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To the NSW Sentencing Council

Please accept a copy of the Police Association of New South Wales submission regarding Standard Minimum Non-Parole Periods: Questions for Discussion.

The Police Association of NSW thanks the NSW Sentencing Council for the opportunity to submit a response to its review and looks forward to the release of the final copy of the Report.

Yours sincerely

SCOTT WEBER
President

Police Association of NSW

Standard Minimum Non-Parole Periods, Questions for discussion

Police Association of New South Wales Submission

October 2013

Version Control

Purpose

The purpose of this document is to provide to the NSW Sentencing Council, the Police Association of New South Wales response to its Questions for Discussion regarding Standard Minimum Non-Parole Periods.

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Standard Minimum Non-Parole Periods

Questions for discussion-A Consultation paper by the NSW Sentencing Council.

The NSW Sentencing Council has released for public comment a consultation paper relating to Standard Minimum Non-Parole Periods.

A SNPP is a legislated non-parole period intended to provide guidance to the courts on the minimum length of time an offender should spend in prison if found guilty of an offence before being eligible to apply for release on parole.

NSW has a defined term scheme that came into operation in February 2003. The NSW scheme applies to a broad range of serious violent offences (including drug offences) and sexual offences, and provides specific defined non-parole periods (in years) for individual offences. The offences to which the scheme applies and their corresponding SNPPs are set out in a table in the Crimes (Sentencing Procedure) Act 1999 (NSW). NSW, the SNPP has been defined as 'the non-parole period for an offence in the middle of the range of objective seriousness' for the relevant offence. When applying the scheme, the court must first determine the non-parole period and then set the head sentence; the balance of the sentence must not exceed one-third of the non-parole period unless there are 'special circumstances'.

In April 2012, the Police Association wrote to the LRC regarding their review on Standard Minimum Non-Parole Periods and was of the view then that the SNPP schemes were ineffective. Consultations today regarding the SNPPs with Police Association members are still voicing the same frustrations:

> *My thoughts are that Standard Non Parole Periods count for very little these days. They are only pressed in the most serious of charges or high media profile cases*
>
> *I believe this is a very difficult area of law and procedure to reform. The safest and cheapest option in the long run for offenders - serious offenders is to build more gaols and keep them in.*
>
> *The system is broken and is need of tightening up.*

Members are still questioning whether SNPPs promote consistency and transparency in sentencing and whether the scheme achieves any public understanding and community satisfaction of the sentencing process. Other criticisms included the lack of transparent rationale and principles for setting the SNPP levels. In its 2012 submission, the Police Association noted SNPPs increased the complexity of the sentencing task which leads to delays in sentencing. Judges back in 2012 had even stated that they did not like the scheme and would not apply SNPPs at all. In its recent review of SNPPs, the Queensland Sentencing Council too, held concerns about this form of scheme in that it did not deliver what victims of crime and the members of the public were hoping for – clarity, transparency and predictability in sentencing, nor did it lead to reduce rates of serious crime or improvements in community safety. Furthermore, it went onto say that the absence of strong evidence that minimum standard non-parole period schemes were effective and whether they had achieved better sentencing outcomes than existing approaches was still left unproven. It still needs to be asked whether the complexity of the SNPP scheme imposes additional workload. Have SNPPs led to an increase in appeals which can affect victims in terms of the expectations that matters will finally be resolved so that they can get on with their lives? These criticisms continue today and have been referred to in one way or another by Association members (see below) in their comments.

In relation to the issues raised in the consultation paper, we provide the following comments:

Standard Minimum Non-Parole Periods
Questions for discussion

This question paper deals with the following questions:

- *What offences should be standard non-parole period (SNPP) offences under the SNPP scheme and how those offences should be identified*
- *The level at which the SNPPs should be set for those offences*
- *Who should identify/recommend changes to the SNPP offences in future.*

Question 2.1

1. **What offences should be SNPP offences?**
2. **What criteria should be used to assess whether an offence should be an SNPP offences?**
3. **How should the criteria be applied? (in what combination?)**

As mentioned the NSW SNPP scheme came into operation on 1 February 2003 and when introduced applied to a broad range of offences. Over time, the offences to which the NSW SNPP scheme applies have been expanded to include new offences:

- murder, where the victim was a child under 18 years
- reckless causing of grievous bodily harm in company
- reckless causing of grievous bodily harm
- reckless wounding in company
- reckless wounding
- knowingly facilitating a car or boat rebirthing activity
- cultivation, supply or possession of prohibited plants involving not less than the large commercial quantity (if any) specified
- unauthorised sale of prohibited firearm or pistol
- unauthorised sale of firearms on an ongoing basis
- unauthorised possession of more than three firearms any one of which is a prohibited firearm or pistol
- unauthorised possession or use of a prohibited weapon – where the offence is prosecuted on indictment
- aggravated offence of sexual intercourse with a child under the age of 10 years (a new offence)

In brief, the SNPP scheme should apply to serious violent offences and sexual offences and, at a minimum, the offences of:

- Murder
- Manslaughter
- Rape, and
- Child sexual offences (such as maintaining a sexual relationship with a child, indecent treatment of children, sodomy and unlawful carnal knowledge).

Other offences for consideration could include (if not considered already that is):

- Serious drug offences
- Unlawful sodomy
- Repeat drink and drug driving
- Assaults against police, emergency services and health workers
- Armed robbery
- Burglary involving an element of violence
- Incidents where people get physically and/or mentally permanently disabled
- People belonging to paedophile rings
- All offences that have a maximum penalty of 10 years or more

Police Association members expressed the following offences be SNPP offences:

- Sex offences involving persons in authority

  Ie when the offender is a person in authority eg school teacher, sport coach and further to that where the POI is a female. Historically I have seen matters where the female offender has received suspended sentences and the circumstances warranted a full custodial for the female offender.

- Offences committed by parents upon their children

  Ie one case involved a father sexually abusing his own children who were 3 and 5 years old. The father admitted the offences and pleaded guilty. He was admitted to the Cedar Cottage pre-trial diversion program (disbanded now). This case highlights serious offending note being punished with custodial sentences.

- Offences involving strangers

  Ie case involving a 22 year old male Indian national who was on a student visa and was charged with 4 x Aggravated Indecent Assault and 1 x Aggravated Sexual Assault after following a 14 year old female. The offender received a 15 month supervision order and was reported to the Department of Immigration. Despite the conviction, offender was allowed to remain in the country on the student visa. He is now a permanent resident married to an Indian national whom he brought to Australia. This case dips into another area of non-citizens convicted of sexual offences. There possibly needs to be a separate look at things from the immigration perspective, so that potential residents such as the offender described above are mandatorily deported when a conviction for a sex offences is identified.

- Child pornography offences

  Ie I have come across cases where offenders in possession of several thousand videos/stills not receiving any custodial sentences. One case involved a young male found in possession of 11000 still images, 616 videos and 61 documents found to be child abuse material. The offender received a Section 12 bond. Another example included a middle aged male senior fireman receiving child pornography from a person he met via an adult magazine. He was found with 46 discs containing around 900 images and videos. The offender went to the extent of opening a false post box to receive these items. He received a 300 hour community service order.

- Offences against police and other gazette persons

  ie custodial officers, ambulance persons, fire, civilians employed in agencies that are at risk of being offended against due to their nature of their work. Those committing such offences should have no parole.

Another member was quoted as saying the following regarding snpps:

My thoughts are that Standard Non Parole Periods count for very little these days. They are only pressed in the most serious of charges or high media profile cases. An example of mine from earlier this year;
Male offender charged with intentionally cause GBH (25 year offence - 7 years SNPP). Took the matter to trial and a jury found him guilty. No remorse or comments provided by the offender. The victim was a 17 year old female who had her jaw broken in two places requiring major surgery. The attack was described by all (including the District Court Judge) as callous and unprovoked. At the time of this offence, the male offender was on bail for a similar type of GBH charge. Magistrate sentenced him to 6 years custody with a SNPP of 3 years and 7 months. I have many other stories similar to this one and that is why I do not look too far into SNPP.

