Mean head sentence	39.14 months	68.5 months	104 months
	40.33 months	74.6 months	128.27 months
Median head sentence	36 months	66 months	108 months
	36 months	70.5 months	120 months
Head sentence inter-quartile range	24 months	50.25 months	NA
	25 months	63 months	66 months
Mean NPP	21.52 months	37.67 months	62 months
	22.64 months	41.67 months	82.13 months
Median NPP	15 months	36 months	66 months
	20 months	36 months	72 months
NPP inter-quartile range	12.5 months	30.5 months	NA
	23 months	43.5 months	54 months

Blue figures indicate numbers from the commencement of the SNPP scheme until Muldrock (5 October 2008 - 4 October 2011). The black figures below represent the data post-Muldock (5 October 2011 - 31 March 2013).

- 4.18 This is particularly obvious in the case of offences under s 61M(2) and 66A(1), and invites a particular review of the SNPPs for those cases, including their potential reduction.
- 4.19 We recognise that statistical analysis of s 61M offences is also potentially complicated by the fact that, as an indictable offence triable summarily (subject to election to the contrary), it can be dealt with in the Local Court. In that case the

jurisdictional limit of the Local Court precludes imposing a sentence in excess of two years, a term well short of the SNPP and of the maximum sentence.

- 4.20 We similarly recognise that there is some blurring in the outcomes for s 61M(2)¹² offences, in that prior to 1 January 2009 the offence only applied to victims aged under 10 years. As a consequence of the enactment of the *Crimes Amendment (Sexual Offences) Act 2008*, the reach of the offence was extended to victims aged under 16 years. It might be expected that the seriousness of the offence would be affected, at least to some degree, by the age of the victim, and that this could have had an impact on historic sentencing over the full period of the availability of the offence.

Identifying a mechanism to set SNPPs

- 4.21 We have identified two possible options for setting an SNPP:
- a “rule of thumb” option
 - an offence by offence analysis option.

Some basic principles

- 4.22 A mechanism to set SNPPs should take into account the fact that the rigidity that was seen in the earlier application of the SNPP scheme has been relaxed as a result of the decision in *Muldrock*, and also by the amendment of s 54B of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA). Each confirms the SNPP’s use as a guidepost rather than as an inflexible direction that has to be carried out within the constraints of s 21A of the CSPA. Each also acknowledges that the sentencing exercise involved is one of instinctive synthesis which is not driven by the SNPP.
- 4.23 However, if the SNPP scheme is to be used as a guidepost, then it remains necessary that the SNPP for any given offence is proportional and consistent with proper sentencing practice, and that due consideration is given to any factors that justify singling it out for special treatment as an SNPP offence. It is also necessary that the method of setting the SNPP be transparent and justifiable.

The views of stakeholders

- 4.24 The submissions received so far have provided limited assistance about this aspect of the SNPP scheme, either in relation to the process to be employed or the levels of the SNPPs that should be set.
- 4.25 The preferred view of Legal Aid NSW was that sexual offences should not be included in the SNPP scheme, because of the highly complex exercise involved in sentencing offenders for these offences, and because their particularities make

12. *Crimes Act 1900* (NSW) s 61M(2).

them unsuited to the limitations and restrictions of the SNPP scheme.¹³ However, if contrary to that view, they continue to be included, then it suggested that consideration be given to standardising the existing SNPPs within a range of 25% to 40% of the maximum penalty for the relevant offence.¹⁴ The Law Society of NSW also adopted this submission.¹⁵ NSW Young Lawyers proposed a ceiling of 40% of the maximum penalty and accepted that if a range was preferred over a consistent proportion then that should be between 25% and 40%.¹⁶

- 4.26 The NSW Bar Association advocated generally removing from the scheme those offences that potentially cover a wide range of offending behaviour.¹⁷ Similarly to Legal Aid NSW it proposed removing child sexual assault offences, because of the difficulty and complexity involved in sentencing for these offences.¹⁸ For those offences that are retained in the scheme it similarly supported adopting a SNPP within a band of 25% to 40% of the maximum sentence.¹⁹
- 4.27 Recognising the impossibility of employing a mathematical formula in the case of offences that carry a maximum sentence of imprisonment for life, the NSW Bar Association advocated an SNPP of less than 20 years (being the SNPP for item 1, murder other than that falling within items 1A and 1B). It submitted this would be appropriate in order to maintain a proportionality in outcome.
- 4.28 The Office of the Director of Public Prosecutions submitted that the SNPP should be consistently set across all offences in the scheme at no more than 50% of the maximum penalty, and suggested that if that figure was considered inadequate to address the seriousness of the offence then the maximum penalty would need to be reviewed.²⁰

A rule of thumb approach

- 4.29 As we note above, some courts have expressed the view that a penalty in the order of 50% of the maximum penalty could be assumed as a matter of logic to be an appropriate penalty for an offence of midrange objective seriousness (without other factors).
- 4.30 While we do not necessarily accept this as a matter of logic in all cases, it may provide a simple starting point for a “rule of thumb” method for setting an SNPP. Applying as general propositions:
- that a midrange offence should attract a head sentence in the order of 50% of the maximum sentence, and

13. Legal Aid NSW, *Submission SNPP7*, 2.

14. Legal Aid NSW, *Submission SNPP7*, 4.

15. Law Society of NSW, *Submission SNPP11*.

16. NSW Young Lawyers, Criminal Law Committee, *Submission SNPP16*.

17. NSW Bar Association, *Submission SNPP10*, 4; and see also NSW, Office of the Director of Public Prosecutions, *Submission SNPP17*; Legal Aid NSW, *Submission SNPP14*.

18. NSW Bar Association, *Submission SNPP10*, 2; and see also NSW Young Lawyers, Criminal Law Committee, *Submission SNPP16*, 6.

19. NSW Bar Association, *Submission SNPP10*, 6-10.

20. NSW, Office of the Director of Public Prosecutions, *Submission SNPP17*.

- that, in accordance with s 44 of the CSPA, the NPP (before allowing for subjective circumstances) should be in the order of 75% of the head sentence (for non-life sentences),

this could then be translated into a formula that results in an assumed starting point for calculating an SNPP that is 37.5% of the maximum penalty (that is, 75% of 50% of the maximum penalty).

- 4.31 The 37.5% starting point could then be adjusted upwards or downwards within a relatively narrow range, so as to take into account any particular features of the offence or sentencing concerns.
- 4.32 In the case of sexual offences against children, this would permit regard to be had, in particular, to:
- the special need for deterrence
 - the need to recognise the exceptional harm which the offence may cause
 - the potential vulnerability of those who may be victims
 - the extent to which the offence may involve a breach of trust or of authority, and
 - sentencing statistics and practice including relevant appellate guidance as to appropriate levels of sentencing for the offence.
- 4.33 A reasoned approach of this kind could assist in standardising the SNPPs, and in introducing a degree of consistency and transparency, at least in the method employed when setting those SNPPs. Such an approach could also take into account, for a particular offence, that every offence of that kind is particularly serious, and that there are unlikely to be many outliers that can be described as technical breaches or low level offences. Rather, and this has a potential relevance for sexual offences against children, offences of this kind might be seen to cluster towards the more serious end of the spectrum. Reference to past sentencing statistics could assist in this regard.
- 4.34 We note that the use of a 37.5% ratio as a rule of thumb, subject to adjustment within a relatively narrow range, would fall within the 25% to 40% proportion proposed in some submissions, albeit at the upper end of that range; and also within the proportion of 25% to 50% proposed by the Office of the Director of Public Prosecutions.²¹
- 4.35 If, in accordance with the recommendation of the NSW Law Reform Commission in its report on *Sentencing*, the “statutory ratio” between the NPP and term of the sentence was changed from three-quarters to two-thirds,²² then the proposed rule of thumb would assume a starting point before adjustment that is 33.3% rather than 37.5% of the maximum sentence before adjustment.

