The Public Defenders

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NSW Law Reform Commission

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Sent electronically: nsw-lrc@justice.nsw.gov.au

Dear Commissioners,

Response to Serious Road Crime Consultation Paper

Thank you for the opportunity to make submissions in response to the NSW Law Reform Commission's consultation paper on serious road crime.

Public Defenders are salaried barristers employed by the Department of Communities and Justice who work independently of the government, and in accordance with the ethical obligations of barristers, modified slightly to reflect their duties as statutory office holders governed by the *Public Defenders Act*. Public Defenders advise and appear in serious criminal matters briefed by the Aboriginal Legal Service or where there is a grant of Legal Aid (instructed by a solicitor from Legal Aid or a private solicitor with an assignment of aid). Public Defenders' first instance appearance work is primarily in the District and Supreme Courts (where the Standard non-parole period (SNPP) scheme operates), although specialist appearances in the Local and Children's Court sometimes occur especially for the assistance of Legal Aid or the Aboriginal Legal Service.

Public Defenders are located in regional areas of NSW as well as metropolitan, and take an active statewide role in the education of the profession in criminal law as well as the provision of informal advice to legal practitioners throughout the state.

Public Defenders undertake a significant level of appellate work (NSW Court of Criminal Appeal (CCA) and High Court). The process of allocation of Legal Aid for appellate matters requires considered written advice from counsel in a large number of matters which do not in fact proceed to the CCA or High Court, in addition to the work involved in those which do, because of the merit requirement for a grant of Legal Aid to appeal to these courts. This provides a wealth of experience in reviewing, with a high level of attention and expertise, first instance trial and sentence proceedings in this state.

The Senior Public Defender, in addition to the work of a Public Defender, and management responsibility in relation to the work of Public Defenders, has a statutory duty to advise the Attorney General on matters of criminal law reform, and is routinely involved in the formulation of policy submissions. The Senior Public Defender is also traditionally a member of the NSW Sentencing Council.

Response to the questions proposed is set out hereunder.

2. Offences

Question 2.1: No. No inadequacy has been shown in the serious criminal offences currently available.

Question 2.2: (1) Yes.

(2) The case of *R v Lidgard* [2022] NSWDC 445 raised in the consultation paper does not cause concern with the longstanding application of the High Court's decision in *Jiminez v R* (1992) 173 CLR 572.

(3) There is submitted to be no sufficient basis outlined in the consultation paper for amendment of elements.

Question 2.3: (1). No. By reference to another area of criminal law where the term 'substantial' is used – namely the partial defence to murder of substantial impairment, the term has been held to mean of substance, not insignificant or trifling. The use of the word 'very' in the circumstance of aggravation is submitted to be necessary to provide sufficiently clear distinction from the basic offence.

(2): There seems merit in adjusting the threshold to cover something like '45 km or 50% over the maximum penalty, whichever is the lesser' to accommodate the very high level of

dangerousness that may occur in low speed areas at a speed of less than 45 km an hour over the applicable limit.

(3) No. the Last proposal on page 23 of the consultation paper (commission as part of a prolonged, persistent and deliberate course of 'very bad driving' offers some potential work but also seems potentially problematic in application.

Question 2.4: The better option would seem to raise penalties for RTA offences (eg as at consultation paper 2.92 where no death or GBH). The victim may not be caused actual bodily harm but very frightened, the driving may have been very dangerous, and so on. A greater range of options would cover the different levels of seriousness.

Question 2.5: The issue of repeal or amendment of this offence is linked to the response to 2.4.

Question 2.6: (1) No.

(2) It is submitted that more information would be useful in providing an opinion regarding this question. In the time available the report of the 2015 inquiry has not been analysed.

Question 2.7: No

Question 2.8: No.

Question 2.9: No, because of the coverage by lesser offences.

Question 2.10: (1) No. There is no adequate reason indicated for treating road crime differently from other types of serious crime.

(2) NA

(3) The Act is sufficiently structured currently.

Question 2.11

(1) Not so far as we are aware. The law regarding accessorial liability generally is submitted to be in need of review. There is no indication that road crime should be treated separately from other criminal offending in relation to this complicated area.

(2) Possibly, but there is not sufficient detail provided in the consultation paper (nor otherwise of salience to the Public Defenders currently) to respond further.

3. Penalties

3.1: (1) Yes regarding both.

(2) No. The availability of an intensive correction order (ICO) in an individual case is already sufficiently limited by three important factors. These are: (i) the length of sentence of imprisonment imposed, (ii) any determination pursuant to s 66(2) of the *Crimes (Sentencing Procedure) Act* that full-time custody is more likely than an ICO to address the offender's risk of re-offending (which, given the requirement in s 66(1) that community safety is the paramount consideration in determining whether to order the service of a term of imprisonment by an ICO, will often point towards full-time detention if the offending is serious enough), and (iii) the appropriate exercise of judicial discretion to order that the sentence of imprisonment be served by full-time detention even where an ICO is likely to better address the offender's risk of re-offending, because the purposes of sentencing otherwise (such as the seriousness of the offence, recognition of the harm done to the victim and the community, the need for the sentence to reflect general deterrence and so on) point to this.

The Public Defenders support the removal of artificial exclusion of offences from the availability of ICOs – certainly not any addition to these barriers. It is understood that artificial exclusion of offences from the ICO scheme (rather than reliance on the three natural limitations set out above) in fact often results in inadequate sentences – such as community corrections orders imposed for sexual offending which should properly have resulted in an ICO (but for their unavailability). It is noted that the Sentencing Council in its 2021 *Homicide* report recommended that ICOs become available for the offence of manslaughter for similar reasons.

3.2: Yes to all.

3.3: Yes to all.

3.4: The only suggestion made is the granting of restricted licenses, which was recommended by the Sentencing Council in 2020 and not adopted by government.

3.5: No. The problems with mandatory minimum sentences are well known and there is no suggested need for these in this sphere.[1]

[1] These are addressed in the Public Defenders' February 2024 submissions to Sentencing Council referred to below.

4. Sentencing principles and procedures.

4.1: No.

4.2: Generally speaking, the guideline is still relevant and appropriate. However the discussion in it of 'moral culpability' has some friction with current sentencing principle.

4.3. No. The standard non-parole period (SNPP) scheme is strongly opposed. Our detailed submissions to the Sentencing Council dated 13 February 2024, for the purposes of its current reference (sentencing for firearms, knives and other weapons offences), are attached and relied upon, and are also available on the Sentencing Council's website.

In essence, the scheme is submitted to be unnecessary, to not provide for consistency or transparency in sentencing (suggested aims of the scheme), and to have provided untold distraction and diversion from the already complex task of sentencing which is well served by principles of the common law and the guidance provided by maximum penalties and other statutory considerations. We based our submissions to the Sentencing Council on not only significant experience, but a review of the great amounts written about the scheme in a number of publications of the Law Reform Commission and the Sentencing Council (as outlined in our February 2024 submissions to Sentencing Council).

Importantly we submitted that there is no jurisprudentially valid method of nominating the length of a standard non-parole period, because of the absence of a conceptual justification for the scheme. The publications make abundantly clear that until December 2013 there was no discernible basis for the nomination of SNPP lengths, which have ranged from about 20 % to 80% of the maximum penalties for the included offences. Without clear consultation or explanation (of this issue) the Sentencing Council in its December 2013 publication *Standard non-parole periods* recommended a 'rule of thumb' of SNPPs corresponding to 37.5% of the maximum penalty, with some minor adjustment up or down to reflect considerations such as the potential vulnerability of victims, and the extent to which the offence involves a breach of trust (these seemingly nominated because of the 2013 context which focused on consideration of sexual offending against children).

The figure was based on an assumption that 'a mid-range offence should attract a head sentence of 50% of the maximum sentence' (and thus ¾ of this – 37.5 % - would be the 'standard' non-parole period, absent a finding of special circumstances pursuant to s 44). This assumption can only have meaningful application in the SNPP scheme if it is meant to

paraphrase the terminology of s 54A(2); namely, an offence that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness. The assumption was based on obiter dicta pre-dating the High Court's decision in *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120. Like the secondary material available from when the SNPP scheme was introduced, this dicta contemplated as valid a process of reasoning where a judge considers a sentence suitable for the objective features of a crime and then adjusts it for 'subjective features'. Such a two-stage process of sentencing has been comprehensively rejected. It is submitted that this was already clear by the stage of the Sentencing Council's December 2013 37.5% 'rule of thumb,' by virtue of the decision in *Muldrock*, but has been made even more explicitly clear in subsequent cases such as the High Court's decision in *The Queen v Kilic* [2016] HCA 48; 259 CLR 256.

The SNPP scheme is inherently disruptive of the proper application of the instinctive synthesis method of sentencing. There is no benefit and much potential problem caused by asking judges to consider a number in years for a component only – not even of the case before the Court – but of an abstract offence. A fundamental reason for the appellate problems caused over the last 20 years by the scheme is its requirement that sentencing judges advert to something they would not advert to in the course of good sentencing procedure otherwise.

As can be seen from the development of a method of calculation of SNPP length, these are not based on any informed guidance to judges from Parliament about the individual offences beyond the maximum penalty (other than the minor adjustments recommended by the Sentencing Council, which are really only double counting factors already reflected in the maximum penalty). The 50 % sentence (37.5% non-parole period) 'assumption' does not need to be legislated if it is legally sound – but it is not legally sound.

As outlined in the reports referred to above, the SNPP scheme has been for a long time generally opposed and its abolition called for by the Public Defenders, Bar Association, Law Society, Legal Aid, the Aboriginal Legal Service, and Council for Civil Liberties. There have been occasions when its abolition has been called for by the Director of Public Prosecutions and a head of jurisdiction.