Another member had this to say regarding snpps:

> *In short I am of the belief that any offence against the person should hold a mandatory period of detention of 90% with the exception of where assistance is given, when that discount should be the maximum allowable time off a sentence - in those "letter of assistance" cases no further discount/parole should be given. Offences against Police and other gazetted persons (ie custodial officers; ambulance; fire; civilians in the employ of those agencies who are affected due to the nature of their work with said agency) should have no parole.*

As the Sentencing Council states, a number of criteria which can be used to assess whether an offence should be an SNPP offence include:

- Maximum penalty
- Type of offence
- Prevalence of the offence
- Community concern about the offence
- Whether the offence can be tried summarily
- Whether sentencing pattern does not sufficiently reflect its seriousness
- Any special need for general deterrence.

Other criteria to consider could include:

- Offences included in SNPP-style schemes elsewhere
- Current sentencing practices
- Community views on the seriousness of certain offences and whether current non-parole periods are appropriate
- Current appeal rates
- The level of harm involved and offences seriousness

Question 2.2

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

As the Sentencing Council states, Parliament has already decided that the worst category of offending for each of the offences listed in Appendix C is sufficiently serious to warrant a serious maximum penalty. Aside to this, one case comes to mind that shows another aspect of the law of sentencing and SNPPs which appear to be settled following Muldrock ,

> *In Cassidy [2012] NSWCCA 68 it was held that, for the purposes of the De Simoni principles, where two offences have the same maximum penalty, but only one has a SNPP, the one with the SNPP is to be considered more serious. The case involved the fire-bombing of a house. The applicant had been sentenced for the offence of intentionally destroying property with intent to endanger life, contrary to s198 of the Crimes Act 1900. That offence carried a maximum penalty of 25 years imprisonment but had no SNPP. The sentencing judge was found to have breached the principles in De Simoni by taking into account the applicant's intention that the "the people inside the house would not get out alive". That the court's reasoning stemmed, at least in part, from Muldrock is apparent from the judgment of Blanch J at [25-26] (with whom Basten JA and Beech-Jones J agreed):*
>
> *[25] The court [in Muldrock] further went on to say at [27] that in imposing the sentence the sentencing court will be "... mindful of two legislative guideposts: the maximum sentence and the standard non-parole period." The High Court observed at [31]:*

It may be, as the Court of Criminal Appeal observed Appeal observed in Way, that for some Div 1A offences there will be a move upwards in the length of the nonparole period as a result of the introduction of the standard non-parole period. This is the likely outcome of adding the court's awareness of the standard non-parole period to the various considerations bearing on the determination of the appropriate sentence.

[26] In those circumstances in my view the offences under ss 27 to 30 which require an intent to kill and which have standard non-parole periods, are "more serious" within the meaning of that term in De Simoni. It is suggested that the same reasoning would apply where two offences have the same maximum penalty but different SNPPs.

Question 2.3

5. **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?**
6. **What types of offences should be SNPP offences?**

This question has been mostly answered in Questions 2.1. In addition to (as the Sentencing Council states), persistent sexual abuse of a child should as well be an SNPP offence. It is critical that a continuing review of offences be conducted to monitor their rates of incidence in whether any of these offences need to be included as a SNPP.

Question 2.4

7. **What child sexual assault offences should be SNPP offences?**

Due to the Attorney's request that the Council give priority consideration to this question, the Police Association has subsequently submitted its response to the Sentencing Council on 8th October 2013. A copy of the Association's letter is attached at the end of this report.

Members (since the lodging of the Police Association's submission on October 8th) have since informed the Police Association of the need to consider the inclusion of the Commonwealth-equivalence offence, that is contained in the Criminal Code Act 1995, that is, s474.26 and s474.27, which goes onto to say,

474.26 Using a carriage service to procure persons under 16 years of age
(1)A person (the sender) commits an offence if:
(a)the sender uses a carriage service to transmit a communication to another person (the recipient); and
(b)the sender does this with the intention of procuring the recipient to engage in sexual activity with the sender; and
(c)the recipient is someone who is, or who the sender believes to be, under 16 years of age; and
(d)the sender is at least 18 years of age.
Penalty: Imprisonment for 15 years.

(2)A person (the sender) commits an offence if:
(a)the sender uses a carriage service to transmit a communication to another person (the recipient); and
(b)the sender does this with the intention of procuring the recipient to engage in sexual activity with another person (the participant); and
(c)the recipient is someone who is, or who the sender believes to be, under 16 years of age; and
(d)the participant is someone who is, or who the sender believes to be, at least 18 years of age.
Penalty: Imprisonment for 15 years.

