THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Criminal:JDad:786665

23 October 2013

The Hon. James Wood AO QC
Chair
NSW Sentencing Council
GPO Box 6
SYDNEY NSW 2001

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

Dear Chair,

Standard Minimum Non-Parole Periods (SNPP) – Questions for discussion

I write to you on behalf of the Criminal Law and Juvenile Justice Committees of the Law Society of NSW ("the Committees"), in relation to the Sentencing Council's Consultation Paper on standard minimum non-parole periods ("SNPP").

The Committees have had the benefit of reading the draft submission from Legal Aid NSW. The Committees express their thanks to Legal Aid NSW and acknowledge that the Committees have adopted many of the views expressed by Legal Aid in response to your questions for discussion.

I thank you for the invitation to make a submission and now attach the Committees' submission for your consideration.

Yours sincerely,

John Dobson
President

STANDARD MINIMUM NON-PAROLE PERIODS ("SNPP")

A consultation paper by the NSW Sentencing Council

("consultation paper")

Submission of the

Criminal Law and Juvenile Justice Committees, Law Society of NSW

23 October 2013

The Criminal Law and Juvenile Justice Committees ("the Committees") of the Law Society of NSW have previously indicated to the Law Reform Commission and the Sentencing Council that they oppose in principle, standard minimum non-parole periods ("SNPP"). The Committees note other stakeholders such as the Bar Association, Legal Aid and the Director of Public Prosecutions are also opposed to the retention of the SNPP legislation.

The Committees' view on SNPP legislation generally is that it restrains judicial discretion and adds to the complexity of the sentencing process. SNPP have also resulted in an increase in the severity of penalties imposed and the duration of sentences of full time imprisonment; especially in relation to the categories of offences where the SNPP is a high proportion of the maximum penalty. These outcomes disadvantage all persons accused of SNPP offences without any demonstrable benefit to our wider community.

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?)**

The Committees submit that SNPP should apply only to offences which:

a) Carry a maximum penalty of 20 years imprisonment or more; AND

b) Are prevalent; BUT

c) Do not encompass a wide range of offending behaviour; AND

d) Are not subject to a guideline judgment.

The Committees' view is that rationalising SNPP in this way would at once narrow and expand those offences covered under the scheme.

Restricting SNPP to offences that have a maximum penalty of 20 years or more would serve Parliament's objective that SNPP apply to serious offences. However, it would also make the scheme more logical by including quite a number of serious offences which are not currently included in the scheme.

The Committees do not share the view expressed in the consultation paper that prevalence is a sound reason for applying a SNPP. At the same time, the Committees do not support the imposition of SNPP on offences that are not prevalent as there would be too little utility in that approach.

The Committees note that these criteria are in line with the NSW Law Reform Commission recommendation that the scheme "be confined to offences of the 'more or most serious' kind, for which there is a sufficient incidence of their occurrence to justify their inclusion in the scheme"[1].

The Committees' view is also that offences which encompass a wide range of offending behaviour should be excluded from the scheme as it is nearly impossible to identify what a middle of the range offence might be. It is for this reason that manslaughter is currently omitted from the scheme but there are other offences which the Committees submit likewise should be omitted, including *but not limited to*:

a) Offences contrary to ss 111, 112 and 113 of the *Crimes Act* 1900 involving variants of entering/breaking into houses and committing, or intending to commit, serious indictable offences in circumstances of aggravation.

   It is the Committees' view that the breadth of offences covered by these provisions arise on account of the fact that any serious indictable offence can be particularised, for example, ranging from stealing, to cause grievous bodily harm with intent to do so, to sexual intercourse. Similarly, the circumstance of aggravation particularised can greatly affect the seriousness of the offence, ranging from the perhaps less serious criteria of being in company to the criteria of intentionally inflicting actual bodily harm.

   The Committees submit that the wide range of offending encompassed by these offences is evident by the statistics as to the proportion of offenders being sentenced to prison for these offences contained in Table G.1 of the consultation paper. Whilst ss 111(2) and 113(2) are both prevalent offences with maximum penalties of 14 years imprisonment, only 60% of offenders charged with a s 111(2) offence and 67% of offenders charged with a s 113(2) offence are sentenced to prison.