It is anticipated that the Sentencing Council will be required to make some comment or recommendation regarding the scheme given the terms of reference of its firearms and knives referral, and the questions posed in its relevant consultation paper.

It is submitted that the SNPP scheme should be abolished, and that no additional offences should be added to it in the meantime (or prior to a review of its operation). Furthermore, as has been noted when the SNPP scheme has been considered previously in relation to serious road crime, the existence of a guideline judgment is a reason for not including offences covered by the guideline in any scheme which exists. The scheme is also particularly inapt for offences with maximum penalties of less than 20 years imprisonment because of the availability of sentences other than imprisonment as informing the relevant range, thus further distorting the 37.5% 'rule of thumb' assumption.

5. Jurisdictional issues

5.1: (1) No.

(2) No.

5.2: No, and consideration should be given to removing manslaughter. The Children's Court in both instances has / would have capacity to require sufficiently serious matters be dealt with at law.

6. The experiences and rights and victims

The Public Defenders are generally supportive of restorative justice principles and improvement of support for victims. However details of proposals in these regards are better left for those with more targeted experience.

Yours sincerely,

Belinda Rigg SC

Senior Public Defender

The Public Defenders

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13 February 2024

The Hon Peter McClellan AM KC
Chair of the Sentencing Council of NSW
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Dear Mr McClellan AM KC,

Weapons-related offences

The Public Defenders thank the NSW Sentencing Council (the Sentencing Council) for the opportunity to respond to its Consultation Paper 'Weapons-related offences: sentencing adult offenders' (the Consultation Paper, CP) and Issues Paper 'Weapons-related offences: sentencing young offenders' (the Issues Paper, IP).

Public Defenders are salaried barristers employed by the Department of Communities and Justice who work independently of the government, and in accordance with the ethical obligations of barristers, modified slightly to reflect their duties as statutory office holders governed by the *Public Defenders Act*. Public Defenders advise and appear in serious criminal matters briefed by the Aboriginal Legal Service or where there is a grant of Legal Aid (instructed by a solicitor from Legal Aid or a private solicitor with an assignment of aid). Public Defenders' first instance appearance work is primarily in the District and Supreme Courts (where the Standard non-parole period (SNPP) scheme operates), although specialist appearances in the Local and Children's Court sometimes occur especially for the assistance of Legal Aid or the Aboriginal Legal Service. Public Defenders have experience being briefed in indictable matters which raise issues such as the carrying of knives and weapons by juveniles

and young people, including matters of the type said to have been the impetus for this referral.

Public Defenders undertake a significant level of appellate work (NSW Court of Criminal Appeal (CCA) and High Court). The process of allocation of Legal Aid for appellate matters requires considered written advice from counsel in a large number of matters which do not in fact proceed to the CCA, in addition to the work involved in those which do. This provides a wealth of experience in reviewing, with a high level of attention and expertise, first instance sentence proceedings in this state. The Public Defenders were instrumental in the review of an enormous number of cases which required consideration, following the October 2011 decision of the High Court in *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 (*Muldrock*), of the implementation of the SNPP scheme before such judgment.

The Senior Public Defender, in addition to the work of a Public Defender, has a statutory duty to advise the Attorney General on matters of criminal law reform,[1] and is routinely involved in the formulation of policy submissions. The Senior Public Defender is also traditionally a member of NSW Sentencing Council. Public Defenders are located in regional areas of NSW as well as metropolitan, and take an active state-wide role in the education of the profession in criminal law as well as the provision of informal advice to legal practitioners throughout the state. The primary focus of our submission will be the CP, with particular focus on the SNPP scheme.

Introduction

1. Data from the NSW Bureau of Crime Statistics and Research reveals that, in the year leading up to March 2023, the occurrences of murders, attempted murders, assaults, and robberies involving knives or firearms were at their lowest compared to nearly any other year in the past 20 years.

2. Conversely, according to the NSW Bureau of Crime Statistics and Research, 'Aboriginal over-representation in the NSW Criminal Justice System', June 2023,

[1] *Public Defenders Act* s 8(1)(d).

the numbers of Aboriginal young people in remand increased by 95.2% from June 2021 to June 2023.[2]

3. The Public Defenders submit that this data is important. Reforms should focus on reducing the involvement of lower-level offenders, including young individuals, in the criminal justice system. Steps to increase penalties or participation in the criminal justice system should only be implemented in response to compelling evidence.

4. Reform must consider its impact on imprisonment levels and in particular on the imprisonment levels of Indigenous Australians. It should also consider the economic and social cost of increasing incarceration and whether it is an effective means of reducing crime, reducing reoffending and rehabilitating offenders.

5. Our position is summarised below. The Public Defenders:

   a. Do not support increased maximum penalties or the introduction of mandatory minimum sentences;
   b. Support the introduction of a tiered-based maximum penalty regime for possession or use of a prohibited weapon under section 7 of the *Weapons Prohibition Act 1998* (NSW), to differentiate between classes of weapons and the risk they present to the community;
   c. Consider that gel blasters should be removed from the *Firearms Act 1996* (NSW) (allowing for criminal charges when imitation or replication of a firearm features);
   d. Contend that the SNPP scheme should be reviewed and abolished generally, should not be expanded in respect of any firearms and weapons offences, do not agree with the December 2013 Sentencing Council recommendations as to selection of offences for inclusion in the SNPP scheme or determination of SNPP length, and contend that if not abolished the SNPP scheme should be amended to remove offences covered by the current referral with a maximum penalty of less than 20 years imprisonment; and
   e. Oppose knife crime prevention orders and the creation of indictable offences for knife-possession offences.

[2] Available at: https://www.bocsar nsw.gov.au/Pages/bocsar_pages/Aboriginal-over-representation.aspx

CP Chapter 3: Maximum Penalties

Question 3.1 (1) Is the maximum penalty for possessing a prohibited weapon in NSW adequate?

Question 3.1 (2) Should maximum penalties depend on the type of prohibited weapon possessed? If yes, what categories should be used and what maximum penalty would be appropriate for each category of prohibited weapon?

6. Section 7 of the *Weapons Prohibition Act 1998* (NSW) (WPA) provides for a maximum penalty of 14 years imprisonment for the offence of unauthorised possession or use of a prohibited weapon. The Public Defenders consider that the maximum penalty for possessing a prohibited weapon in NSW is adequate as an outer limit on the sentencing power, subject to our comment below. We are unable to identify any decisions of a Court where there has been adverse comment as to the magnitude of the maximum penalty for offences contrary to s 7. Given the offence deals with possession, and in instances of multiple weapons can involve multiple sentences and applicable adjustments for accumulation of sentence, it is sufficient.

7. However, as noted at CP 3.12, the WPA contains a list of weapons that are considered "prohibited weapons" under the Act, including knives, military-style weapons, miscellaneous weapons, imitations, concealed blades etc, and miscellaneous articles. The maximum penalties should depend on the type of prohibited weapon possessed. Given the range of weapons from miscellaneous, relatively innocuous articles up to military-style weapons capable of inflicting enormous damage, the use of the maximum penalty as a relevant sentencing yardstick is diminished without differentiation. Under the current sentencing scheme, possession of a laser pointer or handcuffs carries the same maximum penalty as would a portable surface-to-air missile launcher. It is inappropriate to have a single maximum penalty which applies to such a broad range of possessory conduct. The maximum penalty should be confined to the most serious military-style weapons, capable of inflicting enormous damage. Lower maximum penalties or penalty should be introduced for other prohibited weapons.

8. An approach of differentiation of weapons and maximum, in similar style to classifications deployed under Schedule 1 *Drug Misuse and Trafficking Act* for quantity and drug type, but potentially differentiated by weapons, size and calibre, is a possible approach. Differentiation of this kind will serve as a more accurate guidepost for sentencing and promote consistency of sentencing outcomes, akin to other areas of criminal offending. As the High Court has said, judges need yardsticks. A differentiated approach will also be more in line with current sentencing outcomes emanating from lower courts in NSW.[3]

9. We note the Sentencing Council at CP 3.25 observes that '[t]he low average non-parole period of five months for an offence with a maximum penalty of 14 years may indicate that the lower-level offenders are being dealt with appropriately in the Local Court, without the need to differentiate maximum penalties by prohibited weapon type.' However, it is submitted that the use of the maximum penalty as a useful yardstick is diminished and there is a risk that judges and magistrates may be required to rely on extraneous information or judicial notice to consider the impact of a specific weapon type on objective seriousness. The Public Defenders submit that consistency in sentencing outcomes may be improved by differentiated maximum penalties.

10. In the alternative, a simplified, two-tiered approach may be appropriate, differentiating only between military-style weapons which are capable of causing widespread harm and other prohibited weapons. It is submitted that the latter category should be the subject of a substantially lower maximum penalty if this approach is adopted, such as 5 – 7 years. 7 years represents half of the maximum penalty. Possession or use of a firearm without licence or permit contrary to s 7A *Firearms Act* 1996 (NSW) carries a maximum penalty of 5 years imprisonment. Even 5 years is vastly greater than the majority of sentences imposed under this section. These types of figures are suggested as a more reasonable magnitude of maximum penalty.

[3] Noting CP 3.22-3.25 and the statistics set out there.

Question 3.2: Is the maximum penalty for possession contrary to a weapons prohibition order appropriate? If not, why, and what should be the maximum penalty?

11. The maximum penalty of 10 years imprisonment for possession or use of a prohibited weapon in contravention of a weapons prohibition order (s34(1) WPA) is lower than the maximum penalty of 14 years imprisonment for possession or use of a prohibited weapon. This works in favour of a reduction in the maximum penalty for Possession of a Prohibited Weapon under s 7 for weapons which are not military-style weapons, rather than increasing the maximum penalty for a s 34(1) WPA offence.

12. The Public Defenders submit there is insufficient evidence supporting an increase in maximum penalties for s34(1) WPA offences.