21. NSW, Office of the Director of Public Prosecutions, *Submission SNPP17*.

22. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) rec 6.2.

- 4.36 The impact that the adoption of ratios of 37.5% and 33.3% respectively would have for the existing SNPPs for current SNPP offences, including the SNPP sexual assault offences, before adjustment, is set out in Table D.1 in Appendix D.
- 4.37 For completeness, we show in Table D.2 in Appendix D at the end of the section, the SNPPs that an application of the 37.5% and 33.3% rule of thumb before adjustment would produce for the additional sexual offences that we have provisionally identified for possible inclusion in the SNPP scheme.
- 4.38 Interestingly, the use of a ratio of 37.5% or 33.3% as a rule of thumb would not result in a materially different result for a significant number of the offences that are currently included in the scheme.
- 4.39 It would have a significant impact on the existing SNPPs for some of the sexual offences against children, in the absence of any adjustment upwards that was justified for them.
- 4.40 It would, however, have an advantage in removing the apparently anomalous SNPPs for the s 61M and s 66A(1) offences which are the only offences that currently attract a SNPP in excess of 50% of their respective maximum penalty. That anomaly could obviously be addressed by increasing the maximum penalty for those offences but this would be likely to result in maximum penalties that would be disproportionate to the kind of offending behaviour involved. For example, if the SNPP for the offences of aggravated indecent assault²³ is retained at 8 years imprisonment, and is to be set at say 50% of the maximum penalty, this would require the maximum penalty to be increased from 10 years to 16 years imprisonment, placing it at a very high level of seriousness in the criminal calendar.
- 4.41 Although an SNPP higher than 37.5% could well be justified for particularly serious and aggravated offences, we do not consider that SNPPs should be set in excess of 50% of the maximum penalty for any offence, at least in the absence of compelling reasons to the contrary. Otherwise, as noted earlier, this might require a review of the appropriateness of the current maximum penalty for that offence.
- 4.42 The setting of an SNPP at a level above 50% assumes an overall term that would seem to be disproportionate for an offence of midrange hypothetical seriousness. For example, in the case of a s 66A(1) offence (item 10) that carries a maximum penalty of imprisonment for 25 years, the setting of the SNPP at 15 years assumes, accepting the current “statutory ratio”, a head sentence of 20 years, a sentence that would only be appropriate for cases in the upper end of objective seriousness. An anomaly exists in any event for this item, in that the same SNPP is set for each of s 66A(1) and s 66A(2) offences even though the latter involves a more serious offence attracting a life sentence.
- 4.43 Preserving a capacity to adjust the ratio that is selected as a rule of thumb is desirable, in that it would avoid the rigid and potential arbitrary application of a single fixed ratio. It permits recognition to be given to the fact that not all of the offence categories included in the SNPP scheme necessarily share sufficiently common characteristics to permit the universal application of a fixed ratio. It would

23. *Crimes Act 1900* (NSW) s 61M(2).

also allow recognition to be given to any special factors that led to the inclusion of the offence in the SNPP scheme, a matter that we accept to be potentially relevant for sexual offences against children.

- 4.44 It also permits adjustment for those offences for which an aggravated form of the offence exists, particularly those that provide for different circumstances of aggravation, not all of which will necessarily sound in the same degree of seriousness. Additionally, in the case of these offences, it would allow potential reference to be made to current and past sentencing trends, which, as we observed earlier, have tended not to reflect the current SNPPs.
- 4.45 We do not propose that a formula of the kind outlined should be incorporated in the CSPA. Rather, it should be used as a means of providing guidance for parliament in setting SNPPs. It follows from the foregoing that any adjustment should involve a reasoned and transparent process.
- 4.46 We recognise that the rule of thumb approach would not assist in the case of offences for which the maximum prescribed penalty is imprisonment for life
- 4.47 Where a life sentence is in fact imposed the question does not arise, since under current law in NSW, a life sentence is a sentence of imprisonment for the term of the offender's natural life, without the option of release on parole.
- 4.48 However for the remaining offences in this category, (including of immediate relevance for this report item 9 and a s 66A(2) offence within item 10), an SNPP does need to be specified if they are to remain in the scheme. At present, it would seem that maintaining an SNPP within the current range of between 15 years and 20 years is appropriate.

Advantages and disadvantages

- 4.49 The rule of thumb approach has a number of advantages. It is simple to apply since it is based on the maximum penalty and, subject to exposure of the reasoning process, it is transparent. It permits a level of flexibility in setting the SNPP that allows for the application of an informed judgement. It appears to reflect the approach that was favoured in submissions, as well as the distribution of most SNPPs under the current scheme. Subject to adjustment based on identifiable and justifiable reasons, it has a capacity to accommodate the particular complexity that exists in sentencing those who are convicted of sexual offences against children, as well as the problems that arise from the manner in which sexual offences against children have been drafted in legislation.
- 4.50 Its disadvantage is that it is based on a conceptual analysis that revolves around the maximum penalty and that pays little regard to the reality of kinds of offending that the courts encounter. The specified SNPPs are always likely to be higher than the NPPs imposed in individual cases. This is partly because the regime is based on a concept of an offence of midrange objective seriousness that is unspecified in its features, and that is divorced from its subjective features. Additionally, it does not

sit entirely comfortably with the reasoning in *Markarian v The Queen*²⁴ or with the now accepted approach to sentencing involving instinctive synthesis.

Offence by offence analysis

- 4.51 An alternative and possibly more principled approach would involve an offence by offence analysis that does not commence with any assumption as to the proportion that an NPP should bear to the maximum penalty, as a starting point for determining the SNPP for that offence.
- 4.52 Under this approach, the analysis would begin with establishing for each current or proposed SNPP offence a profile of the kind of offending behaviour that would occupy the midrange of hypothetical seriousness for that offence. This might require more than one profile to be built where the relevant offence is one for which varying circumstances of aggravation have been specified by parliament.
- 4.53 The second step would involve assigning to that hypothetical midrange offence a head sentence and an NPP, by reference to:
- established sentencing principles and practice,
 - the factors that led to the inclusion of the offence in the SNPP scheme,
 - the guidepost provided by the current maximum penalty for that offence, and
 - the special features of the offence that call for a particular minimum level of full-time custody (in the same way as those identified above for the rule of thumb weighing process).
- 4.54 This alternative approach would require a careful review of every offence in the current scheme accompanied by a statement of the reasons for setting the SNPP. In all probability it would result in a considerable revision of the current SNPPs, unless the process was confined to including further offences in the SNPP scheme. Some submissions opposed this approach.²⁵
- 4.55 It would not necessarily overcome the kind of variation that currently exists in the ratio of the SNPPs to the maximum penalties, that has attracted criticism. However it would require an express identification of the principles that were applied when setting an SNPP for each offence, which for the most part would be derived from:
- proper sentencing practice
 - a consideration of the factors that justified inclusion of the offence in the SNPP scheme, and
 - a consideration of any special features of the offence that called for the imposition of a minimum NPP.

In that respect the process would provide transparency and accountability.

24. *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 [30]-[33].

25. Legal Aid NSW, *Submission SNPP14*; Law Society of NSW, *Submission SNPP15*.

- 4.56 The analysis would need to be informed by expert and experienced opinion. We outline a possible process in more detail below.

Advantages and disadvantages

- 4.57 This approach has the advantage of a clear and understandable logic. It would be based on an analysis of offending that actually occurs and of the individual features of each offence included in the SNPP scheme. Using this method, SNPPs might become closer to sentences actually imposed. It may be able to accommodate informed community views depending on the procedure adopted.
- 4.58 It is, however, a comparatively complex approach that would take considerable time. The outcome may result in more variation than would arise under the “rule of thumb” method, and, unless confined to newly-added offences, it may result in a need for substantial adjustments to current SNPP levels, in some cases downwards, depending on the extent to which past sentencing trends are weighted in the analysis. In turn this could destabilise existing sentencing trends and result in an increased incidence of appeals until it was bedded down.