   The Committees further note the above offences would be excluded pursuant to their proposal that SNPP table offences have a maximum penalty of at least 20 years.

b) Supply prohibited drug on an ongoing basis contrary to s 25A(1) *Drug Misuse and Trafficking Act 1985*.

   Unlike all other drug offences, this offence does not prescribe a range of quantities encompassed by the offence against which the quantity involved in the subject offence can be assessed. Thus, the offence might involve discrete supplies by a street dealer of just over the indictable quantity of a prohibited drug or the ongoing supply of up to a quantity greater than the

[1] Report 134: Interim report on standard minimum non-parole periods, May 2012, at 2.92.

large commercial quantity. Sentences therefore vary significantly as shown in the table below:

Drug	Total cases	Prison	Prison %
Heroin	173	152	89%
Amphetamines	317	255	80%
Cocaine	54	32	59%
Ecstasy	73	49	67%
Total	617	488	79%

c) Persistent sexual abuse of a child contrary to s 66EA of the *Crimes Act 1900.*

The Committees note that current JIRS statistics record only 17 cases for offences contrary to s 66EA. In those cases 100% of offenders received a custodial sentence and most sentences imposed were very substantial. The section captures a wide range of criminality and for all of those reasons does not satisfy the criteria submitted at 2.1 above.

d) Solicit and conspiracy to murder contrary to s 26 of the *Crimes Act 1900.*

It is the Committees' view that soliciting a person to kill a third party is of course fundamentally abhorrent and serious. However, this offence encompasses a broad range of offending behaviour; from no harm being occasioned to the intended victim due to factors beyond the offender's control, through to the victim being unharmed due to the offender voluntarily withdrawing from the enterprise. This charge also captures a range of matters where the intended victim suffers harm; sometimes where the offender is the ringleader and at other times where the offender is a minor player in a much broader plan.

The Committees submit that the wide range of offending encompassed by these offences is evident in JIRS statistics, which show a broad spread of sentences with no clearly discernible grouping around a middle range.

The JIRS statistics also suggest that it is not a prevalent offence.

It is the Committees' view that offences which presently carry a guideline judgment should be excluded from the scheme as the courts already have sufficient guidance in relation to sentencing for these offences, as previously highlighted by the Judicial Commission.

The Committees support the exclusion of offences which can be summarily tried as such offences do not meet the criteria they propose given:

(a) They are not of such seriousness so as to attract a maximum penalty of 20 years; and

(b) That they can be dealt with to finality in the Local Court may also be an indicator that a broad range of offending is encompassed by the offence such that it is difficult to specify the middle of the objective range.

Question 2.2

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

The Committees submit it should be used in combination with the other criteria listed in the response to 2.1.

Question 2.3

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

(2) What types of offence should be SNPP offences?

The Committees submit it should not be a criterion, particularly when it is a discrete offence amongst a cluster of non-SNPP offences that have similar elements.

Question 2.4

What child sexual assault offences should be SNPP offences?

Please refer to the Committees' letter of 14 October 2013 to the Sentencing Council endorsing the submission from Legal Aid NSW attached for your convenience.

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?

The Committees submit that for the same reason that offences cover a wide range of offending behaviours they are not suitable to be SNPP offences.

Question 2.6

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

It is the Committees' view that aggravated offences should only be included if they meet the criterion in 2.1. However, the Committees note that often aggravated offences (such as those described in 2.1) encompass a broad range of offences and are therefore not appropriate for inclusion in the scheme.

Question 2.7

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

The Committees' view is that it should be used in combination with the criteria set out in 2.1.

Question 2.8

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

It is the Committees' view that such offences should not apply as by definition they do not fit the criteria set out in 2.1.

If it is a Table 1 or Table 2 offence it should not be subject to SNPP because by definition it encompasses a wide range of criminal activity and therefore it does not fit into the criteria set out in 2.1.

A concern of the Committees is the interpretation of s 45 of the *Crimes (Sentencing Procedure) Act 1999*. In the jurisdiction of the Local Court this process appears to add additional restraints to the discretion of the Magistrate in imposing a sentence for an SNPP offence.