Question 3.3(1) Are the maximum penalties for possessing a firearm, prohibited firearm or pistol adequate?

13. The Public Defenders consider that the penalties for these offences are adequate. Again, the statistics do not demonstrate any difficulty: see CP 3.45.

14. The Public Defenders consider that an increase in maximum penalties will disproportionately burden remote and regional communities, and may particularly impact First Nations communities in those areas. The presence of firearms in regional areas on rural properties is common. Testamentary bequest of firearms is not uncommon. Firearms, and occasionally unregistered firearms, are inherited by people who do not have a firearms licence and may well be ignorant or unaware of their obligations under the law.

Question 3.3(2) Should increased maximum penalties for "prohibited persons" be introduced? If yes, why and what criteria should be used for a "prohibited person", and what should the maximum penalties be?

15. The Public Defenders submit that there should not be increased maximum penalties for "prohibited persons". Again, the maximum penalties provide ample latitude for the imposition of an appropriate sentence. It is likely that a

person committing an offence as a 'prohibited person' will be considered more adversely than otherwise would be the case.

Question 3.3(3) Should the maximum penalties for subsequent offences of firearm possession be increased? If yes, why, and what should the maximum penalties be?

16. The Public Defenders do not support increased maximum penalties for subsequent offences of firearm possession. We are unaware of data supporting any conclusion that increased maximum penalties for subsequent offences of unauthorised firearm possession has an effect on deterring recidivist offenders. Moreover, the maximum penalty provides for ample punishment of recidivist offenders through ordinary sentencing considerations. The Public Defenders note that the presence of a record (especially for similar offending) may be an aggravating factor on sentence under s21A(2)(d) *Crimes (Sentencing Procedure) Act 1999 (*the Sentencing Act*)*.

17. Again, a concern is expressed regarding the extent to which imposing a higher penalty would disproportionately affect regional communities.

Question 3.4 Should mandatory or minimum sentences be introduced for certain firearms offences? If so, what kind of minimum penalties should be introduced and for which offences?

18. The Public Defenders strongly oppose mandatory sentences in general, including the introduction of them for any firearms or weapons offences. Mandatory sentences, by their nature, undermine judicial discretion. They prevent a proper consideration of the purposes of sentencing, set out in s 3A of the Sentencing Act which accord generally with the common law purposes of sentencing, which are well known, but for example as discussed in *Veen v The Queen (No 2)* (1988) 164 CLR 465 where Mason CJ, Brennan, Dawson and Toohey JJ said at 476:

> … sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend,

> retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.

19. Similarly, *R v Engert* (1995) 84 A Crim R 67 Gleeson CJ said at 68 after discussing *Veen v The Queen (No 2)*:

> A moment's consideration will show that the interplay of the considerations relevant to sentencing may be complex and on occasion even intricate. …
>
> It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise.

20. Mandatory sentencing ignores the range of factors that impinge on criminal culpability and the purposes of sentencing, resulting in potentially inappropriate, harsh and unjust sentences. As Gibbs CJ (Wilson J agreeing) in *Lowe v The Queen* (1984) 154 CLR 606 at 609 stated:

> It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence, have to be taken into account.

21. As referred to below in addressing the SNPP scheme, a strong line of High Court authority pronounced since the commencement of that scheme has confirmed as core factors of the common law of sentencing the need for individualised justice (as demonstration of consistency, not in opposition to it), the instinctive synthesis method of imposing sentence (in which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case), the need for deep understanding of features which may reduce moral culpability for offending (such as a background of deprivation, or

intellectual disability) and the range of consequences this has on the purposes of sentencing and the sentence to be imposed, and the complex nature of the sentencing task. The Public Defenders refer to the *Mandatory Sentencing Policy Discussion Paper* published by the Law Council of Australia in May 2014. In that Discussion Paper, the Law Council concluded that mandatory sentencing:

(1) potentially results in unjust, harsh and disproportionate sentences where the punishment does not fit the crime. It is not possible for Parliament to know in advance whether a minimum mandatory penalty will be just and appropriate across the full range of circumstances in which an offence may be committed. There are already numerous reported examples where mandatory sentencing has applied with anomalous or unjust results;

(2) when adopted, fails to produce convincing evidence which demonstrates that increases in penalties for offences deter crime;

(3) potentially increases the likelihood of recidivism because prisoners are placed in a learning environment for crime, which reinforces criminal identity and fails to address the underlying causes of crime;

(4) provides short- to medium-term incapacitation of offenders without regard for rehabilitation prospects and the likelihood of prisoners reoffending once released back into the community;

(5) wrongly undermines the community's confidence in the judiciary and the criminal justice system as a whole. In-depth research demonstrates that when members of the public are fully informed about the particular circumstances of the case and the offender, 90 per cent view judges' sentences as appropriate;

(6) displaces discretion to other parts of the criminal justice system, most notably law enforcement and prosecutors, and thereby fails to eliminate inconsistency in sentencing;

(7) results in significant economic costs to the community, both in terms of increasing incarceration rates and increasing the burden upon the already under-resourced criminal justice system, without sufficient evidence to suggest a commensurate reduction in crime; and

(8) is inconsistent with Australia's international obligations, including:

   a. the prohibition against arbitrary detention as contained in Article 9 of the International Covenant on Civil and Political Rights (ICCPR);

   b. the right to a fair trial and the provision that prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR; and

   c. key obligations concerning children under Articles 3, 37 and 40 of the Convention on the Rights of the Child.

22. We agree with those conclusions and adopt them in making this submission. The Law Council noted that evidence was then also mounting that overseas jurisdictions which have substantial experience of mandatory sentencing are now moving away from such schemes because of doubt regarding the efficacy of mandatory penalties in reducing crime; increased incarceration costs; the potential for arbitrary, unduly harsh, and disproportionate sentences; and discriminatory impacts. It is not likely that a mandatory sentence will provide an effective deterrent effect beyond the current maximum penalties.

23. The Public Defenders also note the likely effect of mandatory sentencing on the Early Appropriate Guilty Plea scheme. There is significantly reduced incentive to plead guilty where an offender is facing a mandatory sentence, even where a discount is applied. Having regard to the relative frequency of non-custodial sentencing options imposed in lower courts for weapons-related offences, the imposition a mandatory minimum is likely to remove the incentive to plead early.

24. Moreover, the approach to mandatory sentencing, and how it fits in with orthodox sentencing schemes, is yet to be settled. In particular (although considered in a different, specific statutory context), it remains to be seen whether a mandatory minimum sentence operates as a sentencing yardstick akin to a maximum penalty. It also remains to be seen whether a mandatory is reserved for the 'least worst' case. Those matters may be resolved when the High Court delivers its decision in the reserved judgement in *Hurt v The King; Delzotto v The King* [2023] HCATrans 156 (9 November 2023). Regardless of how those principles of law are resolved, the principal arguments against mandatory minimum sentences remain relevant.

Question 3.5: Maximum penalties for gel blasters and imitation firearms

3.5(1) Are the maximum penalties for gel blaster use or possession in NSW appropriate?

25. The potential consequences for possessing a gel blaster depend on its classification as either a pistol or other type of firearm, with maximum penalties

ranging from 5 to 14 years of imprisonment: ss 7 and 7A *Firearms Act* 1996. If a gel blaster is categorised as a pistol, the higher maximum penalty of 14 years' imprisonment is applicable. Additionally, owning more than three gel blasters, especially if one of them is a pistol or prohibited firearm, is considered a strictly indictable offence under section 51D(2) of the *Firearms Act* 1996 (NSW) and carries a maximum penalty of 20 years imprisonment.

26. The Public Defenders submit that the penalties for gel blaster use or possession in NSW are disproportionate when these are toy-like, and may lead to manifestly excessive sentences (although noting the existence of District Court and Supreme Court judgments recognising the relative triviality of offending that can be involved with these items). Given the fact that gel blasters are often marketed to children and are sold online in this way in other states (including Queensland), there is a real risk of the unnecessary criminalisation of young people unless reform is pursued.

3.5(2) If gel blasters should be dealt with separately from firearms and imitation firearms, what would be the appropriate way to do so and what would be the appropriate maximum penalties?

3.5(4) If imitation firearms should be dealt with separately from firearms, what would be the appropriate way to do so and what would be the appropriate maximum penalties?

27. The Public Defenders submit that gel blasters (or at least gel blasters which resemble toys) should be removed from the definition of 'firearm' in the *Firearms Act* 1996 (NSW) and that gel blasters should not be incorporated within the *Paintball Act* 2018 (NSW). Regulation akin to paintball markers is neither necessary nor proportionate. In particular, we note that in *R v Smith* [2023] NSWDC 88, evidence indicated that a paintball marker's impact force is 14 times higher than a gel blaster.

28. The Public Defenders note that gel blasters can still be considered to be an 'offensive weapon or instrument' for the purpose of relevant criminal offences within the *Crimes Act* 1900 (NSW). As noted by the Office of the Director of

Public Prosecutions in its Preliminary Submission at pg 3, if gel blasters were removed from the definition of 'firearm' under the *Firearms Act* 1996 (NSW) but a particular gel blaster substantially duplicated in appearance a firearm and was not produced and identified as a children's toy, it may qualify as 'imitation firearm', which is a 'dangerous weapon' under the *Crimes Act*.

CP Chapter 4: Standard Non-Parole Periods

Question 4.1(3) Are there any offences that do not currently have SNPPs that we should consider for inclusion (other than those we discuss from [4.51] onwards)? If so, why?

Question 4.2(1) Are the principles set out at [4.9] (should be 4.14) appropriate for determining whether weapons offences should be included in, retained or removed from the SNPP scheme?

Question 4.3(1) Is the process set out at [1.8] (NB should be 4.21 – 4.23) appropriate for determining the length of an SNPP for a weapons offence? Why or why not?