Undertaking the review process

- 4.59 We have considered the method which could best assist parliament in approaching the adjustment process if the rule of thumb method was to be adopted, or if the alternative offence by offence analysis was to be preferred.
- 4.60 Either method could be informed by the Sentencing Council taking into account the collective views of its constituent members and evidence provided by criminal justice agencies. The Council is diverse in its membership and has both expert and community members. However, consensus may not emerge on all issues, and the analysis may produce a range rather than a specific adjustment in each case, which parliament could then take into account.
- 4.61 Additionally or alternatively, the Council could establish some focus groups consisting of experts (experienced lawyers, retired judicial officers, others working in the sentencing field), to assist it in advising the government on specific SNPPs. Such groups might be supplemented by research of community views, for example through engaging focus groups of community members or “citizen juries” who are given adequate background material to assist them in assessing appropriate sentencing levels.
- 4.62 Either exercise would require, in relation to each offence group that is currently or potentially in the SNPP scheme, consideration of the factual (objective) circumstances that might bring a case within the midrange of hypothetical seriousness, accompanied by the identification of an appropriate head sentence and SNPP.
- 4.63 It has not been possible, in the time available for delivery of this Interim Report, for the Council to reach a firm conclusion as to which method is preferable or to undertake an exercise of either kind from which it could advance a considered view as to the precise SNPPs that should apply for each of the child sexual offences.

- 4.64 However, the Council could undertake either exercise in the course of its wider consideration of the remaining offences that are included in the SNPP scheme, and of the offences that might usefully be added to it in accordance with the principles outlined earlier in this report. During that period further guidance might also emerge when the remaining *Muldrock* appeals are decided and the impact of the amendment to s 54B of the CSPA is observed.
- 4.65 In the meantime this Interim Report is provided to inform further consultation, and to assist the parliamentary select committee in its current review of sexual offences involving children.

Appendix A: Crimes (Sentencing Procedure) Act 1999 (NSW) Part 4 Division 1A: Table – Standard non-parole periods

Item No	Offence	Standard non-parole period
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 years
1B	Murder —where the victim was a child under 18 years of age	25 years
1	Murder —in other cases	20 years
2	Section 26 of the Crimes Act 1900 (conspiracy to murder)	10 years
3	Sections 27, 28, 29 or 30 of the Crimes Act 1900 (attempt to murder)	10 years
4	Section 33 of the Crimes Act 1900 (wounding etc with intent to do bodily harm or resist arrest)	7 years
4A	Section 35(1) of the Crimes Act 1900 (reckless causing of grievous bodily harm in company)	5 years
4B	Section 35(2) of the Crimes Act 1900 (reckless causing of grievous bodily harm)	4 years
4C	Section 35(3) of the Crimes Act 1900 (reckless wounding in company)	4 years
4D	Section 35(4) of the Crimes Act 1900 (reckless wounding)	3 years
5	Section 60(2) of the Crimes Act 1900 (assault of police officer occasioning bodily harm)	3 years
6	Section 60(3) of the Crimes Act 1900 (wounding or inflicting grievous bodily harm on police officer)	5 years
7	Section 61I of the Crimes Act 1900 (sexual assault)	7 years
8	Section 61J of the Crimes Act 1900 (aggravated sexual assault)	10 years
9	Section 61JA of the Crimes Act 1900 (aggravated sexual assault in company)	15 years
9A	Section 61M(1) of the Crimes Act 1900 (aggravated indecent assault)	5 years
9B	Section 61M(2) of the Crimes Act 1900 (aggravated indecent assault)	8 years
10	Section 66A(1) or (2) of the Crimes Act 1900 (sexual intercourse—child under 10)	15 years
11	Section 98 of the Crimes Act 1900 (robbery with arms etc and wounding)	7 years
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 years
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 years

Item No	Offence	Standard non-parole period
14	Section 154C(1) of the Crimes Act 1900 (taking motor vehicle or vessel with assault or with occupant on board)	3 years
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 years
15A	Section 154G of the Crimes Act 1900 (organised car or boat rebirthing activities)	4 years
15B	Section 203E of the Crimes Act 1900 (bushfires)	5 years
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 years
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 years
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 years
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 years
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 years
20	Section 7 of the Firearms Act 1996 (unauthorised possession or use of firearms)	3 years
21	Section 51(1A) or (2A) of the Firearms Act 1996 (unauthorised sale of prohibited firearm or pistol)	10 years
22	Section 51B of the Firearms Act 1996 (unauthorised sale of firearms on an ongoing basis)	10 years
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 years
24	Section 7 of the Weapons Prohibition Act 1998 (unauthorised possession or use of prohibited weapon)—where the offence is prosecuted on indictment	3 years

Appendix B: Judicial Information Research System statistics for existing and proposed SNPP offences

Table B.1: Item 8: s 61J of the *Crimes Act 1900* - aggravated sexual assault (child victim) - JIRS statistics for adult offenders ^a

	Pre-period 3 April 2000 - 31 January 2003		Post-period (before <i>Muldrock</i>) 5 October 2008 - 4 October 2011		Post-period (after <i>Muldrock</i>) 5 October 2011 - 31 March 2013	
Maximum penalty of imprisonment	20 years		20 years		20 years	
Standard non-parole period (SNPP)			10 years		10 years	
Number of cases	51		29		31	
Penalty type for principal offence	n	%	n	%	n	%
Full-time imprisonment	49	96.1	29	100.0	30	96.8
Custodial alternatives ^b	0	0.0	0	0.0	0	0.0
Suspended sentence	1	2.0	0	0.0	1	3.2
Other ^c	1	2.0	0	0.0	0	0.0
If full-time imprisonment	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP
Sentence for principal offence	(months)	(months)	(months)	(months)	(months)	(months)
Mean	68.04	41.00	82.86	49.21	85.43	51.04
Median	60.00	36.00	78.00	45.00	93.00	53.00
Middle 50% range	42.5 - 90	24 - 57	62 - 105	32 - 64	65.25 - 102	33 - 69.5
Interquartile range ^d	47.5	33	43	32	36.75	36.5
Overall sentence (months)						
Mean	74.88	47.43	98.31	64.21	103.70	69.30
Median	60.00	36.00	93.00	57.00	96.00	60.00
Middle 50% range	51 - 96	27.5 - 60	69 - 120	39 - 87	72 - 126.75	46.75 - 85.25
Interquartile range ^d	45	32.5	51	48	54.75	38.5

Notes:

- a In addition to excluding juvenile offenders, the analysis excludes offenders sentenced to imprisonment for life or to detention under the *Mental Health (Forensic Provisions) Act 1990*.
- b Includes intensive correction orders (commenced on 1 October 2010), periodic detention (ceased on 30 September 2010) and home detention.
- c Includes s 10 dismissals, s 10 bonds, s 10A convictions, rising of the court, fines, s 9 bonds and community service orders.
- d The interquartile range (IQR) refers to the middle 50% range of sentences. It is the difference between the two values.