Question 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 2.1 above.

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?

It is the Committees' view, that although community concern is a relevant consideration for the setting of criminal penalties generally, it is very difficult to identify and measure informed community opinion for the reasons outlined in 1.24 and 1.25 of the consultation paper. For this reason, the Committees recommend that community concern not be a formal criterion for assessing whether an offence should be an SNPP offence. The criteria recommended at 2.1 (seriousness and prevalence) are capable of objectively identifying offences about which the community may have well-held concerns and which may be suitable for inclusion in the scheme.

At 4.1 the Committees submit that the Sentencing Council should be the appropriate body to recommend offences to be included or removed from the SNPP scheme. The committees note that the Sentencing Council has a number of members appointed to reflect community concerns and on difficult questions it has the capability to call for community comment.

Question 2.11

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

(2) How should that disparity be measured?

It is the Committees' view that if there is disparity in sentencing for an offence it will often be a result of wide ranging behaviour captured by the particular offence in question.

The Committees submit that in most cases it is practically impossible to determine whether disparity is due to that fact or due to inconsistent judicial approaches to sentencing except if a detailed analysis of each and every case is undertaken. The Committees' view is that statistics alone are incapable of identifying disparity as disparate sentences imposed for an offence encompassing a broad range of criminality might just as likely indicate consistency in sentencing approach as it might suggest inconsistency. This is one of the reasons why the Committees have recommended the criteria set out in 2.1 above.

In the event that an offence satisfies those criteria the Committees recommend that a case by case analysis of the true reasons for any perceived disparity be undertaken before an offence is added to the scheme.

Question 2.12

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

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

(b) to which SNPP offences should they relate?

As the consultation paper recognises, the SNPP will currently apply to a person who is liable as a principal for an offence by virtue of the doctrine of joint criminal enterprise.

The Committees do not support the inclusion of accessorial offences, additional attempt offences, or aiding and abetting in the SNPP scheme, as such offences are often of a very broad range of seriousness and can attract sentences where a full time custodial term of imprisonment is not imposed.

The Committees note their response to question 2.1 regarding the exclusion of solicit to murder from the scheme.

Question 3.1

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

The Committees' view is that it seems an extremely difficult, if not nearly impossible, task to rationally determine and justify an appropriate level at which an SNPP ought to be set.

The Committees cannot suggest a way to approach this question which would not directly conflict with the role of sentencing judges in properly exercising their discretion to arrive at a fair sentence.

That said, and given that the Government has determined to retain the scheme, the Committees recommend that SNPP be set at between 25-40% of the maximum penalty.

This is consistent with the Committees' previous submission to the Sentencing Council.

Question 3.2

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

It is the Committees' view that SNPP should not be set on an offence by offence basis. See 3.1.

The Committees say further that the current illogical structure of SNPP and maximum penalties demonstrates how the current scheme does not work well in practice. (See Appendix A of the consultation paper which demonstrates that the proportion of the maximum penalty which is represented by the SNPP varies between 21.4% to 80% depending upon the offence).

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?

See the Committees' response to question 3.1.

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?

See the Committees' response to question 3.3 above.

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?

The Committees' view is that a high proportion of SNPP to maximum penalty would never be appropriate. The Committees concur with the comments quoted at 1.23 in the consultation paper that setting an SNPP so high is illogical, and comments made previously by the Bar Association (quoted in the NSW Law Reform Commission's *Report 134: Interim report on standard minimum non-parole periods*, May 2012, at 2.104). The Committees note further that the NSW Law Reform Commission considered there was merit in the Bar Association's observations (at 2.109).

The Committees submit that it is also difficult to see how setting an SNPP that is so high is consistent with the object of the *Crimes (Sentencing Procedure) Act 1999* to increase consistency and transparency. It rather has the appearance, and indeed effect based on Judicial Commission research, of serving to increase penalties.

Question 3.6

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

The Committees agree with the difficulties expressed in the comments of the consultation paper (see 3.29 – 3.31) and are of the view these issues require considerable discussion.

Question 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?