Responding also to questions 4.5(2), 4.6, 4.7

29. While the Public Defenders support the need for consistency in sentencing, we do not support the SNPP scheme, and do not support expansion of the scheme in respect of firearms and weapons offences. Maximum penalties and SNPPs are legislative guideposts (*Muldrock* at 132 [27]); however, the Public Defenders question the extent to which SNPPs truly fulfil that purpose. The High Court in *Muldrock* was engaged in a task of statutory construction, not with considering the desirability of SNPPs as sentencing yardsticks, the manner specifically in which they could be so used, or reconciling in any way or commenting upon the length at which they are set.

30. We recognise that at CP 4.12 the Sentencing Council stated:

> The terms of reference for the 2013 review did not ask us to consider whether the SNPP scheme should exist or not. The terms of reference for this review also do not ask us to consider whether the SNPP scheme remains appropriate, but rather whether the SNPPs for offences within the scope of the review are appropriate.

31. Nonetheless we consider it important to explain as briefly as possible our opposition in respect of SNPPs generally, as it informs our answers to the terms of reference and specific questions asked in the CP. The question of the appropriate length of SNPPs calls in a fundamental way for endeavouring to understand the conceptual justification of the scheme. Clearly as well it is our view of the scheme which informs the strongly held view that there should be no expansion of the existing SNPP scheme to include new offences. The Public Defenders call for further review of the scheme's efficacy.

32. Our opposition to the SNPP scheme and to the selection and calculation methods contained in the CP is based on a number of factors. It is unnecessary: see below at [33] – [36]. It has come at almost unfathomable cost, and cannot be seen to have achieved anything: [37]-[50]. The process set out at CP 4.21 – 4.23 is not appropriate for determining the length of a SNPP for a weapons offence and there remains a fundamental lack of ability to identify the point of a SNPP so as to nominate its length: [51] – [130].There is a fundamental lack of harmony between the scheme and proper sentencing principle.

33. The scheme is unnecessary. We remain of the view as previously submitted to this Council on 11 October 2013, in response to a call for submissions regarding SNPPs, that common law sentencing principles, the principles embodied in the Sentencing Act (e.g. ss.3A. 5, and 21A[4]), 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 (purported purposes of the scheme). Education, ongoing striving for clarity of reasons in sentencing judgments, and more information for judges such as by enhanced JIRS functions are tools more meaningfully able to manage the purported goals of the scheme.

34. In its report published July 2013, Report 139: *Sentencing* (NSWLRC 2013 final report), the NSW Law Reform Commission (NSWLRC or the Law Reform Commission / Commission) noted that the Sentencing Council plays an

[4] Although the last of these is not regarded by the Public Defenders as necessarily positive.

important advisory and public education role.[5] The Commission's interim report published in May 2012, Report 134: *Sentencing – Interim report on standard minimum non-parole periods* (NSWLRC 2012 interim report)[6] had acknowledged the Sentencing Council's background reporting in November 2011 - *Standard Non-Parole Periods, A background report* (Sentencing Council November 2011) - regarding the flawed premise that the community expected higher penalties for serious crime – and the need for enhanced information and education; and this was again acknowledged in the Commission's final report. The Sentencing Council's September 2013 published *Standard Minimum Non-Parole Periods, Questions for discussion* (Sentencing Council September 2013 Consultation paper) outlined the difficulty in gauging informed public opinion about sentencing.[7]

35. Consistent application of principle in the determination of the length of sentences of full-time imprisonment does not require any more specific articulation of law than the maximum penalty and the common law (and any express statutory indication of matters to be taken into account for policy reasons, such as discounts for guilty pleas and assistance). Judges know how to sentence, and the scheme offers nothing but diversion and distraction from the proper (albeit complex) sentencing task. The conceptually flawed method of calculation of SNPPs proposed in the CP (to which see further below) exposes either or both the lack of need for the SNPP scheme (in that it is based on an assumption which, if valid, shows the scheme to be unnecessary); or worse than this, as the assumption is not valid, the fact that after two decades there does not exist any clear understanding of how SNPPs should be set because their conceptual justification is not known.

36. There seems to be no meaningful organisation of data supporting the achievement of any positive aim of the scheme. Very limited early studies by the Sentencing Council in the 2000s and the Judicial Commission in 2010 are referred to repeatedly in the reports of the NSWLRC and the Sentencing Council as all

[5] NSWLRC Report 139: *Sentencing* (July 2013) 0.52.
[6] NSWLRC 2012 interim report, 2.14.
[7] Sentencing Council *Standard Minimum Non-Parole Periods, Questions for discussion* (September 2013) 1.24.

that was meaningfully available. For example the Sentencing Council's report published in December 2013 *Standard non-parole periods* (Sentencing Council December 2013) still relies on 2010 Judicial Commission statistics regarding whether anything had been achieved, and confirmed that the impact of the decision in *Muldrock* had not yet been evaluated.[8]

37. The scale of the cost of the scheme has been immense – addressed now simply in terms of the massive burden on the judiciary and legal profession, without addressing the toll on individual offenders and the community caused by any increase in sentences which has not been justified.

38. The scheme has caused vast problems from the outset, continuing over two decades and abated somewhat but not stemmed by the relaxation of application of the scheme following the High Court's decision in *Muldrock* and 2013 amendments to the Sentencing Act.

39. In its report published in August 2008 *Penalties relating to sexual assault offences in New South Wales* Volume 1 (Sentencing Council 2008), the Sentencing Council noted at 3.26 (footnote in original) that:

> The Council has drawn attention in earlier reports to some of the difficulties which have arisen in relation to the application of s 54A of the Crimes (Sentencing Procedure) Act 1999 (NSW).[9]

40. In its report published in January 2011 *Standard Non-parole Periods for Dangerous Driving Offences* (Sentencing Council January 2011) the Sentencing Council recorded at 15 – 16 that there was a plethora of decisions in the CCA concerned with the operation of the scheme and its implementation by a sentencing judge revealing the complexity of sentencing in this State caused largely by the introduction of s 21A of the Sentencing Act and the SNPP scheme. These were

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[8] Sentencing Council December 2013 1.25. The need for such evaluation was a key consideration to the NSWLRC in its post *Muldrock* recommendations for the continuation of the scheme. See also NSWLRC 2012 interim report 1.57 ff).

[9] See New South Wales Sentencing Council, Report on Sentencing Trends and Practices 2003-2004 (2004) 10-22; New South Wales Sentencing Council, Report on Sentencing Trends and Practices 2004-2005 (2005) 9-14; New South Wales Sentencing Council, Report on Sentencing Trends and Practices 2005-2006 (2006) 13-6; New South Wales Sentencing Council, and Report on Sentencing Trends and Practices 2006-2007 (2007), 25-46.

said to have also noted the difficulty in applying the apparently illogical and inconsistent SNPPs set for certain offences, and an increase in the level of sentences for some offences as a result of the scheme notwithstanding that the introduction of the scheme was not intended to increase sentences for the offences falling within the Table (citing *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 (*Way*) at [141] – [142]).

41. In Sentencing Council November 2011 it was stated at 2.48 (footnote omitted):

> It has been judicially noted that the application of the SNPP scheme has been causing problems; and has been one of the causes of an increase in Crown appeals against sentence in recent years. The annual Sentencing Trends & Practices reports of this Council since its 2005–2006 report have drawn attention to the incidence of errors and appeals in relation to the application of the SNPP scheme.

42. The report referred to the existence of a multitude of cases regarding the extent to which individual characteristics causally related to offending were to be taken into account in assessing objective seriousness: for example *MDZ v R* [2011] NSWCCA 243. Despite the High Court in *Muldrock* seemingly clearly stating that such characteristics did not logically bear on 'an offence in the middle of the range of objective seriousness' as s 54A(2) of the Sentencing Act provided prior to 2013 amendment (and as even more clearly stated by the 2013 amendments), the issue was regarded by the NSWLRC in September 2013 as left unresolved (in part because the High Court had not in *Muldrock* considered earlier High Court authority on the topic), was the subject of unsuccessful reforming recommendations by the NSWLRC, and continued troubling Courts to varying degrees until mid-2022 [10] (which issue would not have warranted any consternation upon the proper application of the instinctive synthesis method of sentencing, unhindered by the SNPP scheme, which allows free focus on all relevant matters and recognises the importance of an offender's moral culpability).

[10] *DS v R; DM v R* [2022] NSWCCA 156; 109 NSWLR 82.

43. Further in Sentencing Council November 2011 it was noted at 4.57 and 4.58 that whereas primary justifications for the scheme were promoting consistency and transparency in sentencing, and public understanding of the sentencing process, submissions described the scheme as complex, difficult to understand and wholly lacking in transparency. Other ways for improving consistency and transparency (enhanced JIRS information, education, guideline judgments etc.) were discussed.[11] Discussion of the magnitude of appellable error was referred to at 4.67 – 4.68. In the opening paragraphs of this correspondence we referred to the Public Defenders' involvement in the post-*Muldrock* review of sentencing determinations in the period of operation of the scheme until October 2011. The embarking on this process is referred to in the NSWLRC 2012 interim report at 1.72.

44. As discussed below regarding the process of setting the length of SNPPs, the Sentencing Council in September 2013 published *Standard Minimum Non-Parole Periods, Questions for discussion* (Sentencing Council September 2013 consultation paper). By this time an often-cited clear example of particular problems that arise when courts must reconcile SNPP, maximum penalty and the presumptive ratio between non-parole period and total sentence was the case of sentencing for aggravated indecent assault (which remains an extreme example of the problems of the scheme, following amendments).[12]

45. The report *Standard non-parole periods; Sexual offences against children / An interim report by the NSW Sentencing Council* published by the Sentencing Council in November 2013 (Sentencing Council November 2013) confirms that the manner in which general principles - referred to at the outset justifying the scheme - were taken into account and applied to each offence was not disclosed, which has led to general criticism of scheme as lacking transparency and delivering anomalous sentencing outcomes.[13]

[11] Sentencing Council November 2011 4.57 ff.
[12] Sentencing Council September 2013 consultation paper at 3.25 – 3.26.
[13] Sentencing Council November 2013 1.8.