	Pre-period		Post-period (before <i>Muldrock</i>)		Post-period (after <i>Muldrock</i>)	
	3 April 2000 - 31 January 2003		5 October 2008 - 4 October 2011		5 October 2011 - 31 March 2013	
Sample characteristics (where full-time imprisonment)	n	%	n	%	n	%
Guilty plea (%)	37	75.5	20	69.0	16	53.3
Form 1 matters (%)	13	26.5	8	27.6	11	36.7
No priors (%)	20	40.8	9	31.0	12	40.0
Priors - same type (%) ^e	5	10.2	5	17.2	3	10.0
Previously imprisoned (%) ^f			8	27.6	7	23.3
Previously imprisoned - same type (%) ^e	1	2.0	5	17.2	2	6.7
Multiple offences (%)	40	81.6	23	79.3	26	86.7
Consecutive sentences (%)	15	30.6	20	69.0	20	66.7
Finding of special circumstances (%)	43	87.8	27	93.1	26	86.7
Mean age		37.37 years		36.86 years		40.57 years

Notes:

^e A prior offence is of the same type if the principal and prior offences fall within the same broad offence type. There are eight offence types, including drug, sexual, fraud, property, violent, driving, breach and other offences.

^f This information was not available for the pre-period.

Source: Judicial Commission of NSW.

Table B.2: Item 9A: s 61M(1) of the *Crimes Act 1900* - aggravated indecent assault (child victim) - JIRS statistics for adult offenders ^a

	Pre-period 3 April 2000 - 31 January 2003		Post-period (before <i>Muldrock</i>) 5 October 2008 - 4 October 2011		Post-period (after <i>Muldrock</i>) 5 October 2011 - 31 March 2013	
Maximum penalty of imprisonment	7 years		7 years		7 years	
Standard non-parole period (SNPP)			5 years		5 years	
Number of cases	54		40		10	
Penalty type for principal offence	n	%	n	%	n	%
Full-time imprisonment	20	37.0	31	77.5	7	70.0
Custodial alternatives ^b	8	14.8	0	0.0	0	0.0
Suspended sentence	14	25.9	4	10.0	2	20.0
Other ^c	12	22.2	5	12.5	1	10.0
If full-time imprisonment	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP
Sentence for principal offence	(months)	(months)	(months)	(months)	(months)	(months)
Mean	24.45	13.90	36.61	18.39	37.00	20.43
Median	20.50	11.00	36.00	15.00	36.00	24.00
Middle 50% range	18 - 30	8 - 18	27 - 42	12 - 24	26 - 48	12 - 27
Interquartile range ^d	12	10	15	12	22	15
Overall sentence (months)						
Mean	27.75	16.60	46.55	27.13	41.14	24.14
Median	20.50	11.00	42.00	24.00	36.00	24.00
Middle 50% range	18 - 34.5	8 - 20.25	31 - 54	15 - 33	26 - 60	14 - 36
Interquartile range ^d	16.5	12.25	23	18	34	22

Notes:

- a In addition to excluding juvenile offenders, the analysis excludes offenders sentenced to imprisonment for life or to detention under the *Mental Health (Forensic Provisions) Act 1990*.
- b Includes Intensive correction orders (commenced on 1 October 2010), periodic detention (ceased on 30 September 2010) and home detention.
- c Includes s 10 dismissals, s 10 bonds, s 10A convictions, rising of the court, fines, s 9 bonds and CSOs.
- d The interquartile range (IQR) refers to the middle 50% range of sentences. It is the difference between the two values.

	Pre-period		Post-period (before <i>Muldrock</i>)		Post-period (after <i>Muldrock</i>)	
	3 April 2000 - 31 January 2003		5 October 2008 - 4 October 2011		5 October 2011 - 31 March 2013	
Sample characteristics (where full-time imprisonment)	n	%	n	%	n	%
Guilty plea (%)	19	95.0	24	77.4	4	57.1
Form 1 matters (%)	4	20.0	7	22.6	1	14.3
No priors (%)	12	60.0	14	45.2	3	42.9
Priors - same type (%) ^e	5	25.0	7	22.6	2	28.6
Previously imprisoned (%) ^f			8	25.8	2	28.6
Previously imprisoned - same type (%) ^e	2	10.0	5	16.1	2	28.6
Multiple offences (%)	13	65.0	21	67.7	6	85.7
Consecutive sentences (%)	4	20.0	18	58.1	3	42.9
Finding of special circumstances (%)	16	80.0	28	90.3	6	85.7
Mean age		40.45 years		44.06 years		33.86 years

Notes:

^e A prior offence is of the same type if the principal and prior offences fall within the same broad offence type. There are eight offence types, including drug, sexual, fraud, property, violent, driving, breach and other offences.

^f This information was not available for the pre-period.

Source: Judicial Commission of NSW.

Table B.3: Item 9B: s 61M(2) of the *Crimes Act 1900* - aggravated indecent assault - child under 16 - JIRS statistics for adult offenders ^a

	s 61M(2)*old* - child under 10						s 61M(2) - child under 16 (age of child unknown)				s 61M(2) and s 61M(2)*old* combined			
	Pre-period		Post-period (before <i>Muldrock</i>)		Post-period (after <i>Muldrock</i>)		Post-period (before <i>Muldrock</i>)		Post-period (after <i>Muldrock</i>)		Post-period (before <i>Muldrock</i>)		Post-period (after <i>Muldrock</i>)	
	3 April 2000 - 31 January 2003		5 October 2008 - 4 October 2011		5 October 2011 - 31 March 2013		5 October 2008 - 4 October 2011		5 October 2011 - 31 March 2013		5 October 2008 - 4 October 2011		5 October 2011 - 31 March 2013	
Maximum penalty of imprisonment	10 years		10 years		10 years		10 years		10 years		10 years		10 years	
Standard non-parole period (SNPP)			8 years		8 years		8 years		8 years		8 years		8 years	
Number of cases	28		18		7		26		21		44		28	
Penalty type for principal offence	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Full-time imprisonment	16	57.1	16	88.9	7	100.0	21	80.8	12	57.1	37	84.1	19	67.9
Custodial alternatives ^b	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Suspended sentence	5	17.9	1	5.6	0	0.0	5	19.2	6	28.6	6	13.6	6	21.4
Other ^c	7	25.0	1	5.6	0	0.0	0	0.0	3	14.3	1	2.3	3	10.7
If full-time imprisonment	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP
Sentence for principal offence	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)
Mean	46.50	28.19	48.06	26.69	43.71	21.43	39.14	21.52	40.33	22.64	43.00	23.76	41.58	22.17
Median	45.00	23.50	47.00	24.00	48.00	24.00	36.00	15.00	36.00	20.00	39.00	20.00	37.00	22.00
Middle 50% range	30 - 63	18 - 39	36 - 57.75	18 - 36	30 - 54	9 - 29	27 - 51	14.5 - 27	27.5 - 52.5	13 - 36	30 - 52.5	15 - 32	29 - 54	12.25 - 30.75
Interquartile range ^d	33	21	21.75	18	24	20	24	12.5	25	23	22.5	17	25	18.5
Overall sentence (months)														
Mean	48.75	30.44	56.25	34.31	52.57	30.00	46.14	27.81	43.58	26.00	50.51	30.62	46.89	27.47
Median	45.00	23.50	56.00	35.00	63.00	36.00	36.00	18.00	36.00	22.00	45.00	27.00	37.00	24.00
Middle 50% range	30 - 63	18 - 39	37.5 - 70.25	18.75 - 46.5	30 - 72	15 - 48	30 - 66	15 - 36	27.5 - 54	13.25 - 36	32 - 68.5	17.5 - 42	29 - 64	14 - 38
Interquartile range ^d	33	21	32.75	27.75	42	33	36	21	26.5	22.75	36.5	24.5	35	24

Notes:

- a In addition to excluding juvenile offenders, the analysis excludes offenders sentenced to imprisonment for life or to detention under the *Mental Health (Forensic Provisions) Act 1990*.
- b Includes intensive correction orders (commenced on 1 October 2010), periodic detention (ceased on 30 September 2010) and home detention.
- c Includes s 10 dismissals, s 10 bonds, s 10A convictions, rising of the court, fines, s 9 bonds and CSOs.
- d The interquartile range (IQR) refers to the middle 50% range of sentences. It is the difference between the two values.