It is the Committees' view that all determinations whether to include or remove an offence from the SNPP scheme should be reviewed by the Sentencing Council and recommendations from that Council forwarded to the Attorney General.

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?

See the Committees' response to question 4.1 above.

(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?

It is the Committees' view that given the Sentencing Council has community members, by definition it takes into account community views. However, if required it can call for submissions.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Criminal:JDad783080

14 October 2013

The Hon. James Wood AO QC
Chair
NSW Sentencing Council
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SYDNEY NSW 2001

By email: joseph.waugh@agd.nsw.gov.au

Dear Chair,

Priority Submissions on SNPPs for Child Sexual Assault Offences

I write to you on behalf of the Criminal Law and Juvenile Justice Committees of the Law Society of NSW ("the Committees"), in relation to the Sentencing Council's Consultation Paper on standard minimum non-parole periods ("SNPPs"). In particular, I refer to the Sentencing Council's request for priority submissions with regard to SNPPs as they relate to child sexual assault offences.

The Committees have had the opportunity to read the submission prepared by Legal Aid NSW and have chosen to endorse Legal Aid's submission as it accurately represents the Committees' position.

I thank you for the invitation to make a submission.

Yours sincerely,

John Dobson
President

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Legal Aid NEW SOUTH WALES

STANDARD MINIMUM NON-PAROLE PERIODS

A consultation paper by the NSW Sentencing Council

Priority consideration of SNPP for child sexual assault offences

Legal Aid NSW submission to the

NSW Sentencing Council, Attorney General & Justice

October 2013

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also administers funding for a number of services provided by non-government organisations, including 36 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW criminal law practice provides legal assistance and representation in criminal courts at each jurisdictional level throughout the State, including proceedings in Local Court and Children's Court, committals, indictable sentences and trials, and appeals. Legal Aid NSW specialist criminal law services include the Children's Legal Service, Prisoners' Legal Service and the Drug Court.

Legal Aid NSW has recently developed a particular expertise in standard minimum non-parole periods (SNPPs). As a result of the High Court of Australia decision in *Muldrock* v The Queen (2011) 244 CLR 120; [2011] HCA 25, the Standard Non-Parole Period Review team was established to systematically review relevant cases and identify appeals arising from the judgment.

Legal Aid NSW values the opportunity to make this priority submission on SNPPs for child sexual assault offences in response to the Sentencing Council, Attorney General and Justice, consultation paper on Standard Minimum Non-Parole Periods (SNPP).

Should you require any further information, please contact Annmarie Lumsden, Executive Director, Strategic Policy and Planning on 921966324 or at annmarie.lumsden@legalaid.nsw.gov.au.

Introduction

This submission addresses the priority consideration of SNPPs for child sexual assault offences and specifically, the questions identified by the Sentencing Council in its consultation paper on Standard Minimum Non-Parole Periods (SNPPs),(the Consultation Paper), namely:

Question 2.4 What child sexual assault offences should be SNPP offences, and

Question 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?

The submission will also make some general observations about the SNPP scheme and briefly touch on other issues raised in the consultation paper as they relate to child sexual assault offences.

The premise of this submission is that sentencing is a highly complex exercise and this calls for a cautious approach to legislative intervention to limit or restrict the discretion of the sentencing judge or magistrate.

Question 2.4 What child sexual assault offences should be SNPP offences

Child sexual assault offences and SNPPs generally

Legal Aid NSW reiterates the views expressed in its 2007 and 2009 submissions to the Sentencing Council that sentencing sexual offences is a highly complex exercise, and the particularities of sexual offences make them unsuited to the limitations and restrictions of the standard non-parole period scheme. This applies to sexual offences against children to the same extent as it applies to sexual offences against adults.

Because sexual offences depend very much on the context or circumstances accompanying the acts that constitute an offence, the attempt to separate the objective seriousness of the offence from the subjective circumstances of the offender can create particular difficulties. This is a concern, for example, where the offender and/or the victim has a disability which bears on the issue of consent.

