NEW SOUTH WALES
BAR ASSOCIATION

Servants of All Yet of None

Selborne Chambers
B/174 Phillip Street
Sydney NSW 2000

DX 1204 Sydney
T +61 2 9232 4055
E enquiries@nswbar.asn.au

ABN 18 526 414 014
ACN 000 033 652

nswbar.asn.au

01/353

14 October 2013

Mr Joseph Waugh
Sentencing Council
GPO Box 6
SYDNEY NSW 2001

By email: sentencingcouncil@agd.nsw.gov.au

Dear Mr Waugh

Consultation Paper on Standard Non-Parole Periods

Thank you for inviting the Bar Association to respond to the Sentencing Council's Consultation Paper on Standard Non-Parole Periods (**SNPPs**).

Overall, the Bar Association does not favour the extension (or even the maintenance) of the system of SNPPs. Clearly the imposition of SNPPs has led to an increase in the general level of sentencing, and an increase in the prison population. It has also led to sentencing outcomes that were clearly unjust and often inconsistent. That serves to diminish public confidence in the administration of criminal justice.

The Bar Association responds to the questions raised in the Consultation Paper as follows.

2. What offences should be part of the SNPP scheme?

2.1

1) What offences should be SNPP offences?

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

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

The Bar Association is not in favour of increasing the number of offences with a SNPP. However, the Bar Association believes that if criteria are to be set, SNPPs should only be imposed for offences which have all the following characteristics: very serious offences carrying high maximum penalties, where the range of objective criminality is relatively narrow, where there has been no guideline judgment and where there is evidence of either inconsistency in sentencing or a pattern of inadequate sentences.

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

The Bar Association believes that the gravity of the offence (as indicated by the maximum penalty) should be one of a number of requirements (see answer to question 2.1).

2.3

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

2) What types of offence should be SNPP offences?

See answer to question 2.1.

2.4 What child sexual assault offences should be SNPP offences?

The Bar Association advocates the removal of SNPPs for child sexual assault offences. Whilst it is accepted that this category of offence is particularly serious and carries with it a high level of community concern and abhorrence, it must also be recognised that sentencing for such matters is often extremely complex and difficult. The introduction of a SNPP creates additional and unwelcome complexity and often results in appealable errors.

The Consultation Paper notes some of the difficulties inherent in the current scheme. For example, the maximum penalties for sections 66A(1) and (2) are not the same: imprisonment for 25 years and imprisonment for life; yet the SNPP is the same for both offences at 15 years. This is illogical and an impediment to arriving at a principled sentence for either offence. It is not uncommon for both charges to be dealt with in relation to the same offender where there is an aggravated form of the offence as well as the *simpliciter* form.

Notwithstanding the SNPPs, for offences pursuant to section 66A(1) Judicial Information Research System (**JIRS**) statistics reveal that the midpoint in the 18 sentences imposed between January 2009 and March 2013 for consecutive and non-consecutive terms is imprisonment for 5 years. It is noted that this relates to the overall term as opposed to the non-parole period. In relation to the non-parole period/fixed term for the principal offence for non-consecutive terms (unlike the overall term this does not include consecutive sentences and therefore there are necessarily fewer matters in this category), the midpoint of the six sentences is 24 months. For offences pursuant to section 66A(2) the midpoint of the 18 sentences imposed between January 2009 and March 2013, for consecutive and non-consecutive terms of imprisonment, is 9 years. In relation to the non-parole period/fixed term for the principal offence for non-consecutive terms, the midpoint of the five sentences is five years.