Sample characteristics (where full-time imprisonment)	s 61M(2)*old* - child under 10						s 61M(2) - child under 16 (age of child unknown)				s 61M(2) and s 61M(2)*old* combined			
	Pre-period		Post-period (before <i>Muldrock</i>)		Post-period (after <i>Muldrock</i>)		Post-period (before <i>Muldrock</i>)		Post-period (after <i>Muldrock</i>)		Post-period (before <i>Muldrock</i>)		Post-period (after <i>Muldrock</i>)	
	3 April 2000 - 31 January 2003		5 October 2008 - 4 October 2011		5 October 2011 - 31 March 2013		5 October 2008 - 4 October 2011		5 October 2011 - 31 March 2013		5 October 2008 - 4 October 2011		5 October 2011 - 31 March 2013	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Guilty plea (%)	12	75.0	14	87.5	4	57.1	20	95.2	12	100.0	34	91.9	16	84.2
Form 1 matters (%)	5	31.3	3	18.8	1	14.3	5	23.8	6	50.0	8	21.6	7	36.8
No priors (%)	5	31.3	6	37.5	3	42.9	10	47.6	7	58.3	16	43.2	10	52.6
Priors - same type (%) ^e	6	37.5	6	37.5	1	14.3	4	19.0	2	16.7	10	27.0	3	15.8
Previously imprisoned (%) ^f			6	37.5	1	14.3	7	33.3	3	25.0	13	35.1	4	21.1
Previously imprisoned - same type (%) ^e	5	31.3	6	37.5	1	14.3	3	14.3	2	16.7	9	24.3	3	15.8
Multiple offences (%)	10	62.5	12	75.0	5	71.4	14	66.7	6	50.0	26	70.3	11	57.9
Consecutive sentences (%)	1	6.3	11	68.8	5	71.4	8	38.1	5	41.7	19	51.4	10	52.6
Finding of special circumstances (%)	13	81.3	14	87.5	7	100.0	20	95.2	11	91.7	34	91.9	18	94.7
Mean age		42.00 years		41.25 years		38.71 years		41.57 years		42.33 years		41.43 years		41.00 years

Notes:

^e A prior offence is of the same type if the principal and prior offences fall within the same broad offence type. There are eight offence types, including drug, sexual, fraud, property, violent, driving, breach and other offences.

^f This information was not available for the pre-period.

Source: Judicial Commission of NSW.

Table B.4: Item 10: s 66A of the *Crimes Act 1900* - sexual assault - child under 10 - JIRS statistics for adult offenders ^a

	s 66A*old*						s 66A(1)				s 66A(1) and s 66A*old* combined				s 66A(2)			
	Pre-period		Post-period		Post-period		Post-period		Post-period		Post-period		Post-period		Post-period		Post-period	
	3 April 2000 - 31 January 2003		5 October 2008 - 4 October 2011		5 October 2011 - 31 March 2013		5 October 2008 - 4 October 2011		5 October 2011 - 31 March 2013		5 October 2008 - 4 October 2011		5 October 2011 - 31 March 2013		5 October 2008 - 4 October 2011		5 October 2011 - 31 March 2013	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Maximum penalty of imprisonment	20 years		25 years		25 years		25 years		25 years		25 years		25 years		Life		Life	
Standard non-parole period (SNPP)			15 years		15 years		15 years		15 years		15 years		15 years		15 years		15 years	
Number of cases	38		25		6		6		10		31		16		3		15	
Penalty type for principal offence	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Full-time imprisonment	35	92.1	25	100.0	6	100.0	6	100.0	10	100.0	31	100.0	16	100.0	3	100.0	15	100.0
Custodial alternatives ^b	0		0		0		0		0		0		0		0		0	
Suspended sentence	2		0		0		0		0		0		0		0		0	
Other ^c	1		0		0		0		0		0		0		0		0	
If full-time imprisonment	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP
Sentence for principal offence	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)
Mean	59.89	35.46	103.36	63.76	97.69	64.33	68.50	37.67	74.60	41.67	96.61	58.71	83.25	50.73	104.00	62.00	128.27	82.13
Median	54.00	36.00	108.00	60.00	111.00	75.00	66.00	36.00	70.50	36.00	96.00	54.00	72.00	45.00	108.00	66.00	120.00	72.00
Middle 50% range	48 - 72	18 - 48	82.5 - 117	48 - 78	39 - 144	18 - 99	44.25 - 94.5	20.5 - 51	38.25 - 101.25	19.5 - 63	72 - 108	36 - 78	39.25 - 124.5	20 - 78			90 - 156	54 - 108
Interquartile range ^d	24	30	34.5	30	105	81	50.25	30.5	63	43.5	36	42	85.25	58			66	54
Overall sentence (months)																		
Mean	65.03	40.03	132.00	91.48	118.17	77.83	77.00	46.17	83.30	49.80	121.35	82.71	96.38	60.31	108.33	66.33	148.67	101.73
Median	60.00	36.00	120.00	84.00	135.00	92.00	72.00	42.00	73.50	42.00	114.00	72.00	90.00	49.50	112.00	70.00	144.00	96.00
Middle 50% range	48 - 90	22 - 48	90.5 - 171	60 - 123	81 - 148.75	39 - 109.75	45 - 115.5	21.25 - 72	40.5 - 73.5	21 - 66	84 - 168	48 - 114	45 - 139.5	22.5 - 94			108 - 213	70 - 156
Interquartile range ^d	42	26	80.5	63	67.75	70.75	70.5	50.75	33	45	84	66	94.5	71.5			105	86

Notes:

^a In addition to excluding juvenile offenders, the analysis excludes offenders sentenced to imprisonment for life or to detention under the *Mental Health (Forensic Provisions) Act 1990*.

^b Includes intensive correction orders (commenced on 1 October 2010), periodic detention (ceased on 30 September 2010) and home detention.

^c Includes s 10 dismissals, s 10 bonds, s 10A convictions, rising of the court, fines, s 9 bonds and CSOs.

^d The interquartile range (IQR) refers to the middle 50% range of sentences. It is the difference between the two values.

Sample characteristics (where full-time imprisonment)	s 66A*old*						s 66A(1)				s 66A(1) and s 66A*old* combined				s 66A(2)			
	Pre-period		Post-period		Post-period		Post-period		Post-period		Post-period		Post-period		Post-period		Post-period	
	3 April 2000 - 31 January 2003		5 October 2008 - 4 October 2011		5 October 2011 - 31 March 2013		5 October 2008 - 4 October 2011		5 October 2011 - 31 March 2013		5 October 2008 - 4 October 2011		5 October 2011 - 31 March 2013		5 October 2008 - 4 October 2011		5 October 2011 - 31 March 2013	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Guilty plea (%)	26	74.3	21	84.0	4	66.7	5	83.3	8	80.0	26	83.9	12	75.0	2	66.7	12	80.0
Form 1 matters (%)	11	31.4	9	36.0	3	50.0	2	33.3	5	50.0	11	35.5	8	50.0	0	0.0	6	40.0
No priors (%)	16	45.7	15	60.0	3	50.0	5	83.3	5	50.0	20	64.5	8	50.0	1	33.3	6	40.0
Priors - same type (%) ^e	7	20.0	2	8.0	0	0.0	0	0.0	3	30.0	2	6.5	3	18.8	0	0.0	1	6.7
Previously imprisoned (%) ^f			5	20.0	1	16.7	0	0.0	2	20.0	5	16.1	3	18.8	1	33.3	2	13.3
Previously imprisoned - same type (%) ^e	6	17.1	1	4.0	0	0.0	0	0.0	1	10.0	1	3.2	1	6.3	0	0.0	1	6.7
Multiple offences (%)	30	85.7	22	88.0	4	66.7	5	83.3	9	90.0	27	87.1	13	81.3	2	66.7	12	80.0
Consecutive sentences (%)	7	20.0	20	80.0	3	50.0	4	66.7	6	60.0	24	77.4	9	56.3	2	66.7	11	73.3
Finding of special circumstances (%)	30	85.7	21	84.0	5	83.3	5	83.3	10	100.0	26	83.9	15	93.8	3	100.0	13	86.7
Mean age		37.54 years		41.24 years		39.17 years		38.00 years		48.40 years		40.61 years		44.94 years		50.67 years		32.60 years

Notes:

^e A prior offence is of the same type if the principal and prior offences fall within the same broad offence type. There are eight offence types, including drug, sexual, fraud, property, violent, driving, breach and other offences.