46. Significantly more attention than is available for these submissions would be required to address the law as articulated over the last two decades regarding the assessment of objective seriousness, or of an offence in the middle of the range of objective seriousness, or an offence which, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness, for the purposes of sentencing offenders for offences with a SNPP.

47. Despite the High Court's determination in *Muldrock* at 132 [29] that the terms of the then applicable Sentencing Act s 54B(4) did not require the sentencing judge in cases governed by the SNPP scheme to classify the objective seriousness of offending, and the 2013 reforming legislation making this clearer still in s 54B(6) (the statutory requirement for a court to make a record of reasons for setting a non-parole period that is longer or shorter than a standard non-parole period does not require the court to identify the extent to which the seriousness of the offence for which the non-parole period is set differs from that of an offence to which the standard non-parole period is referrable), a very large number of appeals have been concerned with suggested error in this regard. In the 12 months from late 2022 onwards alone, see as some examples: *DH v R* [2022] NSWCCA 200 at [58] - [60], *Kochai v R* [2023] NSWCCA 116 at [47] - [51], *R v Sharrouf* [2023] NSWCCA 137 at [274], and *Walker v R* [2023] NSWCCA 219 at [3]-[4] and [56]-[59].

48. In many ways an understanding of the caselaw, legislative developments, and law reform work over the last two decades demonstrates a process of endeavouring to apply legislation ostensibly restrictive of judicial discretion in a way that reduces to as little as is required the distance between necessary application of the provisions and orthodox sentencing. The current position is significantly less restrictive of judicial discretion than has previously been thought to be required. However a fundamental reason for so much law regarding this scheme is its ongoing requirement for sentencing judges to advert to something they would not advert to in the course of good sentencing following the instinctive synthesis model: a quantitative figure (years)

representing a sentence for a component only – not even of the case before the court (which would itself be inappropriate) – but of an abstract offence. As discussed below, this is antithetical to the instinctive synthesis method, and is not a process prompted by respecting the proportionality principle.

49. Apart from the terrible lack of transparency demonstrated in this regime, lack of consistency (in the sense of unlike cases being treated alike) is a real problem. This has long been recognised in relation to the risk of consideration of objective seriousness dominating other important considerations. However the movement to considering not just a point in the middle of the range of objective seriousness but a broad 'mid-range', which may be a range so indistinct and undefined that descriptions of offending as below 'mid-range', in the 'mid-range', and above 'mid-range' may be treated as meaning the same thing, that greatly disparate objective offending risks being considered as though the same.[14]

50. As explained further below, for many offences the fact of inclusion in the SNPP scheme, utilising a rule of thumb as high as 37 ½ % for setting the SNPP, and adjusting it upwards (or not adjusting it downwards, despite the actual sentencing trends and statistics) due to the factors nominated by the Sentencing Council December 2013 report, creates a compounding or cascading process of likely escalation of penalty, despite the fact no inadequacy of sentencing practice has ever been identified. Fundamentally, diverting judges from sentencing in accordance with McHugh J's judgment in *Markarian v R* [2005] HCA 25; 228 CLR 357 (*Markarian*), endorsed by the High Court in *Muldrock* and consistent with the High Court decisions in *Elias* and *Kilic,* runs a meaningful risk of producing unjust sentences – whether this can be easily discerned or not.

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[14] See *Way* at [102] regarding the broad 'mid-range' (a term not used in any version of the legislation) and for example *R v Pearce* [2020] NSWCCA 61 at [56], [58] – [59], *R v Sharrouf* [2023] NSWCCA 137 at [274], *Walker v R* [2023] NSWCCA 219 at [2] – [3]. The Second Reading Speech did talk of points: with SNPPs as an important reference point, being a point in the middle of the range: see for example as quoted in *Way* at 181 [49].

51. The Public Defenders contend that the SNPP has an unstable identity, and no transparent conceptual justification so as to be able to rationally nominate lengths. This raises issue with CP question 4.3(1), which really directs attention to CP 4.21 – 4.23. We do not agree with the method of calculation for three major reasons:

- The assumption that 'a mid-range offence should attract a head sentence of 50% of the maximum sentence' can only be meaningful in this context if it is meant to paraphrase the terminology of s 54A(2); namely, an offence that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness. Any assumption that such 'offence' should attract a head sentence of 50% of the maximum sentence is not valid.

  If valid, the whole scheme would be unnecessary – the rationale proceeds on the basis that the lengths will be set in accordance with the law as it already exists (with some minor tweaks for factors such as the offence being aggravated, the victim being especially vulnerable and so on). Clearly the calculated figures would not then be something requiring legislation, but can be made up administratively as a table for by or for any judge or practitioner (a 'ready reckoner' setting out what 37.5% and 50% of the maximum penalties is for each offence). This would form the basis of submissions and reasons for judgment, at first instance an on appeal.

  Clearly no such thing occurs, because the assumption is not a statement of existing law. The assumption is not valid. No authority is cited in support of it other than some 2007 obiter remarks of Howie J in *Maxwell v R* [2007] NSWCCA 304. We are not aware of the assumption forming the ratio of any decision of the CCA or High Court. A handful of obiter remarks can be referred to – mainly by appellate judges criticising the scheme – framed in very broad terms, not analysing McHugh J's judgment in *Markarian* or the instinctive synthesis approach, and made prior to the High Court's judgments in *Muldrock* and *The Queen v Kilic*

[2016] HCA 48; 259 CLR 256 (*Kilic)*. The long-standing requirement of all sentencers to assess objective seriousness and respect proportionality does not require specific nomination on a range, does not permit let alone require consideration of a figure suitable for sentence looking at only the objective seriousness of the case, and plays no role by itself in assisting the judge where on a range of sentencing options with the maximum at the top, the case should be placed.

- The very broad proposition that a *case* (taking into account all its components) which falls in the middle of the range of seriousness should attract a head sentence of 50% of the maximum penalty is true only in the most crude of ways, and even then only for offences which do not carry any meaningful scope for sentences other than full-time imprisonment. Any possible path to move from this very broad proposition to discern a suitable SNPP for an offence regarding which only one component is known has not been made clear (and is not clear). Any offence where the range of expected contraventions includes proportionate punishment by the imposition of sentences other than full time imprisonment can not be looked at on a spectrum graded the same way, because the range of sentencing options does not commence at a day in custody (thus offences with a maximum penalty of less than 20 year should be excluded).

- If the rule of thumb approach is adopted, there is no warrant for tweaking it. There is no justification for increasing the SNPP beyond 37.5% because of the factors set out at CP 4.21(a) – (d) (which are matters that have directly contributed to the maximum penalty being what it is, and accordingly 37.5% of that figure being as high as it is). The statistics, practice and guidelines mentioned at 4.21 (e) would be of direct relevance to the 'offence by offence' method of setting SNPPs, but not to the rule of thumb approach recommended in December 2013 (although these may, in a parallel way with a maximum penalty of less than 20 years, indicate a meaningful range of offences are dealt with by

non-custodial options, demonstrating that a 37.5% consideration is inapt).

52. As to the last of these three reasons, we acknowledge before moving on that an offence 'in the middle of the range' (as categorised both prior to and subsequent to the 2013 amendments to Sentencing Act s 54B) is different from the mean sentence. The CCA in *Way* noted that a mid-range offence is not necessarily represented by a 'typical' or 'common' case, because such a case only indicates the numerical frequency of its occurrence, and not the objective criminality or the consequences of the offence: 189 [101].

53. However the middle of the range is not the middle of the range of only those matters dealt with on indictment which are serious enough to require the imposition of a sentence of full-time imprisonment. Local Court sentences are set as against the maximum penalty as the relevant yardstick, not the jurisdictional limit: *R v Doan* [2000] NSWCCA 317; 50 NSWLR 115 [35].

54. The contextual history of the Sentencing Council December 2013 suggested method of calculation of SNPP length is important in understanding it. This method was offered in pressing circumstances, a decade after the SNPP scheme commenced, when it had formed no part of any meaningful policy work prior thereto despite significant ongoing analysis.

55. In 2004 the Sentencing Council reviewed firearms offences in *Firearms Offences and the Standard Non-parole Period Scheme* (Sentencing Council 2004). The Council made no recommendations as to length of SNPPs, but did as to inclusion of certain firearms offences in the scheme.

56. It was stated a number of times in this report that nothing can be drawn from JIRS statistics as to what sentence would be appropriate for an offence in the middle range of seriousness.[15] There was no suggestion that one could simply halve maximum penalties to show suitable head sentences for an offence in the middle of the range of objective seriousness as per the SNPP definition (then

[15] Sentencing Council 2004 8, 13, 15.

apply the ¾ ratio to expose a matching NPP) to reveal a suitable SNPP for legislative action.

57. Of relevance to the current inquiry, and the CP's inclusion of some recent sentencing statistics, the Sentencing Council 2004 report analysed contraventions of s 7 of the *Firearms Act* which has a maximum penalty of 14 years imprisonment and initially had a SNPP of 3 years imprisonment. At 15 it was said (footnotes omitted):

> From the JIRS sentencing statistics, it can be seen that there are well over 2,600 sentences imposed in the Local Court in the past 5 years against the Firearms Act 1996. In stark contrast, 42 sentences were imposed in the higher courts over the same period against the Firearms Act 1996. Specifically in relation to section 7 offences, the vast majority of sentences were imposed in the Local Court, with the most common penalty being a fine. Only 6% received a sentence of imprisonment. In the higher courts, 50% received a prison sentence, with the highest non parole period being 18 months. This is markedly lower than the 3-year standard non-parole period specified in the table.