The SNPP is in fact rarely applied. In relation to offences committed pursuant to section 66(1), of the 18 sentences recorded on JIRS between January 2009 and March 2013, none of the consecutive and non-consecutive terms imposed were as high as imprisonment for 15 years. In relation to section 66A(2), of the 18 sentences recorded for the same period, only 17% were over 15 years. Whilst the SNPP for an offence pursuant to section 61M(1) is imprisonment for 5 years (with a maximum penalty of 7 years), the midpoint in the 76 sentences imposed between April 2006 and March 2013 for consecutive and non-consecutive terms of imprisonment is 36 months. In relation to the non-parole period/fixed term for the principal offence for non-consecutive terms, the midpoint of the 39 sentences is 18 months. The SNPP for an offence pursuant to section 61M(2) is imprisonment for 8 years (with a maximum penalty of 10 years), the midpoint in the 34 sentences imposed between January 2009 and March 2013 for consecutive and non-consecutive terms was also imprisonment for 36 months. In relation to the non-parole period/fixed term for the principal offence for non-consecutive terms, the midpoint of the 20 sentences is also 18 months. None of the consecutive and non-consecutive terms imposed were for imprisonment for 8 years or more.

The fact that SNPPs are regularly not applied is a source of great distress to victims of crime. If victims are aware of SNPPs, and many are, and an offender is appropriately sentenced to significantly less than the SNPP, as is often the case, this can give rise to a justifiable sense of grievance and a feeling that as a victim, their individual suffering is for some unfathomable reason less than the norm. The SNPPs can also cause offenders to suffer unnecessary anxiety about the possible imposition of a much harsher sentence than will in fact be imposed.

There are significant inexplicable disparities between the percentages of the maximum penalty and the SNPP for various offences (50% for offences committed pursuant to sections 61I and 61J and as high as 80% for section 61M(2)). There is no rational basis for such a distinction.

There is also no readily apparent explanation as to why certain offences in the same category of offending are not included in the SNPP scheme. It is often the case that offenders sentenced in relation to child sexual assault offences are sentenced for a constellation of charges. The difficulty entailed in a sentencing exercise encompassing a range of offences where only some have a SNPP is self-evident.

With respect to the various offences of sexual intercourse with a child between the ages of 10 and 16, there is no data to suggest that the sentences being imposed are inconsistent or manifestly inadequate or excessive (paragraph 2.15). The Bar Association is of the view that there is no need for SNPPs to be set for these offences.

There are SNPPs for offences of indecent assault. These offences include section 61L, indecent assault with a child under 16, where the maximum penalty is 10 years, and the SNPP is 8 years. If a sentencing judge found that an offence was in the mid-range of objective seriousness and felt compelled to impose the SNPP, the resulting head sentence would have to be the maximum penalty, which traditionally is reserved for the worst class of offence. The Bar Association strongly believes that very high SNPPs for offences such as section 61M has in many cases led to positive injustices and these SNPPs should be substantially reduced or removed.

The offence of persistent sexual abuse is suggested as an offence which should have a SNPP. However the offence of persistent sexual abuse covers a very wide range of behaviour, from cases of a very small number (at least 3) of isolated indecent assaults, on the one hand, to cases of almost daily incidents of sexual intercourse over a period of years. A requirement that the sentencing judge determine the mid-range of objective seriousness would be an impossible task. The Bar Association believes that because of the broad range of behaviour which can constitute this offence, a SNPP should not be prescribed. In addition, prosecution for this offence requires the sanction of the Director of Public Prosecutions. This sanction is rarely applied. JIRS records only 17 sentences for this offence between April 2006 and March 2013.

If the policy objectives of the SNPP scheme were to promote 'consistency and transparency' then the Bar Association is of the view that the imposition of SNPPs for child sexual assault offence is counterproductive to the stated aims of the scheme.

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

The Bar Association does not believe that there should be SNPPs for offences covering a wide range of offending behaviour (see above).

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

The Bar Association generally opposes the addition of further offences to the list of offences with a SNPP. The addition of aggravated offences would further complicate the sentencing process and increase the risk of sentencing error.

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

The Bar Association does not believe that prevalence should be a criterion for assessing whether or not there should be a SNPP. The most prevalent offences are minor offences, such as assaults, shoplifting, and offensive language. For the most part, they are appropriately dealt with by way of non-custodial sentences. Attaching a SNPP to them would inevitably lead to an increase in the prison population. Gravity of the offence, rather than prevalence, should be a criterion, along with inconsistencies or inappropriateness in sentencing patterns.

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

The Bar Association believes that where Parliament has determined that a particular offence can be dealt with summarily, Parliament has indicated that the offences may not be sufficiently serious to be dealt with in a higher court. It follows that these offences should be regarded as not sufficiently serious to require a SNPP.