^f This information was not available for the pre-period.

Source: Judicial Commission of NSW.

Table B.5: Potential SNPP offences - sexual offences against children under the *Crimes Act 1900* - JIRS statistics for adult offenders: 1 April 2006 to 31 March 2013 ^a

	s 66C(1) Sexual intercourse, child 10<14		s 66C(2) Sexual intercourse, aggravated, child 10<14		s 66C(3) Sexual intercourse, child 14<16		s 66C(4) Sexual intercourse, aggravated, child 14<16		s 66EA(1) Persistent sexual abuse, child <18		s 91G(1) Use child <14 to produce child abuse material		s 91H(2) Produce, disseminate or possess child abuse material	
Maximum penalty of imprisonment	16 years		20 years		10 years		12 years		25 years		14 years		10 years	
Number of cases	74		36		79		24		16		12		58	
Penalty type for principal offence	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Full-time imprisonment	49	66.2	31	86.1	50	63.3	18	75.0	16	100.0	11	91.7	49	84.5
Custodial alternatives ^b	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	1.7
Suspended sentence	19	25.7	3	8.3	19	24.1	5	20.8	0	0.0	1	8.3	5	8.6
Other ^c	6	8.1	2	5.6	10	12.7	1	4.2	0	0.0	0	0.0	3	5.2
If full-time imprisonment	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP	Full term	Fixed term/NPP
Sentence for principal offence	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)	(months)
Mean	45.39	23.33	75.74	44.35	32.94	17.44	46.22	25.17	114.13	74.63	47.36	25.55	31.37	16.14
Median	39.00	20.50	72.00	48.00	30.00	14.50	45.00	24.00	114.00	72.00	31.00	23.00	30.00	14.00
Middle 50% range	30.5 - 54	15 - 30	54 - 96	36 - 60	24 - 45	10.5 - 24	32.5 - 57	17.25 - 36	84.75 - 138	45 - 90	24 - 72	6 - 42	22 - 40.5	10.5 - 19
Interquartile range ^d	23.5	15	42	24	21	13.5	24.5	18.75	53.25	45	48	36	18.5	8.5
Overall sentence (months)														
Mean	54.45	31.82	90.68	59.23	38.44	22.54	59.89	38.00	126.75	85.75	55.55	33.73	39.14	23.45
Median	45.00	24.00	90.00	60.00	31.00	18.00	48.00	25.00	120.00	81.00	54.00	36.00	36.00	18.00
Middle 50% range	36 - 67.5	17.5 - 36	60 - 108	36 - 72	24 - 48	12 - 30	36.75 - 87	22 - 55	94.5 - 154.5	55.5 - 114.75	30 - 76	13 - 48	23 - 49.5	12 - 30
Interquartile range ^d	31.5	18.5	48	36	24	18	50.25	33	60	59.25	46	35	26.5	18

Notes:

- a In addition to excluding juvenile offenders, the analysis excludes offenders sentenced to detention under the *Mental Health (Forensic Provisions) Act 1990*.
- b Includes intensive correction orders (commenced on 1 October 2010), periodic detention (ceased on 30 September 2010) and home detention.
- c Includes s 10 dismissals, s 10 bonds, s 10A convictions, rising of court, fines, s 9 bonds and CSOs. As it happens all "other" sentences were s 9 bonds in this table.
- d The interquartile range (IQR) refers to the middle 50% range of sentences. It is the difference between the two values.

	s 66C(1) Sexual intercourse, child 10<14		s 66C(2) Sexual intercourse, aggravated, child 10<14		s 66C(3) Sexual intercourse, child 14<16		s 66C(4) Sexual intercourse, aggravated, child 14<16		s 66EA(1) Persistent sexual abuse, child <18		s 91G(1) Use child <14 to produce child abuse material		s 91H(2) Produce, disseminate or possess child abuse material	
Sample characteristics (where full-time imprisonment)	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Guilty plea (%) ^e	44	89.8	25	80.6	44	88.0	18	100.0	8	50.0	11	100.0	48	98.0
Form 1 matters (%)	17	34.7	13	41.9	18	36.0	5	27.8	4	25.0	4	36.4	14	28.6
No priors (%)	13	26.5	13	41.9	19	38.0	11	61.1	9	56.3	6	54.5	21	42.9
Priors - same type (%) ^f	8	16.3	3	9.7	6	12.0	0	0.0	1	6.3	3	27.3	16	32.7
Previously imprisoned (%)	19	38.8	5	16.1	14	28.0	3	16.7	2	12.5	2	18.2	15	30.6
Previously imprisoned - same type (%) ^f	7	14.3	3	9.7	3	6.0	0	0.0	1	6.3	2	18.2	11	22.4
Multiple offences (%)	35	71.4	25	80.6	36	72.0	15	83.3	9	56.3	7	63.6	39	79.6
Consecutive sentences (%)	28	57.1	23	74.2	23	46.0	13	72.2	8	50.0	2	18.2	26	53.1
Finding of special circumstances (%)	47	95.9	27	87.1	46	92.0	16	88.9	12	75.0	11	100.0	46	93.9
Mean age		35.06 years		42.65 years		30.98 years		33.06 years		41.25 years		39 years		40.57 years

Notes:

^e Please note the plea was missing in one s 66C(1) case as the offender was found not guilty to an offence under s 61J but guilty to the statutory alternative of s 66C(1).

^f A prior offence is of the same type if the principal and prior offences fall within the same broad offence type. There are eight offence types, including drug, sexual, fraud, property, violent, driving, breach and other offences.

Source: Judicial Commission of NSW.

