



**Submission in Response to NSW Sentencing Council
Consultation Paper**

Standard Minimum Non-Parole Periods

23 October 2013

1. Introduction

Women in Prison Advocacy Network (WIPAN) is a grassroots community charity governed by women, including reformed ex-prisoners, dedicated to advancing the prospects and wellbeing of women and female youth affected by the criminal justice system. WIPAN addresses the many issues facing criminalised women and female youth both systemically, by advocating to improve the criminal justice systems and individually, by mentoring. WIPAN know from experience that by providing women and female youth with gender-responsive social support, recidivism rates will be reduced and the burgeoning prison population will be minimised.

2. WIPAN's experience with persons in custody

WIPAN's close and extensive work with women during their incarceration and post their release informs our submission.

Since May 2010 WIPAN have recruited, interviewed and trained women volunteers from the community to mentor women being released from prison. In 2012 WIPAN also started to mentor female youth.

Women in NSW are being incarcerated at an unprecedented rate (particularly Aboriginal and Torres Strait Islander Women), far surpassing that of men. They face unique challenges that are much greater and more complex than those of men.

The majority of women prisoners come from deeply disadvantaged backgrounds. Many report having experienced incidence of past childhood and adulthood sexual, emotional and physical abuse. Women prisoners confront unique challenges as the primary carers for their children. As a consequence the emotional, social and economic costs for mothers, children and families can be extensive.

A gendered approach must be taken when considering SNPP. The Australian Institute of Health and Welfare's (AIHW) 2013 report *The Health of Australia's Prisoners 2012* paints a worrying picture of the women in detention. WIPAN would like to take this opportunity to reiterate some of the AIHW's findings:

- Females are less likely than males to be employed with unemployment rates of 69% compared with 46% prior to incarceration.¹
- Females are also less likely to have employment organized prior to their release than males (10% and 31% respectively).²

¹ The Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2012*, Catalogue No PHE 170 (2013) 22.

² Ibid 23.

- Female entrants face serious risks of homelessness, with 45% in emergency or short-term accommodation prior to incarceration compared with 26% of male entrants.³
- 56% of female discharges had been diagnosed with a mental health disorder compared with 44% of male discharges.⁴
- Female entrants were more likely than males to report high and very high levels of psychological distress (44% compared with 29%).⁵
- Whilst in prison, data from one day shows 44% of women were taking a prescription mental health medication, compared with 23% of men.⁶
- Nearly twice as many women than men have a history of self-harm (28% compared with 15%) and recent thoughts of self harm (19% and 10%).⁷
- Women have higher rates of testing positive for hepatitis C than men (34% compared with 21%).⁸
- 3% of women entering prison in 2011-2012 were pregnant.⁹
- Women in prison use illicit drugs differently to men, with more 14% women reporting use of ecstasy, 20% heroin, 30% tranquillizers, 38% analgesics and 44% methamphetamine (44%) than men in prison (respectively 9%, 14%, 15%, 15% and 36%).¹⁰ More women (56%) than men (42%) reported previous or current injecting drug use.¹¹ 80% of female prisoners are daily smokers.¹²
- Females report alarmingly higher rates than males of being subject to sexual violence since the age of 16 (29% compared with 2%).¹³
- 22% of women report engaging in sexual activity with a partner who threatened violence.¹⁴

³ Ibid 27.

⁴ Ibid 36.

⁵ Ibid 39.

⁶ Ibid 45.

⁷ Ibid 48.

⁸ Ibid 54.

⁹ Ibid 71.

¹⁰ Ibid 77.

¹¹ Ibid 78.

¹² Ibid 84.

¹³ Devon Indig et al *2009 NSW Inmate Health Survey: Key Findings Report* (Justice Health, 2010) 131.

¹⁴ Ibid.

- Two thirds of women in prison have been in at least one violent relationship (66% compared with 28% of men).¹⁵
- 45% of women reported a partner engaging in abuse or control in the year prior to their incarceration.¹⁶

Due to the increasing rate of imprisonment of women, WIPAN is of the opinion that a gendered approach is necessary in this area of law reform.

3. Our submission in summary

WIPAN is apprehensive of a ‘one size fits all’ approach to SNPP, preferring wide judicial discretion in determining the non-parole periods based on all the circumstances surrounding the offender and the offence.

WIPAN supports the High Court of Australia decision of *Muldock v The Queen*¹⁷ (Muldock) and agrees with the Court’s unanimous decision that SNPP should not be a starting point in sentencing¹⁸ and that sentencing must be ‘determined wholly by reference to the nature of the offending.’¹⁹

WIPAN’s primary concern is that women who are and have been personally affected by the criminal justice system and sentencing procedure have not been consulted with. Persons with lived experience should be involved in the process of identifying and recommending changes to the SNPP offence in the future.

WIPAN is also concerned that the focus of SNPP assessments is being made in reference to the deterrence and punishment roles of imprisonment, failing to incorporate and focus on the role of imprisonment in rehabilitating.

4. WIPAN’s Responses to Questions Raised for Discussion

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

WIPAN opposes a strict application of SNPP to offences at all, rather a discretionary, individualised approach should be made in relation to sentencing and parole periods.

¹⁵ Ibid 131.

¹⁶ Ibid 70.

¹⁷ [2011] HCA 39.

¹⁸ Ibid [17].

¹⁹ Ibid [27].

WIPAN opposes the introduction of further SNPP offences, particularly as this would increase time spent in custody. SNPP should continue to be reserved for only the most serious offences, and not be introduced to deal with less serious, albeit frequent offence, such as those that women generally receive a custodial sentence.

