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 [redacted] or at [redacted].

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.

[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 the present date Legal Aid NSW has filed 39 applications for leave to appeal against the severity of sentence, 27 of which are listed for hearing in the Court of Criminal Appeal, 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.