THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Criminal Law Committee

Response to Consultation Paper

Standard Minimum Non-Parole Periods

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NSW Sentencing Council
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By email

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Introduction

The NSW Young Lawyers Criminal Law Committee ("the Committee") refers to the terms of reference given to the NSW Sentencing Council ("the Council") on 11 September 2013 on the offences to be included in the Standard Non-Parole Period scheme. The Committee has structured its submission by reference to the Commission's Consultation Paper.

NSW Young Lawyers, a division of the Law Society of NSW, is made up of legal practitioners and law students, who are under the age of 36 or in their first five years of practice. Our membership is made up of some 13,000 persons.

The Committee provides education to the legal profession and wider community on current and future developments in the criminal law, and identifies and submits on issues in need of law reform.

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Summary

Consistent with previous submissions, the Committee maintains its opposition to standard minimum non-parole periods as a whole ('SNPPs'). The primary reason for this is inappropriateness of attempting to provide a statutory formula for sentencing where ranges of offending behaviour can vary greatly within a particular offence and where the moral culpability of offenders can be similarly divergent. There are others, which are outlined in this submission. Subsequent to the High Court's decision of *Muldrock v The Queen* [2011] HCA 39, (2011) 244 CLR 120, the Committee notes the diminished applicability of SNPP in NSW sentencing courts and the resulting Crimes (Sentencing Procedure) Amendment (SNPP) Bill 2013. In any event, given the Attorney General's present review of the SNPP scheme, the Committee is willing to offer some pragmatic suggestions assuming that the scheme is to be retained.

In particular, the Committee submits that SNPPs should be imposed only for offences that satisfy all of the following conditions:

- offences with maximum penalties of 20 years or more;
- offences that do not reflect a wide range of objective criminality;
- offences for which there is no guideline judgement; and
- offences which are prevalent.

The Committee also proposes that SNPPs not be set on an offence-by-offence basis and in any event be fixed at no more than 40% of the maximum penalty.

The Committee does not support further extension to the SNPPs applicable to complicity offences.

The Committee does not support an increase in the SNPPs applicable to offences punishable by life imprisonment.

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

2.1

1. What offences should be SNPP offences?

See answer to 2.1.3.

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

See answer to 2.1.3

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

The Committee is opposed to retaining or extending the SNPP scheme. The Committee is of the view that the applicable legislation, guideline judgments, maximum penalties and the common law provide adequate and appropriate guidance and allow discretion in sentencing.

However, noting that there is currently a lack of consistency in the offences to which a SNPP applies, if the SNPP scheme is to be extended to further offences such offences should be subject to defined criteria.

The Committee considers that SNPPs should be imposed only for offences that:

- carry maximum penalties of 20 years or more;
- do not reflect a wide range of objective criminality (see response to 2.4);
- are not subject to a guideline judgement; and
- are prevalent.

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?

See answer to 2.1.3.

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?

See answer to 2.1.3.

2. What types of offence should be SNPP offences?

See answer to 2.1.3.

2.4

What child sexual assault offences should be SNPP offences?

There are three child sexual assault offences that are not currently subject to a SNPP and have a maximum penalty of 20 years or more: ss 66B, 66C(2) and 66EA of the *Crimes Act 1900*.

The Committee does not agree with the concern expressed at 2.14 that there is a 'problem' in sentences for the persistent sexual abuse of a child contrary to s 66EA. In the Committee's view, this offence should only be included in the SNPP scheme if it can be demonstrated that the offence fits the other criteria listed at response 2.1.3. In this case, the Committee has concerns about whether the three offences are prevalent enough to warrant inclusion, in addition to our more general concerns about whether the range of criminality is too broad for there to be utility in prescribing a SNPP for sexual offences.

Child sexual assault offences that do not carry a maximum penalty of 20 years or more should not remain part of the SNPP 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?

See generally our answer to 2.1.3.

Assuming that the SNPP scheme is to be retained, the fact that an offence covers a wide range of offending behaviour should be considered an indication that the offence should not be included in the list of SNPP offences.

Prescribing a SNPP for an offence 'in the middle of the range of objective seriousness' provides courts with very little assistance when an offence can encompass a wide range of offending behaviour. Where identifying the middle of the range for an offence is difficult or impossible, courts are required to engage in an artificial process of reasoning. This is conducive to inconsistency and error.