(3)A person (the sender) commits an offence if:
(a)the sender uses a carriage service to transmit a communication to another person (the recipient); and
(b)the sender does this with the intention of procuring the recipient to engage in sexual activity with another person; and
(c)the recipient is someone who is, or who the sender believes to be, under 16 years of age; and

(d)the other person referred to in paragraph (b) is someone who is, or who the sender believes to be, under 18 years of age; and
(e)the sender intends that the sexual activity referred to in paragraph (b) will take place in the presence of:
(i) the sender; or
(ii) another person (the participant) who is, or who the sender believes to be, at least 18 years of age.
Penalty: Imprisonment for 15 years.

474.27 Using a carriage service to "groom" persons under 16 years of age
(1) A person (the sender) commits an offence if:
(a) the sender uses a carriage service to transmit a communication to another person (the recipient); and
(c) the sender does this with the intention of making it easier to procure the recipient to engage in sexual activity with the sender; and
(d) the recipient is someone who is, or who the sender believes to be, under 16 years of age; and
(e) the sender is at least 18 years of age.
Penalty: Imprisonment for 12 years.
(2) A person (the sender) commits an offence if:
(a) the sender uses a carriage service to transmit a communication to another person (the recipient); and
(c) the sender does this with the intention of making it easier to procure the recipient to engage in sexual activity with another person (the participant); and
(d) the recipient is someone who is, or who the sender believes to be, under 16 years of age; and
(e) the participant is someone who is, or who the sender believes to be, at least 18 years of age.
Penalty: Imprisonment for 12 years.

(3) A person (the sender) commits an offence if:
(a) the sender uses a carriage service to transmit a communication to another person (the recipient); and
(c) the sender does this with the intention of making it easier to procure the recipient to engage in sexual activity with another person; and
(d) the recipient is someone who is, or who the sender believes to be, under 16 years of age; and
(e) the other person referred to in paragraph (c) is someone who is, or who the sender believes to be, under 18 years of age; and
(f) the sender intends that the sexual activity referred to in paragraph (c) will take place in the presence of:
(i) the sender; or
(ii) another person (the participant) who is, or who the sender believes to be, at least 18 years of age.
Penalty: Imprisonment for 15 years.

474.27A Using a carriage service to transmit indecent communication to person under 16 years of age
(1) A person (the sender) commits an offence if:
(a) the sender uses a carriage service to transmit a communication to another person (the recipient); and
(b) the communication includes material that is indecent; and
(c) the recipient is someone who is, or who the sender believes to be, under 16 years of age; and
(d) the sender is at least 18 years of age.
Penalty: Imprisonment for 7 years.
(2) In a prosecution for an offence against subsection (1), whether material is indecent is a matter for the trier of fact.
(3) In this section:
"indecent" means indecent according to the standards of ordinary people.

Question 2.5

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

In the beginning the introduction of the SNPP scheme was primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process, therefore, the list of SNPP offences should not include offences that are basic offences and that can cover a wide range of offending behaviors and objective seriousness. One such example is that of manslaughter since it covers a wide range of conduct.

Question 2.6

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

It is worth considering as the Sentencing Council suggests the inclusion of provisions setting out aggravating circumstances for sexual offences that often include factors such as:

- the victim being under 16
- the victim being under the authority of the offender
- the victim having a physical disability or cognitive impairment
- sexual offences involving aggravating elements such as persistent sexual abuse of a child, and,
- where harsher penalties are prescribed for a second or subsequent offence by an offender eg persistent child sex offending.

Question 2.7

10. **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 prevalence of an offence can be determined by measures such as crime rates or the number of successful prosecutions in higher courts. However, as the Sentencing Council points out the prevalence is not a measure of seriousness or community concern for instance. There needs to be more case analysis.

Question 2.8

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

Indictable offences are very serious in nature and should be perhaps excluded (ie those indictable offences specified in Schedule 1 of the Criminal Procedure Act 1986 NSW) as capable of being dealt with summarily.