The aggravating and mitigating factors that under the scheme may be used to vary a standard non-parole period for a mid-range offence are not all appropriate considerations in the context of sexual offences. Nevertheless, their existence in the list of factors that can be taken into account can lead to certain factors being inappropriately taken into account at sentence. Examples include the mitigating factors at section 21A(3)(a) and (c), which encourage a focus on considerations that the law on sexual assault has tried to move away from.

Sexual assault offences are already graduated in a way that takes into account detailed circumstances of aggravation, depending on the associated conduct of the offender or circumstances of the victim. Their inclusion in the standard non-parole period scheme creates a tension in the sentencing process between the penalties attached to specific offences and the requirement to consider a limited range of aggravating and mitigating factors. For these reasons, Legal Aid NSW is of the view that no child sexual assault offences should be SNPP offences.

Criteria for SNPP offence

In addition, Legal Aid NSW is of the view that no new non-SNPP child sexual offences should be SNPP offences on the basis of criteria that should be used to assess whether an offence should be a SNPP offence.

Legal Aid NSW notes that a fundamental rationale for the SNPP scheme was inconsistent sentencing trends that do not adequately reflect the seriousness of the offence. Clearly, this concept runs counter to the exercise of judicial discretion appropriate to the circumstances of a particular case. However, accepting the fundamental rationale for the SNPPP scheme and accordingly, that criteria, the preliminary summary view of Legal Aid NSW is that addition criteria for a SNPP offence should be that the offence:

a) carries a maximum penalty of 20 years imprisonment or more

b) is prevalent, and

c) does not encompass a wide range of offending behavior.

As noted in the Consultation Paper, the Sentencing Council reviewed penalties relating to sexual offences in 2008, some of which are specific to children and other of general application. Excluding the offence under section 66EA of the *Crimes Act 1900* (NSW) for which it took a separate view as discussed below, at that time the Sentencing Council concluded that for all non-SNPP sexual offences, there did "not appear to be a sufficient incidence of offending as to justify their inclusion ... but it is important that there be a continuing review of each because of the message that their inclusion in the table would convey" (paragraph 2.11).

Subsequently, as noted in the Consultation Paper, the 2011 Sentencing Council background report found that for the period 2006-2010 the incidence of the following non-SNPP sexual offences was significant:

- Indecent Assault: *Crimes Act 1900* (NSW) s 61L;
- Act of Indecency: *Crimes Act 1900* (NSW) s 61N;
- Aggravated Act of Indecency: *Crimes Act 1900* (NSW) s 61O;
- Sexual Intercourse – child between 10 and 16: *Crimes Act 1900* (NSW) s 66C;
- Production, dissemination or possession of child abuse material: *Crimes Act 1900* (NSW) s 91H (paragraph 2.41).

The Consultation Paper observes that offences under section 61L and 61N of the *Crimes Act 1900* (NSW), while prevalent, do not meet the identified seriousness criteria (paragraphs 2.42 - 2.45).

Legal Aid NSW is also of the view that 61O of the *Crimes Act 1900* (NSW) does not meet that criteria either, as the maximum penalty for the offence under 61O(2A) is imprisonment for 10 years.

The 2011 Sentencing Council background report also noted the need to consider whether various offences of sexual intercourse with a child between 10 and 16 years under sections 66C(1), (2) and (4) of the *Crimes Act 1900* (NSW), 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.

However, the Sentencing Council noted that barring other valid grounds for inclusion in the SNPP list, there was no data to suggest that sentencing trends for these offences were currently inconsistent (paragraph 2.15).

For all other non-SNPP sexual offences Legal Aid NSW notes that there remains insufficient incidence of offending to justify their inclusion as a SNPP offence.

Section 66EA

The Consultation Paper notes that in its review of penalties relating to sexual offences in 2008, the Sentencing Council suggested including the offence of persistent sexual abuse of a child under section 66EA of the *Crimes Act 1900* (NSW) as a SNPP offence "to overcome a problem with the court's treatment of the offence" (paragraphs 2.11 and 2.14), namely that section 66EA has been interpreted as a "procedural offence" that merely relieves the complainant of the task of remembering precise dates and circumstances.