58. The 37.5 % 'rule of thumb' suggestion came about at the very last minute of a further five year process of consideration of the method of selecting offences for inclusion and the setting of their lengths.

59. In 2008 the Sentencing Council reviewed sexual offences. The terms of reference, resulting in 3 volumes of report, included a request to address anomalies or gaps in the law of sentencing in relation to sexual offences, and specifically by term of reference 3 to:

> Advise on the use and operation of statutory maximum penalties and standard minimum sentences when sentences are imposed for sexual offences and whether or not statutory maximum penalties and standard minimum sentences are set at appropriate levels.

60. Volume 1, *Penalties Relating To Sexual Assault Offences In New South Wales* (Sentencing Council 2008) was published in August 2008. *Way* was referred to

throughout this report, and there was no mention of the High Court's decision in *Markarian*. The Council recommended:[16]

> Giving consideration at the time of any wholesale review of the Crimes (Sentencing Procedure) Act 1999 (NSW) to standardising the SNPPs for sexual (and other) offences within a band of 40- 60% of the available maximum penalty, subject to the possibility of individual exceptions, by reference to an assessment of the incidence of offending and special considerations relating thereto.

61. No conceptual foundation for the proposed 40 – 60% range was offered. The report included analysis of existing SNPPs, sentences imposed, and was clearly concerned to provide some amelioration of the existing problems and the scope for great injustice caused by the SNPP levels set for some offences.

62. Recommendation 25 was to consult with the NSW Sentencing Council regarding potential additions to the SNPP scheme, involving the level or levels at which the SNPP might be appropriately set. Recommendation 26 was to give consideration to the establishment of a transparent mechanism by which a decision is made to include a particular offence in the Table, and by which the relevant SNPP is set.

63. The Council confirmed at 3.29 – 3.30 that it had not been able to determine reasons for how the SNPPs were set although secondary material suggested the maximum penalty, seriousness of offences, current trends, and community expectations had been considered (in a way that was not explained).

64. The Council said at 3.38:

> The concerns which were primarily identified in the submissions were to the effect that there is no consistency in the ratio between the SNPPs and the maximum sentence for the sexual offences, and that the SNPPs have been set too high having regard to the prior sentencing pattern and the conventional approach taken to the application of s 44 of the Crimes (Sentencing Procedure) Act 1999 (NSW).

[16] Recommendation 24 - executive summary and page 69.

65. This report shows very stark problems.[17] Table 4 showed the SNPPs as a proportion of the NPP that would attach on the usual ratio in a worst case attracting the maximum penalty. These were nothing like 50% (which would correspond with the assumptions later made in Sentencing Council December 2013) but figures such as 80% for s 66A (sexual intercourse with child under the age of 10 years), 120% for 61M(2) (aggravated indecent assault with person under the age of 10 years), and 95% for s 61M(1) (aggravated indecent assault).[18]

66. The extremity of these figures understandably had attracted critical submissions which very roughly assumed the type of reasoning which then came to be taken as an assumed proposition of law in Sentencing Council December 2013. For example at 3.40 – 3.41, after referring specifically to s 66A (offences of sexual intercourse-child under 10 years), it was said:

> This offence carries a maximum penalty of imprisonment for 25 years. The SNPP is 15 years, which represents 60% of the maximum. If the objective seriousness of a particular offence was found to be in the middle range and there was no adjustment downwards of the NPP for s 21A reasons, then if the balance of the term was set at one-third of the NPP, the prisoner would be sentenced to an overall term of 20 years. That would represent 80% of the maximum sentence and place the sentence into that band of sentences traditionally reserved for the worst possible case.

67. The report refers to Simpson J's critique of these type of ratio problems in *R v AJP* (2004) 150 A Crim R 575, [36], then also to the 7 year maximum / 5 year SNPP as then applicable for 61M(1), aggravated indecent assault.

68. Table 5 and the commentary at 3.55 ff. highlighted the divergence between the median and average NPPs actually set and the SNPPs. This was thought to give rise to '..some cause for concern as to whether, in some cases, the SNPPs have been set too high, and as to whether a more transparent methodology should be adopted in setting the SNPPs in the future.'

69. The conclusion regarding problems and possible way forwarded was reached in the particularly acute setting of the SNPPs for many of the sexual offences under

[17] See for example 3.39 ff.
[18] Leaving out s 61JA - aggravated sexual assault in company - which is not amenable to the same calculation as it carries a maximum penalty of life imprisonment.

consideration being so extremely high and unworkable: see further Sentencing Council 2008 3.65 – 3.66. In that context, the Council then suggested at 3.68:

> The Council is of the view that, as a general principle, the SNPPs for the sexual offences included in the Table should be set consistently within a more narrow band of say 40-60% of the maximum penalty by reference to an assessment of the incidence of offending and existing sentencing patterns. The advantages would be as follows:
>
> • such a scheme would leave the present case law concerning sentencing practices intact;
>
> • it would provide consistency in the ratio of the SNPP to the maximum penalty in place of the wide variations which currently exist both within the Table, and in current sentencing outcomes as demonstrated in the JIRS tables;
>
> • it would be of greater efficacy if SNPPs in reality reflected the median range of objective seriousness;
>
> • it would enhance the intention of the legislature that the amendments promote greater consistency and transparency;
>
> • it may provide fewer avenues of appeal and by these means lessen the burden on the Court of Criminal Appeal;
>
> • it would satisfy the legislature's concern regarding repeat off enders and condign punishments; and
>
> • it would overcome the problem noted above in relation to s 61M(2).

70. At 3.70 it was said that logically similar considerations would apply to the SNPPs for other offences included in the Table, which would then have the effect of overcoming the disparities evident. Relevantly for the purposes of the current inquiry, the example was provided of the fact that whereas s 61I of the *Crimes Act* has a maximum penalty of 14 years imprisonment with a SNPP of 7 years, unauthorised possession of a firearm contrary to s 7 of the *Firearms Act* (with the same maximum penalty) has a SNPP of 3 years.

71. The Council recognised that any substantial revision of the Table at that stage could have the effect of unsettling current trends in sentencing, and lead to inequities in sentencing outcomes for those sentenced prior to any amendment, such that revision would need to await a substantial review of the Sentencing Act.[19] However it was considered necessary to bring this anomaly to attention

[19] Sentencing Council 2008 3.71.

so that it could be addressed if, at any time before such a review, it was thought appropriate to add one or more offences to the Table.

72. As noted above there was no articulation of why the 40 - 60% range was suggested other than, inferentially, its relationship with existing patterns of SNPPs and sentences and some attempt to disrupt existing sentencing principles as little as possible. The Sentencing Council December 2013 37.5% figure received no mention nor articulation other than obliquely in the sense that the general proposition was advanced that these really high SNPPs would, if actually imposed and orthodox setting of the balance of term applied, result in sentences close to, at or above the maximum, which should be for worst cases.

73. The 2008 recommendations (including consideration of the suggested 40-60% range for SNPP levels) were referred back to the Council and formed the basis of a number of subsequent reports.

74. On 30 March 2009 the Attorney-General requested that the Sentencing Council examine SNPPs and guideline judgments in accordance with terms of reference (set out on page 1 of Sentencing Council 2011) including consideration of standardising the SNPPs for sexual (and other) offences within a band of 40 – 60% of the available maximum penalty, subject to the possibility of individual exceptions.

75. There were five reports of the Sentencing Council and Law Reform Commission published prior to and related to the Sentencing Council's December 2013 report in which the relevant calculation of length of standard non-parole period is considered.

76. In June 2010 the Sentencing Council was asked to deal first discretely with dangerous driving, and in January 2011 the Council published its report, *Standard Non-parole Periods for Dangerous Driving Offences* (Sentencing Council January 2011), prior to the High Court's decision in *Muldrock*.

77. This report considered whether the offences of dangerous driving occasioning death or grievous bodily harm (and the applicable aggravated offences) should

be included in the SNPP scheme.[20] It was recorded that there were no submissions in favour of extending the scheme to dangerous driving offences.[21] The Council saw no justification in increasing the complexity of sentencing for dangerous driving offences by introducing a SNPP for those offences or some of them. The Council recommended that there be no standard non-parole period fixed for any dangerous driving offences contained in the *Crimes Act*.[22]

78. Although opposed to adding driving offences to the table, the DPP submitted that if included 'Logically the SNPP should be set at half the statutory maximum penalty for each of the offences.'[23]

79. The Sentencing Council noted at 12:

> The SNPPs are set at different levels—ranging from 21.4% of the maximum penalty (for items 20 and 24 in the Table) to 80% of the maximum penalty (for item 9B). Even where offences have the same maximum penalty there is a significant disparity in the levels at which the SNPPs are set. For example, items 2, 3, 4, 10, 11 and 13 of the Table are offences with the same maximum penalty of 25 years imprisonment; however, the SNPPs range from seven to 15 years, with the SNPP for item 10 more than doubling that for items 4, 11 and 13.

80. Page 13 noted multiple inconsistencies for offences with 10 year maximum penalties, including SNPPs of 8 years and 3 years. Page 14 quotes the 2003 article by Peter Johnson SC (as he then was) on the issue of disparity of SNPPs (this is quoted in virtually all, if not all reports on this issue). After referring to the existence of several offences with the same maximum penalty, but differing standard non-parole periods, the author said 'These differing statutory numerical indicators may serve to demonstrate that some offences are regarded by the legislature as being more serious than others, although these offences

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[20] It is noted that the Law Reform Commission is currently considering recommendations for the potential reform of sentencing law in relation to serious road crime including as to whether any such offences should be included in the SNPP regime.
[21] Sentencing Council January 2011 p 35.
[22] Sentencing Council January 2011 p 47.
[23] Sentencing Council January 2011 p 38. The problem of the 50% figure is addressed in more detail below. This is an early mention of it – but seemingly not recognising that it is not a head sentence but non-parole period nominated (see also RS Hulme J in *Najem* [2008] NSWCCA 32).

have the same maximum penalty. Such an approach would involve concepts, which are new to the law of sentencing.'