Appendix C: Sexual offences in NSW

		Age of victim:							Adult	
		<10 years	10<14 years	14<16 years	16 years	17 years				
Act of indecency									Act of indecency	
Attempt									Attempt	
61P	Attempt s 61I-61O	same as for basic offence or aggravated offence					61P	Attempt s 61I-61O	same as below	
Basic offence									Basic offence	
61N(1)	child <16	2 X 21					61N(2)	Act of indecency	1.5 X 10	
61O(2)	child <10	7 X 24								
Aggravated offence									Aggravated offence	
61O(1)	child <16	5 X 40					61O(1A)	Aggravated offence	3 X 3	
61O(2A)	child <16, knowing production of child abuse material	10 X 38								
Indecent assault									Indecent assault	
Attempt									Attempt	
61P	Attempt s 61I-61O	same as for basic offence or aggravated offence					61P	Attempt s 61I-61O	same as below	
Basic offence									Basic offence	
61M(2)	child <16	10 8 213					61L	Indecent assault	5 X 82	
Aggravated offence									Aggravated offence	
							61M(1)	Aggravated	7 5 187	
Sexual intercourse									Sexual assault	
Attempt or assault with intent									Attempt or assault with intent	
66D*	Attempt or assault with intent, child 14<16	10 X 0					61K*	Assault with intent to have sexual intercourse	20 X 7	
66D*	Attempt or assault with intent, child 10<14	16 X 9								
66B*	Attempt or assault with intent, child <10	25 X 5								
Basic offence									Basic offence	
73(2)*	child 17, under special care	4 X 0					61I*	Sexual assault	14 7 229	
73(1)*	child 16, under special care	8 X 5								
66C(3)	child 14<16	10 X 49								
66C(1)*	child 10<14	16 X 66								
66A(1)*	child <10	25 15 23								
Aggravated offence									Aggravated offence	
66C(4)*	child 14<16, aggravated offence	12 X 17					61J*	Aggravated sexual assault	20 10 306	
66C(2)*	child 10<14, aggravated offence	20 X 87					61JA*	Aggravated sexual assault in company	Life 15 14	
66A(2)*	child <10, aggravated offence	Life 15 24								
Sexual intercourse - cognitive impairment									Sexual intercourse - cognitive impairment	
Attempt									Attempt	
							66F(4)*	Sexual intercourse: take advantage of impairment	8 X 0	
							66F(4)*	Sexual intercourse: person responsible for care	10 X 0	
Basic offence									Basic offence	
							66F(3)*	Sexual intercourse: take advantage of impairment	8 X 0	
							66F(2)*	Sexual intercourse: person responsible for care	10 X 1	
Sexual assault by forced self manipulation									Sexual assault by forced self manipulation	
Basic offence									Basic offence	
80A(2A)*	Child <16 (aggravated offence)	20 X 0					80A(2)*	Sexual assault by forced self manipulation	14 X 0	
Aggravated offence									Aggravated offence	
80A(2A)*	Child <16, circumstances of aggravation	20 X 0					80A(2A)*	Circumstances of aggravation	20 X 0	
Persistent sexual abuse										
Basic offence										
66EA*	Child <18 (3 or more separate occasions)	25 X 0								

Key: Black numbers = maximum penalty in years
* = triable on indictment only

Blue numbers = SNPP in years (X = no SNPP)

Green numbers = Charges finalised in higher courts, 2012

		Age of victim:							Adult		
		<10 years	10<14 years	14<16 years	16 years	17 years					
Grooming, etc											
Basic offence											
66EB(3)	Groom child 14<16 for unlawful sexual activity			10	X	2					
66EB(3)	Groom child <14 for unlawful sexual activity	12	X	4							
66EB(2A)	Meet child 14<16 after grooming for sexual purposes			12	X	0					
66EB(2A)	Meet child <14 after grooming for sexual purposes	15	X	0							
66EB(2)(b)	Procure child 14<16 for unlawful sexual activity			12	X	0					
66EB(2)(a)	Procure child <14 for unlawful sexual activity	15	X	3							
Sexual servitude					Sexual servitude						
Basic offence					Basic offence						
80D(2)*	Cause sexual servitude, child <18 (agg off)	20	X	0			80D(1)*	Cause sexual servitude	15	X	1
80E(2)*	Conduct sexual serv business, child <18 (agg off)	19	X	0			80E(1)*	Conduct sexual servitude business	15	X	0
Aggravated offence					Aggravated offence						
80D(2)*	Cause sexual servitude, child <18, agg offence	20	X	0			80D(2)*	Cause sexual servitude, agg offence	20	X	0
80E(2)*	Conduct sexual serv business, child <18, agg off	19	X	0			80E(2)*	Conduct sexual servitude business, agg offence	19	X	0
Prostitution					Prostitution						
Basic offence					Basic offence						
91F*	Allow premises used for child prostitution, child <18	7	X	0			91A	Procuring for purposes of prostitution	7	X	0
91D*	Promoting/engaging in child prostitution, child 14<18			10	X	0	91B	Procuring for purposes of prostitution, by drugs etc	10	X	0
91E*	Obtaining benefit from child prostitution, child 14<18			10	X	0					
91D*	Promoting/engaging in child prostitution, child <14	14	X	3							
91E*	Obtaining benefit from child prostitution, child <14	14	X	0							
Voyeurism, etc					Voyeurism, etc						
Basic offence					Basic offence						
91J(3)	Voyeurism, child <16 (aggravated offence)	5	X	-			91J(1)	Voyeurism	2	X	1
91K(3)	Film person in private act, child <16 (aggravated offence)	5	X	-			91K(1)	Film person engaged in private act	2	X	0
91L(3)	Film person's private parts, child <16 (aggravated offence)	5	X	-			91L(1)	Film person's private parts	2	X	1
							91M	Installing device to facilitate observation or filming	2	X	0
Aggravated offence					Aggravated offence						
91J(3)	Voyeurism, child <16, aggravated offence	5	X	-			91J(3)	Voyeurism, aggravated offence	5	X	1
91K(3)	Film person in private act, child <16, aggravated offence	5	X	-			91K(3)	Film person in private act, aggravated offence	5	X	1
91L(3)	Film person's private parts, child <16, aggravated offence	5	X	-			91L(3)	Film person's private parts, aggravated offence	5	X	0
Child abuse material					Child abuse material						
Basic offence					Basic offence						
91H(2)	Production, etc of child abuse material	10	X	110							
91G(2)*	Use (or allow) child 14<16 to produce child abuse material			10	X	4					
91G(1)*	Use (or allow) child <14 to produce child abuse material	14	X	12							

Key: Black numbers = maximum penalty in years
* = triable on indictment only

Blue numbers = SNPP in years (X = no SNPP)

Green numbers = Charges finalised in higher courts, 2012

Appendix D: Current and potential SNPP levels

Table D.1: Current SNPP offences

Item No	Offence	SNPP (yrs)	Maximum penalty (yrs)	SNPP as % of maximum	37.5% of maximum	33.3% of maximum
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	N/A	N/A
1B	Murder – where the victim was a child under 18 years of age	25	Life	N/A	N/A	N/A
1	Murder – in other cases	20	Life	N/A	N/A	N/A
2	<i>Crimes Act 1900 s 26</i> (conspiracy to murder)	10	25	40	9.375	8.33
3	<i>Crimes Act 1900 s 27, 28, 29 or 30</i> (attempt to murder)	10	25	40	9.375	8.33
4	<i>Crimes Act 1900 s 33</i> (wounding etc with intent to do bodily harm or resist arrest)	7	25	28	9.375	8.33
4A	<i>Crimes Act 1900 s 35(1)</i> (reckless causing of grievous bodily harm in company)	5	14	35.7	5.25	4.67
4B	<i>Crimes Act 1900 s 35(2)</i> (reckless causing of grievous bodily harm)	4	10	40	3.75	3.33
4C	<i>Crimes Act 1900 s 35(3)</i> (reckless wounding in company)	4	10	40	3.75	3.33
4D	<i>Crimes Act 1900 s 35(4)</i> (reckless wounding)	3	7	42.9	2.625	2.33
5	<i>Crimes Act 1900 s 60(2)</i> (assault of police officer occasioning bodily harm)	3	7	42.9	2.625	2.33
6	<i>Crimes Act 1900 s 60(3)</i> (wounding or inflicting grievous bodily harm on police officer)	5	12	41.7	4.5	4.00
7	<i>Crimes Act 1900 s 61I</i> (sexual assault)	7	14	50	5.25	4.67
8	<i>Crimes Act 1900 s 61J</i> (aggravated sexual assault)	10	20	50	7.5	6.67
9	<i>Crimes Act 1900 s 61JA</i> (aggravated sexual assault in company)	15	Life	N/A	N/A	N/A
9A	<i>Crimes Act 1900 s 61M(1)</i> (aggravated indecent assault)	5	7	71.4	2.625	2.33
9B	<i>Crimes Act 1900 s 61M(2)</i> (aggravated indecent assault)	8	10	80	3.75	3.33
10	<i>Crimes Act 1900 s 66A(1)</i> (sexual intercourse – child under 10)	15	25	60	9.375	8.33
10	<i>Crimes Act 1900 s 66A(2)</i> (sexual intercourse – child under 10)	15	life	N/A	N/A	N/A
11	<i>Crimes Act 1900 s 98</i> (robbery with arms etc and wounding)	7	25	28	9.375	8.33