Question 2.9

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

As the Second Reading speech for the Bill that introduced SNPPs proposed that the courts should continue to use the existing guideline judgments when sentencing. The Hon James Spigelman AC has described guideline judgments as a mechanism for structuring discretion, not for restricting discretion. He adds, guideline judgments are preferable to the constraints of mandatory minimum terms or grid sentencing and have been well received by the public. It has been similarly suggested that the re-establishment of guideline judgments a preferred method of achieving consistency in sentencing outcomes.

Question 2.10

13. **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?**

It is crucial that if sentences are to be consistent with community expectations there is a need to understand exactly what those expectations are and ensure that they are well informed rather than media driven. At times there is an indication that the community expectations are not in fact, well-informed, but are driven by distorted media portrayal about crime and justice. All too often media reporting of crime and justice is distorted, selective and sensationalist.

All in all, there must always be the need to promote public confidence in the criminal justice system. Penalties imposed for serious offences and sexual offences must be commensurate with community expectations.

Members have suggested via their frustrations that, *the community's concern and expectations seem to go down the drain when sentencing occurs. Community views need to not only be monitored through the media, but also properly referenced in regards to complaints, enquiries to judicial bodies, government agencies including police, and also letters of concern or complaints to local politicians. I don't know if this plausible in regards to obtaining this data, but there needs to be a more transparent way of meeting community expectations. Perhaps surveys in regards to community views on crime need to be conducted by the judiciary, Judiciary Commission of NSW, police or BOCSAR.*

As a way of guidance, it is quite relevant to not forget Ian Callinan's comment in his review of the parole system in Victoria when he mentioned of the critical and supreme role of the parole board in protecting the wider community, *I do say, relatively early in my work, I formed an impression that the balance in relation to the grant of parole, its cancellation and the revocation of cancellations may have been tilted too far in favour of offenders, and sometimes, every very serious offenders. I also formed a clear view that the Parole Board should be, I safety to the public is truly to be paramount consideration, more risk averse than it has become*.

Question 2.11

14. **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?**
15. **How should that disparity be measured?**

It is crucial that a transparent mechanism by which SNPPs are set needs to be shown has been established. One of the aims of the SNPP scheme has been to achieve consistency and disparity in sentencing levels therefore is a relevant criterion when determining whether an offence should be an SNPP offence. The Judicial Commission can assess consistency by measuring the spread or range of sentences.

Alternatively, members have suggested BOCSAR be involved in the assessment of consistency of sentences,

Again, I think also BOCSAR needs to be involved in this.

Question 2.12

16. 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?

The principles of complicity make a person liable for an offence which he or she has intentionally assisted another to commit. As the Sentencing Council recommends an offender convicted of an offence under the doctrine of joint criminal enterprise or extended joint criminal enterprise is taken to have committed the substantive offence and is within reach of the SNPP scheme. The Sentencing Council also states there continues to be little data on the sentencing of any of the complicity offences in higher courts.

Part 3
At what level should the SNPPs be set?

Question 3.1

What approach should be taken to setting the level of SNPPs?

The Police Association in its last submission to the NSW Sentencing Council regarding the review of SNPPs expressed concern about the inconsistency in the ratios of the SNPPs to their maximum penalties and the lack of transparency about the manner in which they were set. It is vital that an SNPP scheme be perceived as relatively unambiguous, simple to understand and apply, and that does not overcomplicate what is perhaps an already complex sentencing process. Setting an appropriate SNPP for the offences included in a SNPP scheme is one of the most challenging aspects of structuring a SNPP scheme. Two such basic approaches have been identified by the Sentencing Council and are worthy of deliberation further by stakeholders:

- Offence by offence assessment based on the objective feature of a midrange offence
- An assessment based on a percentage or a range of percentages of the maximum penalty

Question 3.2

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

As the Queensland 2011 review best puts it, there is limited evidence to support what 'works' in terms of the quantum of imprisonment that meets the purposes of punishment, deterrence, community protection or rehabilitation, although there is some evidence of the minimum parole period that is necessary to enhance community safety for more serious offences after an offender's release from custody. Members of the community have a right to be safe and feel safe in their day-to-day lives. Community concern must be taken seriously as the impacts on victims of serious crime and their families can be devastating and continue long after an offender has served their sentence. Generally, it is important that the penalties imposed for the offences are commensurate with community expectations and that the offender serves an appropriate period of actual incarceration.