WIPAN is concerned that the criteria set out at paragraph [2.3] identified as criteria by which offences should be assessed as having a SNPP fails to consider the rehabilitative aim of sentencing.

In addition WIPAN is concerned that none of the criteria relate to the relationship between the offender and the offence. The offences women commit are often closely associated with social, psychological and health circumstances. These circumstances surrounding the offence should be used to assess whether a particular offence should be an SNPP offence.

The criteria should be considered in light of the aims of Corrective Services NSW: to reduce re-offending and enhance community safety. Criteria used to determine whether an offence should be an SNPP offence, should fall within one of these aims. A combination of criteria across these aims should be applied to determine if an offence should be and SNPP offence.

Summary Responses

1. WIPAN does not support the use of SNPP, preferring broad judicial discretion to make individualised sentences and parole periods taking into consideration all mitigating and aggravating factors.
2. WIPAN does not support increasing the list of SNPP offences, limiting it only to the most serious offences, if at all.
3. Emphasis on the aim reducing of re-offending and rehabilitation should be reflected in a list of criteria, which could be used to assess whether an offence should be an SNPP offence.

WIPAN recommends including in the criteria to determine whether an offence should be an SNPP offence:

- Rehabilitative effect of imposing SNPP.
 - The relationship between the offence and the offender
 - Whether the sentencing pattern does not sufficiently reflect the circumstances in which the crime was committed.
4. Regard must be had to both all aims of imprisonment when assessing the criteria, equal emphasis should be placed on the role imprisonment has in reducing reoffending and rehabilitation.

Question 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?

Applying SNPP to offences where the range of behaviour is wide-ranging and broad is unjust. Sentencing and the parole period should be determined on the basis of the individual offence.

WIPAN recommends that where the offence covers a broad range, such as manslaughter, it should continue to be the position that it would be unjust to impose an SNPP.

Question 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?**

WIPAN is concerned about a lack of informed public discussion about crime and offenders. WIPAN is concerned about the risks of an unbalanced, reactionary or uniformed community perspective informing SNPP. WIPAN notes the findings of the Victorian Sentencing Advisory Council and is uneasy about using community concern as a criterion. People have very little accurate knowledge of crime and the criminal justice system, their knowledge is gained from mass media which focuses on more violent and repeat offenders which increases levels of fear which in turn increases the punitive inclinations of the public.²⁰ The instinct to impose harsher sentences is only mitigated with increased information (as stated in paragraph [1.25]), which the community, at present, does not access.

WIPAN would discourage attempts identify and measure community concern and accept that parliament represents the community's views about the appropriate punishment level. WIPAN is not of the option that the public appreciates the complexity of offending and offences to be criteria for assessing such a serious and important area of law.

WIPAN is of the opinion that Parliament should be influenced by the submissions made in response to this consultation paper and the consultation papers of the Australian Law Reform Commission as representations of informed members of the public.

²⁰ K Gelb, *More Myths and Misconceptions* (Victorian, Sentencing Advisory and Council, 2008) 3

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?

Applying a fixed percentage of the maximum penalty for all SNPP offences fails to take into consideration individual circumstances. WIPAN agrees that a fixed percentage solution would not reflect the view that some offences are less objectively serious than others with the same maximum penalty.

WIPAN is against increasing time spent in incarceration, citing the findings in paragraph [1.14] that

the greater the proportion of the SNPP to the maximum penalty,
the greater the increase in sentences imposed

WIPAN agrees with the recommendation of the NSW Bar Association, endorsed by the Law Society and Legal Aid NSW at paragraph [3.19] that any range that exceeds 40% would be too high. If there is to be a fixed percentage, WIPAN recommends allowing a broad percentage range relative to the maximum penalty not more than 40%.

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 SNPP for each offence included?**

It is WIPAN's recommendation that people with lived experience of prison ought to be included in this process. WIPAN would like to emphasize the importance of the NSW Sentencing Council in directly engaging with people in prison and who have been in contact with the criminal justice system. Law reform in relation to sentencing must reflect the experiences and perspectives of the subjects of these laws. Inclusion in the law reform processes is itself an important step towards greater community inclusion, which can inadvertently lead to a reduction in offending.

WIPAN questions the level of consultation that has been conducted with women in prison and would like to see a greater level of direct consultation with the people who these reforms would most impact.

WIPAN would like to see at least one member of the Sentencing Council to have lived experience of the criminal justice system. If so appointed, this would overcome the

WIPAN's concern that those persons who have personally experienced the criminal justice system were involved in SNPP assessments and recommendations. WIPAN recommends

WIPAN is of the view that the Sentencing Council with an appointed member with lived experience would be best able to assess and make recommendations regarding SNPP due to the reasons put forward by the ALRC in paragraph [4.8].

6. Conclusion

In conclusion, WIPAN reiterates that we do not support the use of SNPP. WIPAN is of the opinion that a gendered and individualized approach provides a more just sentencing system.

WIPAN is concerned that the focus of the suggested SNPP criteria focuses too heavily on the punishment aspect of the criminal justice system, failing to consider the rehabilitative role the criminal justice system is to take.

WIPAN is against attempting to identify, measure or use community concern as a criterion for assessing whether an offence should be an SNPP at all.

WIPAN is further concerned that people with lived experience of the criminal justice system are not given the opportunity to be involved in these decisions that concern them more than anybody else in society.