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

The Bar Association adopts the comment made by the Judicial Commission that the absence of offences subject to a guideline judgment in the list of offences with a SNPP was because 'Parliament took the view that judges have sufficient guidance' (quoted in the Consultation Paper, paragraph 2.52). If SNPPs were introduced they would inevitably differ from and inhibit the application of the guideline judgments, which would cause confusion and be conducive to error.

2.10 If community concern about an offence were to be a criterion for assessing whether an offence should be an SNPP offence: (a) how should it be identified and measured; and (b) how should it be used?

The Bar Association does not believe that it is possible to accurately identify and measure legitimate community concern, as distinct from the will of the people as determined by Parliament. Community concern should not be regarded as a criterion for determining whether a particular offence should be a SNPP offence.

2.11

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

2) *How should that disparity be measured?*

Disparity in sentencing should be a criterion in determining whether or not an offence should be a standard non-parole period offence. Disparity can be measured by statistical analysis and by comparison of comparable cases.

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

a) *which forms of complicity should be included; and*

b) *to which SNPP offences should they relate?*

Forms of complicity should not be included in the SNPP scheme because frequently there is a lesser degree of culpability for parties than for the principal offenders (for example, in the case of an accessory after the fact). Similarly, generally a person convicted of attempt, rather than the completed offence, will have caused less damage or injury, so it would be inappropriate to impose the SNPP.

3. At what level should the SNPPs be set?

3.1 At what level should the SNPPs be set?

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

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

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

a) *what should the range be, and*

b) *how should the amount be determined for each individual SNPP offence from within that range?*

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

These questions can be conveniently considered together. First, the Bar Association maintains its view, expressed in previous submissions, that the SNPP should be within a band of 25% to 40% of the maximum sentence. There should be no offence where the SNPP should be more than 50%, for these reasons. In the absence of special circumstances, the non-parole period is generally 75% of the head sentence. It follows that in the worst class of case, where a head sentence is imposed which is the maximum penalty, the non-parole period will be generally

75% of the maximum penalty. However, if the SNPP is set at 75% of the head sentence, then the SNPP, appropriate for an offence in the middle range of objective seriousness, will be the same as the non-parole period for the worst class of offender. That is an outcome that has the potential to create positive injustice.

Generally there will be a considerable difference between an offence in the middle of the range of objective seriousness and the worst class of case. That should be reflected in a significant difference between the likely non-parole period in the worst class of case (75% of the head sentence) and the non-parole period in the middle of the range of objective seriousness. To reflect that difference, the Bar Association believes that the SNPP should be in a band of between 25% and 40% of the maximum penalty.

The question of where in the range of 25% to 40% of the maximum penalty the SNPP should be fixed should be determined by the difference between the worst class of offence and an offence in the middle range of objective seriousness for the particular offence. For example, the offence of break, enter and commit an indictable offence in circumstances of aggravation (section 112(2) *Crimes Act*) covers a very wide range of offending behaviour. The typical offence involves an offender breaking into a house intending to steal, perhaps in company, or with a weapon. However the worst class of case might involve an offender who enters a house intending to sexually assault or kill the occupants. It is appropriate that the present SNPP for this offence (5 years) is only 25% of the maximum penalty (25 years). Arguably it should be lower.

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

The Bar Association agrees with the observations in the Consultation Paper that nominating a SNPP for an offence carrying a life sentence cannot be determined by a mathematical formula and will require policy decisions taking into account a number of factors including potential seriousness and sentencing patterns. However, to maintain proportionality the SNPP for offences other than murder should be less than the SNPP for murder (that is, 20 years).

4. How should future SNPP offences be identified?

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

4.2

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

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

These questions can be considered together. The Bar Association believes that the Criminal Law Review Division of the Attorney General's Department is the appropriate body to consider questions of the inclusion of offences in the list of SNPP offences.

Should you or your officers require any further information, please do not hesitate to contact me or the Association's Executive Director Mr Philip Selth on [redacted] or at [redacted]

Yours sincerely

Phillip Boulten SC
President