In answer to the question, the objective features would need to be taken into account as well as the non-parole period, and overall sentence. Any confusion or lack of clarity regarding what should be considered part of the objective circumstances of the offence needs to be established and eliminated (this was also picked up in the Queensland 2011 review of NSW SNPPs).

It is also quite relevant to bear in mind that (and going back to the Queensland 2011 review once again), and in its research on the effectiveness of community supervision, Queensland Corrective Services concluded that there was no definitive answer on how long an offender should be supervised after release, without consideration of the individual's circumstances but that empirical evidence suggested that the first 12 months post-release remained the highest period of re-offending. On this basis it suggested that for higher-risk offenders community safety would most likely be enhanced by a minimum offender supervision period of one year post release.

Question 3.3

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

As the Sentencing Council argues this may provide a simple solution but would not reflect the view that some offences are more objectively serious and that this should be reflected in specifying an appropriate SNPP.

Question 3.4

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

a. What should the range be, and

b. How should the amount be determined for each individual SNPP offence from within that range?

As the Sentencing Council details, allowing SNPPs to be set from within a percentage range may ensure a level of consistency while allowing scope to reflect the objective seriousness of the offence. It further suggests that the nominated SNPPs could be standardized within a range of 40% to 60% of the respective maximum penalties subject to the possibility of individual exceptions based on factors such as the incidence of offending and any other special consideration. Further case analysis and consultation with experts and stakeholders is required.

Members of the Police Association believe the nominated SNPPs could be standardized within a range of 90%;

> *In short I am of the belief that any offence against the person should hold a mandatory period of detention of 90% with the exception of where assistance is given, when that discount should be the maximum allowable time off a sentence…*

There is some debate on the range to be nominated, as other Police Association members have insisted on a range within 60-80%.

Question 3.5

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

As the Sentencing Council argues this could be appropriate for offences with extreme aggravating circumstances, such as indecent assault of a child under 16 in circumstances where the offender is in company, or where the victim is under the authority of the offender or has a serious physical disability or has a cognitive impairment. Further case analysis is required from experts and stakeholders.

Question 3.6

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

As recommended by the Sentencing Council, the current SNPPs for offences carrying a maximum penalty of life imprisonment range between 10 years and 25 years imprisonment which are broadly consistent with the SA, NT and Queensland models.

Part 4
How should future SNPP offences be identified?

Question 4.1

What procedure 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?

As per the recommendation of the Sentencing Council, the Government can apply the principles whenever it creates offences, amends existing offences and adjusts penalty levels.

Question 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?**

Again, as per the recommendation of the Sentencing Council, the Government can seek the input of a number of agencies which can engage with the community and assist parliament in reflecting community views. These agencies can include:

- Department of Attorney General and Justice (formulating changes to the law and legal system and providing quality legal policy)
- The Sentencing Council (being one step removed from political processes they can ensure that media receives accurate information)
- A Parliamentary Committee (can gather evidence and inform parliament)

Also, engaging agencies such as the Judicial Commission or BOCSAR that can provide relevant information and data.

It is important to monitor and evaluate the impacts of the SNPP scheme regularly for changes in sentencing patterns and impact on the courts for instance.

Attachment A

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25 September 2013

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To NSW Sentencing Council,

The Attorney General has asked the NSW Sentencing Council to specifically prioritise a report on the sexual assault offences against children, in light of the current Parliamentary Select Committee Inquiry into child sexual assault offences. The Sentencing Council specifically asks:

Question: What child sexual assault offences should be SNPP offences?

As the Judicial Commission states: the abhorrence with which the community regards the sexual molestation of young children and the emphasis attached to general deterrence in sentencing offenders is reflected in the judgment in R v BJW (2000) 112 A Crim R 1 at[20], where Sheller JA stated:

> *"The maximum penalties the legislature has set for [child sexual assault] offences reflect community abhorrence of and concern about adult sexual abuse of children. General deterrence is of great importance in sentencing such offenders and especially so when the offender is in a position of trust to the victim".*

The case of R v Fisher (1989) 40 A Crim R 442 at 445 is also frequently cited:

> *"This court has said time and time again that sexual assaults upon young children, especially by those who stand in a position of trust to them, must be severely punished, and that those who engage in this evil conduct must go to gaol for a long period of time, not only to punish them, but also in an endeavour to deter others who might have similar inclinations ...*

This court must serve notice upon judges who impose weakly merciful sentences in some cases of sexual assault upon children, that heavy custodial sentences are essential if the courts are to play their proper role in protecting young people from sexual attacks by adults …".