The criteria for a SNPP offence proposed by Legal Aid NSW suggest that the offence of persistent sexual abuse of a child would establish that it is not an appropriate offence for inclusion in the scheme. The offence of section 66EA can encompass a wide range of offending behavior,[1] from three acts of indecency to continuous penetrative sexual acts over a period of years. In addition, as the section has been rarely prosecuted,[2] adequate statistics are not available from which to determine an appropriate mid-range.

A more appropriate course of overcoming the "problem with the court's treatment of the offence" would be to amend section 66EA to make it clear that the gravamen of the offence is the persistence of the abuse.

Question 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?

Setting the level of SNPPs

Legal Aid NSW is of the view that there are no circumstances in which a high proportion of SNPP to maximum penalty (for example 80%) would be appropriate for a SNPP offence.

Consistent with the views expressed in its 2009 submissions to the Sentencing Council Legal Aid NSW, which adopted the reasoning in the 2009 submission of the NSW Bar Association, Legal Aid NSW would opposes any proposal to adopt SNPPs greater than 40% of the available maximum penalty. Instead, consideration should be given to standardising the existing SNPPs for sexual and other offences within a range of 25% to 40% of the available maximum penalty.

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[1] *R v Manners* [2004] NSWCCA 181 [34].
[2] Judicial Commission statistics show 17 cases in total.

In addition, no new offences should be added to the SNPP regime until such time as a transparent mechanism for setting the SNPP has been developed and made public.

Appeals arising from Muldrock

Of the cases identified by the Legal Aid NSW Standard Non-Parole Period Review team where the SNPP had been given determinative significance contrary to the High Court decision in *Muldrock*, approximately 75% involve offences where the SNPP is a relatively high proportion of the maximum penalty (at least 50%) or where a high SNPP has been set for an offence carrying life imprisonment. A relatively large proportion of the matters involve sexual assault offences.

Assuming judges now apply *Muldrock* and use the SNPP only as guidepost or marker, further sentencing decisions are far less likely to give rise to appellable error. However, it remains possible that some judges will use the SNPP, perhaps inadvertently, as more than a guidepost. If judges were to use the SNPP as more than a guidepost, then particularly where the SNPP is a high proportion of the maximum penalty, this may lead to imposition of a sentence that is unjust or manifestly excessive, requiring appellate intervention.

Timing of consultation

As a result of identifying cases where the SNPP had been given determinative significance contrary to the High Court decision in *Muldrock*, as at October 2013 Legal Aid NSW has 27 applications for leave to appeal against the severity of sentence listed for hearing in the CCA, and a further 29 applications in the Supreme Court under Part 7 *Crimes (Appeal and Review) Act* (for clients who had appeals determined in the CCA before the decision in *Muldrock*) seeking referral to the CCA for a fresh sentence appeal.

The imminent publication of 27 decisions from the CCA, and up to 68 decisions in the next six months, involving SNPP offences will most likely further develop the law on SNPPs. Legal Aid NSW expects that stakeholders will be in a better position to comment on the operation of SNPPs and the questions in the Consultation Paper when these matters have been finalised.

Conclusion

Legal Aid NSW remains of the view that the particularities of sexual offences make them unsuited to the limitations and restrictions of the standard non-parole period scheme. This applies to sexual offences against children to the same extent as it applies to sexual offences against adults. This is the primary reason why no child sexual assault offences should be SNPP offences. However, Legal Aid NSW is of the view that no new non-SNPP child sexual offences should be SNPP offences on the basis of criteria that should be used to assess whether an offence should be a SNPP offence. In relation to the offence of persistent sexual abuse of a child under section 66EA of the *Crimes Act 1900* (NSW), rather than making it a SNPP offence, the more appropriate course of overcoming the "problem with the court's treatment of the offence" would be to amend the section 66EA to make it clear that the gravamen of the offence is the persistence of the abuse. In addition, Legal Aid does not support a high proportion SNPP to maximum penalty.

Legal Aid NSW is concerned that this consultation may be premature given the special fixture hearings in the CCA that will consider the SNPP scheme and its application in the coming months. It is expected that stakeholders will be in a better position to comment on the operation of SNPPs and the questions in the Consultation Paper when these matters have been finalised.