The Public Defenders

11 October 2013

The Hon James Wood AO QC,
The Chair,
NSW Sentencing Council,
GPO Box 6,
Sydney 2001

Dear Mr. Wood,

I refer to the Sentencing Council's invitation extended to the Public Defenders and other relevant agencies to forward a submission in relation to the Sentencing Council's review of standard non-parole periods. I am grateful to Ian Nash, Public Defender, for his assistance in preparing this submission.

Background

The Sentencing Council (the Council) has been asked by the Attorney General to review standard minimum non-parole period (SNPP) offences contained in Part 4 Division 1A of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* and report to him by 20 December 2013. The report has as its focus 3 questions:

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

However, in the context of a current Parliamentary Select Committee inquiry into child sexual assault offences, the Attorney has requested that the Council give priority to the question of SNPPs for such offences.

Although some of what follows is applicable generally to SNPPs, these submissions focus on SNNPs for offences related to child sexual assault offences.

Over-arching views of the Public Defenders in relation to SNPPs

While the Public Defenders support the need for adequacy, consistency and transparency in sentencing (a primary purpose for which the SNPP scheme was introduced – see, for example NSWLRC Interim Report on SNPPs, May 2012 at [2.114]), we also strongly support the conservation of the principle of individualised justice in sentencing law: *R v Lattouf* (Unreported, NSWCCA 21.10.96, 12.12.96, BC9606020 per Mahoney ACJ).

The Public Defenders are of the view that the SNPP scheme has, particularly prior to *Muldrock v The Queen* (2011) 244 CLR 120, affected the ability of the criminal justice system to dispense individualised justice outweighing any benefit the legislative scheme has had on consistency in sentencing. Furthermore, we are of the opinion that the stipulation in *Muldrock* that SNPPs are a "guidepost" in the exercise of the sentencing discretion is a positive development which should not be altered by legislation.

Public Defenders Chambers, 23/1 Oxford Street, Darlinghurst NSW 2010
Telephone (02) 9268 3111 Fax (02) 9268 3168 DX 11545 Sydney Downtown

www.publicdefenders.nsw.gov.au

We are of the view that common law sentencing principles, the principles embodied in the *Crimes (Sentencing Procedure) Act* (e.g. ss.3A, 5, 21A), in combination with appropriately set maximum penalties and other available mechanisms (such as guideline judgments) are sufficient to ensure adequacy, consistency and transparency in sentencing.

If SNPPs are to be retained, it is this Office's strong view that a review of SNPPs levels is called for. This is particularly so in relation to offences covering sexual misconduct against children (child sexual assault offences). These submissions now address the specific questions set out above in respect of child sexual assault offences.

Questions for consideration

1. What (child sexual assault) offences should be standard non-parole period (SNPP) offences under the SNPP scheme and how those offences should be identified?

This Office recognises that sexual assault offences against children are particularly serious. However, if the effect of *Muldrock* is to be altered by legislation so that SNPPs become more directive than a guidepost, it is important that not all indictable offences in Division 10 of the Crimes Act, 1900 (NSW) be subject to a SNPP. For example, s 66C(3) criminalises consensual sexual intercourse with a person under the age of 16 years, regardless of the age of the alleged offender. The maximum penalty is 10 years imprisonment,

In *CTM v The Queen* [2008] HCA 25, the High Court considered the defence of honest and reasonable mistake in relation to this section. Gleeson CJ, Gummow, Crennan, and Kieffel JJ said:

> 16. A related matter is how the law is to deal with the not uncommon case of the offender who is approximately the same age as the victim. The present appeal provides an example. At the relevant time, the appellant was 17, and the complainant was 15. The term "sexual predator" may be appropriate to describe some people who engage in sexual activity with consenting 15-year old females, but it is hardly of universal application.

SNPPs apply to adult offenders, that is, persons aged 18 years and over.[1] There may well be little public interest in the imposition of a full-time custodial penalty for such an offender aged just over 18, in respect of a consenting sexual partner being just under 16. However, the existence of a SNPP, particularly one that was intended to be more than a guidepost, for such an offence would constrict the judicial officer's discretion in handing down a sentence that fits that crime in such a circumstance.

2. The level at which the SNPPs should be set for those offences?

As annexure A to the Sentencing Council's September 2013 consultation paper (the September paper) on SNPPs reflects, the ratio of SNPP to the total sentence varies significantly. Of particular note, in the context of these submissions is that the SNPP for an offence contrary to s.61M(1) *Crimes Act* (an aggravated form of indecent assault) is 70% of the maximum penalty. Similarly the SNPP for an offence contrary to s.61M(2) *Crimes Act* (another form of aggravated indecent assault) is 80% of the maximum

[1] s.55D(3), *Crimes (Sentencing Procedure) Act, 1999* (NSW).

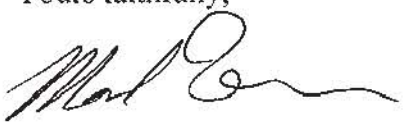
penalty. Such high ratios are in clear tension with other statutory sentencing provisions such as s.44(2) which establishes, in effect, that a non-parole period be 75% of a head sentence unless special circumstances are found. Accordingly, we are of the view that the level of the SNPP for these offences be reduced to a level in keeping with the sentencing pattern before the legislation was introduced.

Mindful that the original purpose of the SNPP scheme was not to increase sentences but to create consistency, there is a need to identify a mechanism by which current sentencing patterns in relation to SNPP offences can be gauged (including, perhaps, reference to JIRS statistics and relevant CCA authority) and have regard to it for the purpose of reviewing the levels at which some SNPPs, particularly those referred to above, have been set. In this regard we note that Annexure B to the September paper indicates that available statistics in relation to aggravated indecent assault reflect sentencing patterns significantly below the SNPP. This argues for a reduction in the SNPPs for such offences.

3. Who should identify/recommend changes to the SNPP offences in future?

In considering changes to the SNPP scheme Parliament should continue to seek the views of the Sentencing Council and the Law Reform Commission and, during that process, ensure that those bodies, in turn, seek the views of all stake-holders in the Criminal Justice System, including this Office.

Yours faithfully,



Mark Ierace SC