Tampering with children of tender years is a matter of grave concern to the community: R v Evans (unrep, 24/3/88, NSWCCA). The courts have recognised a change in community attitudes to child sexual assault. In R v MJR (2002) 54 NSWLR 368 at [57], Mason P expressed the view that there has been a pattern of increasing sentences for child sexual assault and that this:

> *"… has come about in response to greater understanding about the long-term effects of child sexual abuse and incest; as well as by a considered judicial response to changing community attitudes to these crimes".*

It has been well-documented that the sexual abuse of children has a range of very serious consequences for victims. Zwi et al. (2007) list depression, post-traumatic stress disorder, antisocial behaviors, suicidality, eating disorders, alcohol and drug misuse, post-partum depression, parenting difficulties, sexual re-victimisation and sexual dysfunction as some of the manifestations of child sexual abuse among victims (see also Abel & Harlow 2001; Kendall-Tackett, Williams & Finkelhor 2001).

Prentky et al. (1997) examined recidivism rates on 115 child molesters and concluded that:

1. child molesters remain at risk to reoffend long after their discharge, in some cases 15-20 years after discharge;
2. there is a marked underestimation of recidivism rates.

Likewise, a review by the American Psychological Association (2003) concluded that "the research demonstrates that even sexual offenses against children that occurred long ago evince a continuing risk of recidivism by the offender."

Another perspective on the problem is offered by Anna Salter, one of the foremost experts on sex offenders in the USA. She writes the following in her book Predators:

> *"The dry research figures only confirm what I have seen over and over in this field: there are a lot of sexual offenses out there and the people who commit them don't get caught very often. When an offender is caught and has a thorough evaluation with a polygraph backup, he will reveal dozens, sometimes hundreds of offenses he was never apprehended for. In an unpublished study by Pamela Van Wyk, 26 offenders in her incarcerated treatment program entered the program admitting an average of 3 victims each. Faced with a polygraph and the necessity of passing it to stay in the treatment program, the next group of 23 men revealed an average of 175 victims each."*

For many in the community, sex offenders are seen as among the most dangerous kinds of offender in terms of both the impact that their offending has on victims' lives and because of concerns about their risk of reoffending. Akin to these concerns, Police Association members aver to the following;

> *Child sexual offences have a high rate of recidivism and a near-on predictable pattern of escalation. A SNPP would encourage participation in pre-release programs and allow a greater certainty in parole period for post release programs. This should reduce the risk of recidivism and escalation of offending.*

It is also quite relevant to point out that given that so few sexual offences are ever reported to police, there is a substantial 'dark figure' of this kind of crime. That is, there is a large gap between official counts of the prevalence of sexual offending and the 'real' prevalence of sexual offending. While crime victimisation surveys help to identify some of the offences that do not come to the attention of the police (and thus help to shed light on the dark figure of sexual offending), undoubtedly additional incidents are not reported in such surveys either. It is thus believed impossible to determine precisely the exact prevalence of sexual offending in the community. This problem is exacerbated by the hidden nature of much sexual offending. Research has shown that victims are less likely to report to the police if the offender is known to them. Some of the factors that have been found to contribute to this include fear of retribution, fear of giving evidence and being cross-examined, fear of not being believed, a belief that the incident was not a real crime, or lack of knowledge and access to help (VicHealth, 2006, p.60).[1]

The Police Association agrees with the Sentencing Council's inclusion of the offence of persistent sexual abuse of a child in the list of SNPPs in order to overcome a problem with the courts' treatment of that offence.

Consideration ought to be given also to whether various offences of sexual intercourse with a child between 10 and 16 years, should be added to the table because of the frequency of offending, and the fact that they are strictly indictable offences, attracting maximum penalties similar to existing SNPP offences.