Even if inclusion in the list was deemed appropriate, when sentencing for offences with a wide range of offending behaviour the objectives of the SNPP scheme become less applicable. One stated aim is to combat a perceived disparity in sentencing levels. However, disparity is to be expected in sentences for such offences. Greater consistency in sentencing for these offences must then come as a result of less serious criminality being sentenced more harshly and vice versa.

A second aim is to ensure that punishment is imposed that is commensurate with the gravity of the crime. To achieve this aim, courts must have the ability to sentence appropriately. For offences that cover a wide range of offending behaviour, this means that courts must not be limited in their discretion to impose a wide range of sentences.

The Committee agrees that there are a number of offences currently subject to a SNPP which can involve a very wide range of offending behaviour. Particularly pertinent examples of this are offences involving indecent and sexual assault, or offences where there is an element of recklessness or negligence. There are many others and examples thereof have become trite. The Committee submits that this is the biggest problem with SNPPs as a whole and one that is insurmountable for the majority of criminal offences. It is chiefly for this reason that we reiterate our opposition to the SNPP scheme as a whole.

There are offences for which, as a general proposition, the range of offending behaviour is more limited. Examples might include serious drug offences, where often the major consideration is the type and quantity of the drug/s in question. Fraud and other dishonesty related offences might fit into this category. However, even here there are often significant circumstantial considerations that vitiate the appropriateness of a SNPP. Examples of this might include negligence or recklessness where a large quantity of drugs is imported.

Without attempting to provide an exhaustive analysis, the Committee submits that the NSW Sentencing Council should thoroughly investigate the spectrum of offending for crimes which are currently subject to a SNPP and determine which ones, as a general rule, involve the least variation in offending behaviour and vice versa.

2.6

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

See answer to 2.1.3.

Assuming that the SNPP scheme is retained, the Committee is of the view that a consistent approach should be taken as to which offences should be SNPP offences.

The Committee is of the view that many of the offences listed at Appendix F of the Consultation Paper are not prevalent enough to warrant inclusion in the list of SNPPs for the reasons discussed in response to 2.7.

In relation to the dangerous driving offences, courts currently have sufficient guidance from the applicable guideline judgment.[1]

In relation to many of the aggravated offences, there is a high maximum penalty that provides courts with significant guidance in sentencing for these offences.

The Committee does not agree that with the suggestion at 2.35 of the Consultation Paper that a higher SNPP ought be imposed for a second or subsequent offence. Such a provision would further contribute to an already unnecessarily complicated sentencing scheme, whereas a current focus of law reform in NSW is a move towards simplification. Further, the common law and s 21A of the *Crimes (Sentencing Procedure)* Act ('the Sentencing Act') already stipulate that leniency cannot be extended to persons who have a history of offending behaviour, particularly offending of a similar type.

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?

See answer to 2.1.3.

The more prevalent an offence, the greater the need for general deterrence. The Committee is of the view that, subject to our stipulated criteria, if JIRS statistics indicate an offence is prevalent (such as those identified in Table G.1 in the Consultation Paper), this should weigh in favour of there being a SNPP. By the same token, offences that are not prevalent (such as those identified in Table G.2 in the Consultation Paper), in our view, ought not be subject to a SNPP.

The Committee acknowledges, however, that where an offence carries a maximum penalty of life imprisonment, considerations of prevalence become less relevant.

2.8

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

SNPPs should not be applied to indictable offences that are triable summarily. These offences do not meet the criteria proposed in our response at 2.1.3.

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[1] *R v Whyte* (2002) 55 NSWLR 252.

2.9

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

See answer to 2.1.3.

Offences subject to guideline judgments should not be considered for the SNPP scheme. The approach to prescribing SNPPs for particular offences should be to achieve the objectives of the scheme. In essence, the objectives of guideline judgments are to achieve reasonable consistency in sentencing.[2] To that end, the purposes of guideline judgments are achieved without the additional stipulation of a SNPP. Indeed the Committee would go so far as to say that SNPPs serve to undermine the efficacy of guideline judgments, particularly given the level of analysis and consideration of the issues by the Court of Criminal Appeal ('the CCA') when formulating such judgments.

It is worth noting that guideline judgments themselves were introduced partially as an attempt to redress concerns about leniency in sentencing.[3] Further guideline judgments would, in the view of the Committee, be a more effective means through which to achieve consistency in sentencing. However, as has previously been observed by the CCA, there are many offences for which a guideline judgment would not be appropriate due to the scope of offending behaviour.