81. Following this report, the prospect of standardisation of the SNPP scheme to a 40-60% range was seemingly an outstanding reference to the Sentencing Council when *Muldrock* was argued in the High Court in June 2011. On 23 September 2011 the Attorney General asked the Law Reform Commission to review the Sentencing Act including, specifically, the operation of the SNPP scheme.[24] The terms of reference required consideration of current sentencing principles including those contained in the common law, the need to ensure that sentencing courts are provided with adequate options and discretions, and opportunities to simplify the law, whilst providing a framework that ensures transparency and consistency, and the operation of the standard minimum non-parole scheme.

82. Given the overlap of terms of reference between Sentencing Council and Law Reform Commission, the two bodies were invited to (and did) work collaboratively, with the Sentencing Council's November 2011 *Standard Non-Parole Periods* background report not making any specific recommendations but rather providing analysis by way of a background report.[25] Sentencing Council November 2011 provided detail of the problems caused by the inconsistent range of relationships of SNPPs to maximum penalties.[26]

83. Judgment was delivered by the High Court in *Muldrock* on 5 October 2011 and the Sentencing Council November 2011 addressed the High Court decision as well as the regime as applied prior to the decision. It acknowledged that the High Court at [26] squarely endorsed the approach to sentencing described by McHugh J in *Markarian* – of identifying *all* the factors that are relevant to the

[24] Sentencing Council November 2011 page 2, NSWLRC Interim Report page 1.
[25] Sentencing Council November 2011 1.11 – 1.13.
[26] For example Sentencing Council November 2011 3.7 – 3.10 confirming that disproportionality caused the Council's 2008 recommendation of consideration to standardising SNPPs within a band of 40-60%, although this required wide ranging review and on the proviso that this consideration of standardisation be deferred until such time as a wholesale review was made of the Sentencing Act, and noting at 3.13 that this issue will now be addressed by the NSWLRC in its review of sentencing laws.

sentence, discussing their significance and then making a value judgment as to what is the appropriate sentence given all the factors of the case.

84. Sentencing Council November 2011 stated that the process by which Table offences were selected and relevant SNPPs set remains somewhat opaque.[27]

85. In March 2012 the Attorney-General asked the Law Reform Commission to provide an interim report on the operation of the SNPP scheme.[28] NSWLRC 2012 interim report recommended the regime remain in place on an interim basis, amended to confirm a simplified process in accordance with the instinctive synthesis process of sentencing, but that it be subject to further consideration of possible reforms to the scheme after a period of monitoring and analysis of post-*Muldrock* sentencing trends, and the release of their final report.[29] The interim report was to be read in conjunction with the Sentencing Council's 2011 background report.[30] The proposed alteration to the legislation recommended that it make clear that when determining seriousness of a SNPP offence, the court can consider matters personal to the offender that are causally connected with or that materially contributed to the commission of the offence (but excluding any purely subjective matters that are not causally connected with the offence).[31] The SNPP could take its place as guidepost or marker in instinctive synthesis. Of importance to the recommendation was the desirability for sentencing for SNPP offences to be the same as employed for all other offences, in accordance with the High Court's unequivocal stand on the use of the instinctive synthesis approach in preference to the two-step approach.[32]

86. NSWLRC interim report 2012 noted the effect of Appendix A (then current SNPPs for each offence) was that ratios varied from as low as 21% to as high as 80% of the maximum penalties. The report noted briefly the conceptual

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[27] Background report 2.9.
[28] NSWLRC 2012 interim Report p 1.
[29] NSWLRC 2012 interim report 0.4 - 0.6. The proposed legislation in the NSLRC Interim Report appears at page xiii.
[30] NSWLRC 1.3.
[31] See pages 35, 38.
[32] NSWLRC 2012 interim report 0.5. The desirability of equivalent sentencing process is interesting in light of initial secondary material suggesting the scheme would ensure that judges are 'always playing by same rule book'

difficulties arising from *Muldrock*: 1.52 ff., 2.4, 2.19 – 2.29. It referred (as had many other publications and judgments) to conceptual impediment to logical application of an 8 year SNPP for aggravated indecent assault with a 10 year maximum (where even a worst case attracting the maximum would expect NPP 7 ½ years): 2.11.

87. Almost universal comment and criticism had been voiced concerning the absence of consistent patterns between terms and maxima (citing again Johnson SC's point regarding different levels of seriousness for offences holding the same maximum penalty introducing a concept unknown to the law, and numerous highly critical adjectives such as 'illogical', and by the former Chief Judge of the District Court of 'nonsensical').[33] Sentencing Council September 2013 noted similar expressions: 1.20, 1.21, 3.4.

88. NSWLRC 2012 interim report recommended option 2 – which was legislating to clarify *Muldrock*. Legislative reform which followed in 2013 did not accord precisely with these recommendations. In particular the recommendation that the 'nature and circumstances of its commission' regarding the offence would include personal matters causally related was not implemented, although specifying that the judge was not required to classify the offence by reference to its position in a range of objective seriousness (see page 35, 38) was implemented.

89. The NSWLRC did not recommend rationalising the scheme, consideration of which had been recommended by the Sentencing Council in 2008 (discussed in relation to possible option '4'). The opportunity for the scheme to work itself out broadly in accordance with *Muldrock* as clarified was thought important before any final decision was made for abolition or replacement; noting that it will depend on whether, after period of review, this brings about consistency in the application of principle and avoids the undue complexity that has accompanied its application to date.[34]

[33] NSWLRC 2012 interim report 2.5.
[34] NSWLRC 2012 interim Report 2.35.

90. If the rationalisation option was nonetheless pursued, it was suggested to be premature without input from Sentencing Council. Emphasising the lack of transparency or consultation regarding the manner in which SNPPs had been set, it was said that any rationalisation of levels should await the proposed period of monitoring.[35] It is apparent that the 25 – 40% range mentioned in the December 2013 report as being the subject of submissions was responsive to the 40 – 60% proposal - standardisation within a band of 25-40 % recommended by the NSW Bar Association, endorsed by the Law Society and Legal Aid, was with expressed concern about a range as high as suggested and proposed this instead (in essence because it was difficult to see why a SNPP should ever be above 40% when a 'worst case gets 75%')[36]

91. NSWLRC 2013 final report was published in July 2013, tabled in Parliament 12 September 2013, and on 11 September 2013 the Attorney General asked the Sentencing Council to review SNPPs (see further below). The Final Report proceeded on the basis that the SNPP scheme is controversial and complex and has created difficulties in practice.[37] Retention of the scheme was recommended (recommendation 7.1) on the basis of implementing the Interim report recommendations to simplify the sentencing process in accordance with the instinctive synthesis approach and ensure that it is the same as that employed for all other offences. Because of apparent inconsistency in the basis for selecting offences for the scheme and for selecting the SNPPs it was recommend that the government consult with stakeholders and the community about which offences should be included in the scheme, at what level the SNPPs should be set, and what the process should be for adding or removing offences from the scheme.

92. The report acknowledged the continuing support for abolition, and criticism of the lack of transparency as to how SNPPs were selected and set.[38] It concluded however (7.12):

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[35] NSWLRC 2012 Interim Report 2.97 – 2.99.
[36] NSWLRC 2012 interim Report 2.104.
[37] NSWLRC 2013 final report 0.17 – 0.18, Chapter 7.
[38] NSWLRC 2013 final report 7.8 – 7.9.

> We do see a benefit in the retention of an SNPP scheme that provides a guidepost for sentencing in relation to serious offences, provided the legislation is amended in the way proposed in the interim report. However, this is conditional on a separate review being undertaken that involves community and stakeholder consultation. Its purpose would be to give further consideration to:
>
> - the offences to be included in the SNPP Table;
> - the levels at which the SNPP should be set in relation to each offence; and
> - the process by which future offences should be considered for inclusion in the Table and SNPPs set for those offences.

93. This reflected the interim report position which noted both the apparent lack of any consistent basis or transparency of the method employed for selecting offences for the scheme or for setting the SNPPs, and also the fact that a number of offences of equivalent or greater seriousness than those included in the scheme were not the subject of SNPPs.[39] Retention of the scheme, subject to the safeguards, was preferred to the introduction of the more rigid mandatory sentencing laws introduced in some jurisdictions. Beneficial guidance with sentencing discretion preserved was seen as possible.[40] Additional amendments to s 21A and s 44 were recommended as were other relevant aspects of a revised Act such as express recognition of individualised justice as an objective of the Act.[41] It was recommended that the NSW Sentencing Council should monitor patterns of sentencing under the SNPP scheme in order to detect any inconsistencies.

94. As noted above, the NSWLRC 2013 final report was tabled in Parliament on 12 September 2013 and on 11 September 2013 the Attorney General asked the Sentencing Council to review the offences which should be included in the standard non-parole period table, the standard non-parole period for those offences, and the process by which any further offences should be considered for inclusion and options for reform on these aspects of the scheme, and report

[39] NSWLRC 2013 final report 7.13.
[40] NSWLRC 2013 final report 7.14.
[41] NSWLRC 2013 final report 1.47, recommendation 1.1.

back by 20 December 2013.[42] The prioritisation of child sexual assault offences was requested, with report back sought by 31 October 2013. A Consultation Paper was issued by the Sentencing Council in September 2013 with submissions sought and a closing date of 11 October set for standard non-parole periods for child sexual assault offences, and of 25 October 2013 otherwise.