Police Association members expressed the following offences be SNPP offences:

- Sex offences involving persons in authority
  > *Ie when the offender is a person in authority eg school teacher, sport coach and further to that where the POI is a female. Historically I have seen matters where the female offender has received suspended sentences and the circumstances warranted a full custodial for the female offender.*

- Offences committed by parents upon their children
  > *Ie one case involved a father sexually abusing his own children who were 3 and 5 years old. The father admitted the offences and pleaded guilty. He was admitted to the Cedar Cottage pre-trial diversion program (disbanded now). This case highlights serious offending note being punished with custodial sentences.*

[1] Karen Gelb Dr, Recidivism of Sex Offenders, Research Paper, Sentencing Advisory Council, January 2007.

- Offences involving strangers

  Ie case involving a 22 year old male Indian national who was on a student visa and was charged with 4 x Aggravated Indecent Assault and 1 x Aggravated Sexual Assault after following a 14 year old female. The offender received a 15 month supervision order and was reported to the Department of Immigration. Despite the conviction, offender was allowed to remain in the country on the student visa. He is now a permanent resident married to an Indian national whom he brought to Australia. This case dips into another area of non-citizens convicted of sexual offences. There possibly needs to be a separate look at things from the immigration perspective, so that potential residents such as the offender described above are mandatorily deported when a conviction for a sex offences is identified.

- Child pornography offences

  Ie I have come across cases where offenders in possession of several thousand videos/stills not receiving any custodial sentences. One case involved a young male found in possession of 11000 still images, 616 videos and 61 documents found to be child abuse material. The offender received a Section 12 bond. Another example included a middle aged male senior fireman receiving child pornography from a person he met via an adult magazine. He was found with 46 discs containing around 900 images and videos. The offender went to the extent of opening a false post box to receive these items. He received a 300 hour community service order.

As a point of comparison, the Queensland Sentencing Advisory Council when conducting research in 2011 on minimum standard non-parole periods recommended that the following sexual offences in the Criminal Code which are included in the definition of 'sexual offences', but excluded from the list of SVOs in Schedule 1, should be included as prescribed offences for the purposes of the new SNPP:

- using electronic communication (eg the internet) to procure children under 16 (s218A)
- obscene publications and exhibitions (s 228)
- involving a child in the making of child exploitation material (s 228A)
- making child exploitation material (s 228B)
- distributing child exploitation material (s228C)
- possessing child exploitation material (s 228D)
- permitting a young person or a person with an impairment of the mind to be at a place used for prostitution (s 229L), and
- bestiality (s 211).

As the Sentencing Council puts it, increasingly, there is recognition that these offences are serious and ordinarily warrant an immediate term of imprisonment. The inclusion of child exploitation material offences and all forms of child sexual offences was strongly supported by many members of the community who made submissions to the Queensland Sentencing Advisory Council and also by a number of other stakeholders.

The modified list of offences is different from, and in some respects broader than, the offences in some other SNPP schemes. The list captures most sexual offences against children, a broad range of sexual offences against adults, offences of violence and serious drug offences. Because the way the Council has recommended that the scheme be structured – to apply to offences only attracting a sentence of five years or more – it will automatically target offences at the higher end of offence seriousness.

In summary, all child sexual offences should be SNPP offences, including maintaining a sexual relationship with a child, indecent treatment of a child, sodomy and unlawful carnal knowledge.

It is also vitally important that the Judicial Commission of NSW consistently examines sentencing practices for SNPP offences and monitors their rates of incidence for any new findings. There is a need for sufficient data to enable analysis of offences for the purposes of reporting same. For instance:

> Between 1 February 2003 and 31 December 2007, there were 32 cases involving charges under s61M(1) that met the conditions for inclusion in the Judicial Commission's study.
>
> Between 1 February 2003 and 31 December 2007, there were 30 cases involving charges under s66A that met the conditions for inclusion in the Judicial Commission's study.
>
> Between July 2003 and June 2010, there were 96 cases in the District Court where a strictly indictable offence under s66C(1), (2) or (4) was the principal offence prosecuted.

The Police Association thanks the Sentencing Council for the opportunity to respond to its review and looks forward to the release of its final report.