2.10

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

The Committee is of the view that community concern is unsuitable as a formal criterion because of the difficulty in measuring informed community opinion about sentencing. The Committee shares the concerns noted in the Consultation Paper at 1.24 – 1.25. The Committee also observes that increasing the available maximum sentence has been the traditional response by Parliament to public demand for harsher punishment.

If, however, community concern is to be given weight, given that the objective of the SNPP scheme is to meet public expectations regarding the severity of punishment, it could be used as a threshold test when determining whether an offence ought have a SNPP. Ultimately, given the somewhat arbitrary nature of such a test, this criterion should be given limited weight.

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?**

   Disparity is not useful as a criterion by which to decide whether a SNPP should be applied to an offence because of the difficulty in defining disparity.

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[2] Gleeson J in Wong v The Queen (2001) 207 CLR 584 at [6]; in response to a pattern of sentencing that falls below what is appropriate: at [77] in R v Whyte [2002] NSWCCA 343; and to reinforce public confidence in the integrity of the process of sentencing: R v Jurisic [1998] NSWSC 423

[3] The first guideline judgment was a public event, the Chief Justice authoring an article ("Making Punishment Fit the Crime" 13 October 1998, p. 4) for the Daily Telegraph and appearing on television to explain it. Nicholas Cowdery QC, in his capacity as Director of Public Prosecutions noted, "guideline judgments go some way to redressing the unfortunate impression, driven by the media's concentration on specific instances of unusually lenient sentences, that sentences in general are too lenient".

In *Hili v R; Jones v R* [2010] HCA 45; (2010) 242 CLR 520 (at [48]–[49]), the High Court held that:

> Consistency is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were.
>
> …
>
> The consistency that is sought is consistency in the application of the relevant legal principles. And that requires consistency in the application of Pt IB of the *Crimes Act*. When it is said that the search is for "reasonable consistency", what is sought is the treatment of like cases alike, and different cases differently. Consistency of that kind is not capable of mathematical expression.

We agree with the view expressed by the High Court and note that the *ratio* drawn from this case is applied to many criminal appellate decisions.

Numerical diversity, of itself, does not imply inconsistency in sentencing practices. Rather, it is indicative of the proper application of the instinctive synthesis approach and the inevitable consequence of each offence and every offender being considered individually. Conversely, increased numerical consistency does not necessarily mean that sentencing principles are being applied consistently. Whilst it has been suggested that the SNPP scheme has led to greater consistency in sentencing outcomes[4], it does not necessarily follow that like cases are being treated alike. It may, in fact, suggest that dissimilar cases are being treated alike so as to comply with the scheme.[5]

2. How should that disparity be measured?

See response to 2.11.1.

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 related?

The Committee does not support the broad inclusion of corresponding complicity offences for all offences currently within the SNPP scheme on the basis that they encompass a broad range of objective criminality.

Some accessorial offences may be caught by the scheme by reason of those offences rendering the offender liable in the same manner as the principal, and thus liable for the substantive offence. These forms of complicity can extend beyond joint criminal enterprise and can include accessories before the fact under s 346 *Crimes Act*. The Committee is of the view that such offences should only be included where the substantive offence is otherwise suitable for inclusion according to the criteria outlined in our response to 2.1.3.

In relation to the offence of accessory after the fact, the Committee agrees with the previous conclusions outlined by the Council that such a form of complicity should not be included in the SNPP scheme by reason of the extremely wide range of offending behaviour present in these offences.[6] In this sense, the Committee endorses the view

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[4] P Poletti & H Donnelly, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (Judicial Commission of NSW, 2010) at 60.

[5] Ibid at 61.

[6] See NSW Sentencing Council, Whether 'Attempt' and 'Accessorial' Offences Should be Included in the Standard Non-parole Sentencing Scheme, Report (2004) at 36.

that, “the sentencing of secondary parties should remain at the discretion of the Court in question”.[7]

The Consultation Paper also makes reference to the inchoate offences of attempt and conspiracy. Decisions of the CCA have confirmed that the offences of attempt and conspiracy to commit SNPP offences are not caught by the SNPP scheme.[8] The Committee endorses this approach. Attempts and conspiracies generally involve a lower level of culpability than the completed offence and are capable of incorporating a very wide range of conduct. The same may be said of the offence of incitement.