Interim Report Standard non-parole periods: Sexual offences against children

Item No	Offence	SNPP (yrs)	Maximum penalty (yrs)	SNPP as % of maximum	37.5% of maximum	33.3% of maximum
12	<i>Crimes Act 1900 s 112(2)</i> (breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation)	5	20	25	7.5	6.67
13	<i>Crimes Act 1900 s 112(3)</i> (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation)	7	25	28	9.375	8.33
14	<i>Crimes Act 1900 s 154C(1)</i> (taking motor vehicle or vessel with assault or with occupant on board)	3	10	30	3.75	3.33
15	<i>Crimes Act 1900 s 154C(2)</i> (taking motor vehicle or vessel with assault or with occupant on board in circumstances of aggravation)	5	14	35.7	5.25	4.67
15A	<i>Crimes Act 1900 s 154G</i> (organising car or boat rebirthing activities)	4	14	28.6	5.25	4.67
15B	<i>Crimes Act 1900 s 203E</i> (bushfires)	5	14	35.7	5.25	4.67
15C	<i>Drug Misuse and Trafficking Act 1985 s 23(2)</i> (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	N/A	N/A	N/A
15C	<i>Drug Misuse and Trafficking Act 1985 s 23(2)</i> (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 - in the case of cannabis plant	10	20	50	7.5	6.67
16	<i>Drug Misuse and Trafficking Act 1985 s 24(2)</i> (manufacture or production of commercial quantity of prohibited drug), being an offence that: does not relate to cannabis leaf, and 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	50	7.5	6.67
17	<i>Drug Misuse and Trafficking Act 1985 s 24(2)</i> (manufacture or production of commercial quantity of prohibited drug), being an offence that: does not relate to cannabis leaf, and 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	N/A	N/A	N/A
18	<i>Drug Misuse and Trafficking Act 1985 s 25(2)</i> (supplying commercial quantity of prohibited drug), being an offence that: does not relate to cannabis leaf, and 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	50	7.5	6.67
19	<i>Drug Misuse and Trafficking Act 1985 s 25(2)</i> (supplying commercial quantity of prohibited drug), being an offence that: does not relate to cannabis leaf, and 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	N/A	N/A	N/A
20	<i>Firearms Act 1996 s 7</i> (unauthorised possession or use of firearms)	3	14	21.4	5.25	4.67

Item No	Offence	SNPP (yrs)	Maximum penalty (yrs)	SNPP as % of maximum	37.5% of maximum	33.3% of maximum
21	<i>Firearms Act 1996</i> s 51(1A) or (2A) (unauthorised sale of prohibited firearm or pistol)	10	20	50	7.5	6.67
22	<i>Firearms Act 1996</i> s 51B (unauthorised sale of firearms on an ongoing basis)	10	20	50	7.5	6.67
23	<i>Firearms Act 1996</i> s 51D(2) (unauthorised possession of more than 3 firearms any one of which is a prohibited firearm or pistol)	10	20	50	7.5	6.67
24	<i>Weapons Prohibition Act 1998</i> s 7 (unauthorised possession or use of prohibited weapon on indictment)	3	14	21.4	5.25	4.67

Table D.2: Additional child sexual offences

Offence	Maximum penalty (yrs)	37.5% of maximum	33.33% of maximum
<i>Crimes Act 1900 (NSW)</i> s 66B Attempt to have sexual intercourse with person under 10 years of age, or assault such person with intent to have sexual intercourse	25	9.375	8.33
<i>Crimes Act 1900 (NSW)</i> s 66C(1) Sexual intercourse with child between 10 and 14 years	16	6	5.33
<i>Crimes Act 1900 (NSW)</i> s 66C(2) Sexual intercourse with person who is of or above the age of 10 years and under the age of 14 years in circumstances of aggravation	20	7.5	6.67
<i>Crimes Act 1900 (NSW)</i> s 66C(4) Aggravated sexual intercourse with child 14-16 years	12	4.5	4.00
<i>Crimes Act 1900 (NSW)</i> s 66EB(2)(a) Procuring or grooming child for unlawful sexual activity - procuring child under 14 years	15	5.625	5.00
<i>Crimes Act 1900 (NSW)</i> s 66EB(2)(b) Procuring a child 14 or 15 years for unlawful sexual activity	12	4.5	4.00
<i>Crimes Act 1900 (NSW)</i> s 66EB(2A)(a) Meeting child under 14 years following grooming	15	5.625	5.00
<i>Crimes Act 1900 (NSW)</i> s 66EB(2A)(b) Meeting child 14 or 15 years following grooming	12	4.5	4.00
<i>Crimes Act 1900 (NSW)</i> s 66EB(3)(a) Grooming a child under 14 years for unlawful sexual activity	12	4.5	4.00
<i>Crimes Act 1900 (NSW)</i> s 66EB(3)(b) Grooming a child 14 or 15 years for unlawful sexual activity	10	3.75	3.33
<i>Crimes Act 1900 (NSW)</i> s 91D(1)(a) Cause or induce a child under 14 years to participate in an act of child prostitution	14	5.25	4.67
<i>Crimes Act 1900 (NSW)</i> s 91E(1) Obtain benefit from child prostitution, child under 14 years	14	5.25	4.67

Interim Report **Standard non-parole periods: Sexual offences against children**

Offence	Maximum penalty (yrs)	37.5% of maximum	33.33% of maximum
<i>Crimes Act 1900 (NSW) s 91G(1)(a)</i> Use child under age of 14 years for pornographic purposes	14	5.25	4.67
<i>Conditionally excluded</i>			
<i>Crimes Act 1900 (NSW) s 91H(2)</i> Produce, disseminate or possess child pornography	10	3.75	3.33
<i>Crimes Act 1900 (NSW) s 61O(2A)</i> Commit offence under s 61O(2) knowing it is being filmed for purposes of production of child abuse material	10	3.75	3.33
<i>Crimes Act 1900 (NSW) s 66C(3)</i> Sexual intercourse with child between 14 and 16 years	16	6	5.33
<i>Crimes Act 1900 (NSW) s 66EA(1)</i> Persistent sexual abuse of child	25	9.375	8.33
<i>Crimes Act 1900 (NSW) s 80A(2A)</i> Sexual assault by forced self-manipulation in circumstances of aggravation.	20	7.5	6.67

Appendix E: Submissions

- SNPP1 NSW Health Education Centre Against Violence, 2 October 2013
- SNPP2 Police Association of NSW, 8 October 2013
- SNPP3 Bravehearts Inc, 8 October 2013
- SNPP4 NSW, Office of the Director of Public Prosecutions, 9 October 2013
- SNPP5 NSW Young Lawyers, Criminal Law Committee, 11 October 2013
- SNPP6 Mental Health Coordinating Council, 11 October 2013
- SNPP7 Legal Aid NSW, 11 October 2013
- SNPP8 The Public Defenders, 11 October 2013
- SNPP9 NSW, Victims Services, 11 October 2013
- SNPP10 NSW Bar Association, 14 October 2013
- SNPP11 Law Society of NSW, 14 October 2013

- SNPP12 Police Association of NSW, 22 October 2013
- SNPP13 Women in Prison Advocacy Network, 23 October 2013
- SNPP14 Legal Aid NSW, 24 October 2013
- SNPP15 Law Society of NSW, --25 October 2013
- SNPP16 NSW Young Lawyers, Criminal Law Committee, 25 October 2013
- SNPP17 NSW, Office of the Director of Public Prosecutions, 18 October 2013