The Committee is of the view that the SNPP scheme should not be expanded to include further forms of complicity than those presently caught by, or explicitly included within, the scheme. Whilst courts have stated that the liability of an accessory may be commensurate with, or even exceed, that of a principal,[9] this is not always the case. Attempting to guide the sentencing process in such situations with a SNPP that is applicable regardless of whether the offender is a principal or accessory can be unnecessarily rigid and risks producing unjust outcomes.

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[7] Ibid.

[8] *DAC v R* [2006] NSWCCA 265 at [9]-[10]; *Diesing & Ors v R* [2007] NSWCCA 326 at [53]-[56].

[9] *GAS & SJK v The Queen* (2004) 217 CLR 198 at 209 [23].

3. At what level should the SNPP offences be set?

3.1

At what level should the SNPPs be set?

The Committee submits that SNPPs be set at no more than 40% of the maximum available penalty.

The Committee's reasoning is that, if it is assumed that a head sentence of half the maximum penalty would be appropriate for an offence in the mid-range of objective seriousness, and that the non-parole period imposed accorded with the statutory ratio of 75% of the head sentence, then the proportion of a non-parole period appropriate to an offence in the mid-range of objective seriousness would be no more than 37.5%. Or, illustrated simply:

- Maximum penalty is 20 years.
- Mid-range offence head sentence is 10 years.
- Mid-range offence NPP is 7.5 years.
- Mid-range offence NPP = 37.5% maximum penalty.

The Committee does recognise the mathematical inconvenience of 37.5%, and notes the Law Society's preference for 40% in this respect.

The Committee acknowledges the NSW Law Reform Commission's proposal that the presumptive ratio of the non-parole period to the head sentence should be two thirds.[10] If adopted, applying the same formula, SNPPs should be set at no more than 33% (or one third) of the maximum available penalty.

3.2

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

The Committee maintains its view that SNPPs should bear a proportionate and consistent relationship to the maximum penalty applicable for each offence. SNPPs should not be set on an offence-by-offence basis.

If SNPP are to be set on an offence-by-offence basis, analysis of the sentencing range for an offence, with reference to JIRS and BOCSAR statistics, including the range of non-parole periods, should be undertaken. For example, an offence such as aggravated break, enter and commit serious indictable offence pursuant to s 112(2) of the *Crimes Act* carries a SNPP of 5 years, and a maximum penalty of 20 years. This is an appropriate offence to carry a SNPP of only 25% of the maximum penalty given the frequency of the imposition of non-custodial sentences, and the wide range of offending that can constitute the offence.

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 the percentage be?

See answer to 3.1.

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[10] NSW Law Reform Commission, *Sentencing*, Report 139 (2013) at 153.

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

In the event that a range is preferred over a consistent proportion, we adopt the response of the NSW Bar Association (endorsed by the Law Society of NSW and Legal Aid NSW) set out at paragraph 3.19 of the Consultation Paper proposing a range of 25% to 40%.

3.5

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

A high proportion of SNPP to maximum penalty is never appropriate for a SNPP offence.

See our response to 3.1.

3.6

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

The Committee opposes an increase the current standard non-parole periods for offences that carry a maximum penalty of life imprisonment. The Committee submits that the current SNPPs are appropriate.

However, it is submitted that there is no utility in having three SNPP categories for murder, as is currently the case:

- The 'community worker' category (1A) has only been applicable to one case since its introduction, and in that case the SNPP played little to no role in the sentence as other provisions provided that a life sentence was mandatory;[11]
- The murder of a child is already considered more serious than the murder of an adult by virtue of s 21A(2)(l) of the *Crimes (Sentencing Procedure) Act* and the common law.

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[11] *R v Jacobs (No 9)* [2013] NSWSC 1470.

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?

The NSW Department of Attorney-General and Justice could have a role in assessing whether offences fit the criteria outlined in our response at 2.1.3.

See also our response below at 4.2.1.

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?**

   The Committee does not have a strong view on this question. However, perhaps the NSW Department of Attorney-General and Justice could monitor this, consistent with the Department's stated purpose.[12]

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?**

   See our answer to 2.10.

[12] Lawlink NSW website: http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/attorney_generals_department_about_us#ourrole.

The Committee thanks the Council for the opportunity to comment.

If you have any questions in relation to the matters raised in this submission, please contact:

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OR

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Yours faithfully,

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