95. At the time of publishing Sentencing Council September 2013, the *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Bill* 2013 was before parliament and expected to clarify the application of the SNPP scheme.[43] The consultation paper noted the long history of criticism regarding no consistency in the SNPPs, but importantly at 1.22 said 'A question arises whether a consistent pattern in the relationship between the SNPPs and the maximum penalties for the offences is necessary or desirable.' This question was not meaningfully considered in the two reports which swiftly followed. It raises a very important matter of principle regarding the purpose of the SNPP scheme which in turn raises its problems – is it to be a scheme which utilises the existing maximum penalties and orthodox sentencing based upon these, such that consistency is expected (in which case the selection of offences, length, terminology and so on are submitted to be misconceived); or is there a policy basis for legislative alteration of sentencing for particular offences, in which case inconsistency would not necessarily be illogical despite potential difficulty of application (evidence for which has not been indicated in 20 years of detailed review)?

96. Chapter 3 of Sentencing Council September 2013 dealt with SNPP levels. Ongoing concern about lack of transparency and support for review of levels, if the scheme was retained, was acknowledged.[44] At 3.6 ff. the paper identified and discussed two basic approaches: offence by offence assessment (what are objective features that would make up a typical offence in the mid range of seriousness, what NPP and overall sentence would be appropriate?) and

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[42] NSW Sentencing Council *Standard Minimum Non-Parole Periods; Questions for discussion. A consultation paper by the NSW Sentencing Council* September 2013 ('Sentencing Council September 2013 Consultation Paper'), 1.2.
[43] Sentencing Council September 2013 Consultation Paper 1.7.
[44] Sentencing Council September 2013 Consultation Paper 3.1 – 3.3.

assessment based on a fixed percentage or narrow range of percentages of the maximum. As to the former, it was envisaged that experts might assist (as well as stakeholders and the public). As to the latter, the 2008 suggestion of a 40-60% range, and the response that this was too high, was noted.[45] Nothing was raised regarding the 37.5% principle which later emerged and which is referenced in the current Consultation Paper.

97. In November 2013 the Council published *Standard non-parole periods; Sexual offences against children / An interim report by the NSW Sentencing Council* (Sentencing Council November 2013). It noted that urgent reporting had been requested on this limited issue, if at all possible by 31 October. The report was prepared as a matter of urgency and without the benefit of submissions from all stake holders and the wider community.[46] The Act had passed by the time of this reporting, amendments having commenced on 20 October 2013. SC November 2013 confirmed that that although Public Defenders, Law Society, Young Layers, and Bar Association had offered some suggestions as to the scheme if retained, they objected in principle to scheme.

98. Chapter 4 regarding setting the standard confirmed again the fact that submissions have mirrored the concerns of the courts regarding how offences were selected and the levels at which they were set, the lack of transparency and significant variation, and the fact that no method was stated at the time the scheme was established, with variation not suggesting an entirely coherent approach.[47] It was said that:

> In a sense, this reference invites us to place the scheme on a stronger conceptual and policy basis. In undertaking this work, we are driven to conclude that "retro-fitting" a coherent policy basis to the current scheme that will justify the current SNPPs is likely to be fruitless. If a coherent policy basis is to be applied, then a careful review of each of the current SNPPs will be required.

[45] Sentencing Council September 2013 Consultation Paper 3.18 – 3.19.
[46] Sentencing Council November 2013 Interim report 1.4.
[47] Sentencing Council November 2013 4.3 – 4.4.

99. An existing SNPP range of 21.4% to 80% of maximum penalties was confirmed.[48] Particular difficulty in the cases with the greatest anomalies was discussed (aggravated indecent assault). [49] A similar but less extreme problem was recorded regarding s 66A(1) (sexual intercourse with a child under 10 which then had a maximum of 25 years and SNPP of 15). Setting the SNPP of 15 years would lead logically to head sentence of 20 years, but this was only 5 years short of the maximum of 25. The report continued at 4.12 to query whether 'A more general inconsistency with maximum penalties' existed and quoted from Howie J's judgment (McClellan CJ at CL and Simpson J agreeing) in *Marshall v R* [2007] NSWCCA 24 at [34] (dealing with a s 112(2) offence with 20 year maximum and 5 year SNPP):

> However, it is not an easy task to make sense of, and apply, the standard non-parole period provisions in relation to s 112(2) offences. Firstly, the standard non-parole period is 5 years as against a head sentence of 20 years. One would expect as a matter of logic and the application of ordinary sentencing principles that, if an offence was hypothetically of the mid-range of seriousness, it would carry a sentence of half the maximum penalty, that is a total term of ten years and, according to the statutory proportion under s 44 of the Crimes (Sentencing Procedure) Act, a non-parole period of seven and a half years. What then is to be made of the fact that the standard non-parole period is only 5 years? Does this disclose the intention of Parliament that the courts should take a more benign view of an offence under s 112(2) than the maximum penalty would seem to suggest? How does a court determine the sentence where the seriousness of the offence is somewhere above the mid-range of seriousness but below the most serious category of an offence under the section: by having more regard to the standard non-parole period or to the maximum penalty?[50]

100. The Sentencing Council continued:[51]

> Although the observations in this case were made in the context of an offence for which the SNPP was set at less than 50% of the maximum sentence (5 years SNPP against a maximum sentence of 20 years), the point made is also applicable where the SNPP is significantly higher than 50% of the maximum penalty.

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[48] Sentencing Council November 2013, 4.5, table D.1 in Appendix D.
[49] Sentencing Council November 2013, 4.8 ff.
[50] Footnote 10 attached to this quotation says that 'The dilemma has been discussed in relation to s 112(2) offences: Maxwell v R [2007] NSWCCA 304 [26]; R v Merrin [2007] NSWCCA 255 [44]; R v Mitchell [2007] NSWCCA 296 [36]-[38]; XY v R [2007] NSWCCA 72 [56]-[57].'
[51] Sentencing Council November 2013 4.13 – 4.15.

> This argument proceeds on the basis that for offending at the midrange level of objective seriousness, the appropriate head sentence is in the order of 50% of the maximum penalty. While this has an attractive simplicity, it is not clear that this is logically justified in all cases. The maximum penalty for offences indicates parliament's view of the penalty required for the worst or most serious case. It does not necessarily imply that the seriousness of offending will be evenly distributed over the penalty range, or that the midrange should be 50% of the maximum. The seriousness of levels of offending might be distributed differently for different offences, depending on the nature and consequences of the offending behaviour.
>
> On this view, the SNPP could be taken as an indication from parliament as to how it views the appropriate distribution of offences within the limits of the maximum penalty, and whether that distribution is likely to be skewed toward the upper or lower range of seriousness.

101. Two pages later two possible options for setting SNPPs (rule of thumb, offence by offence) were identified.[52] Previous SNPP rigidity had been relaxed by *Muldrock*, with the SNPP expected to work as a guidepost rather than inflexible direction. However even as a guidepost it remained necessary that the SNPP for any offender is proportional and consistent with proper sentencing practise, and for the method to be transparent and justifiable. It was noted that submissions received so far had provided limited assistance about this aspect of the SNPP scheme, either in relation to the process to be employed or the levels of the SNPPs that should be set. Submissions regarding a range of SNPP within a 25-40% of maximum ceiling (for example Legal Aid, Bar Association) had been made in the context of opposition to inclusion of child sex offences in the scheme (and in opposition to the 40 – 60% range postulated in 2008).

102. The 'rule of thumb' option was developed from Howie J's judgment in *Maxwell*:[53]

> As we note above, some courts have expressed the view that a penalty in the order of 50% of the maximum penalty could be assumed as a matter of logic to be an appropriate penalty for an offence of midrange objective seriousness (without other factors).
>
> While we do not necessarily accept this as a matter of logic in all cases, it may provide a simple starting point for a "rule of thumb" method for setting an SNPP. Applying as general propositions:

[52] Sentencing Council November 2013 4.21 ff.
[53] 4.29 – 4.31.

- that a midrange offence should attract a head sentence in the order of 50% of the maximum sentence, and
- that, in accordance with s 44 of the CSPA, the NPP (before allowing for subjective circumstances) should be in the order of 75% of the head sentence (for non-life sentences),

this could then be translated into a formula that results in an assumed starting point for calculating an SNPP that is 37.5% of the maximum penalty (that is, 75% of 50% of the maximum penalty).

The 37.5% starting point could then be adjusted upwards or downwards within a relatively narrow range, so as to take into account any particular features of the offence or sentencing concerns.

103. It was noted that the 37.5 % ratio as rule of thumb would accord with the ceiling of 25-40% of maximum penalty submissions (mentioned in opposition to a 60-80% range, and while continuing to oppose the scheme) plus the DPP submission of a range of 25 – 50% of maximum.[54]

104. An acknowledged disadvantage of this approach was its conceptual revolution around the maximum penalty with little regard to the reality of the kinds of offending that the courts encounter.[55] It was also acknowledged that the approach does not sit entirely comfortably with the reasoning in *Markarian* at [30] – [33] or with the now accepted approach to sentencing involving instinctive synthesis. The Public Defenders submit that this proposition demonstrates a fundamental problem with the assumptions, did not receive adequate consideration in 2013, and has been shown even more clearly to not sit comfortably with instinctive synthesis by the 2016 High Court decision in *Kilic*.

105. The offence by offence analysis was acknowledged as a possibly more principled approach albeit one which would require a careful review of every offence in the current scheme accompanied by a statement of the reason for setting the SNPP, and likely considerable revision of current SNPPs unless confined to further, and need to be informed by expert and experienced opinion. This process had a clear and understandable logic to it but was comparatively complex and would likely

[54] Sentencing Council November 2013, 4.34.
[55] Sentencing Council November 2013,4.50.

take considerable time.[56] It was not possible in the time available to reach firm conclusion as to which was preferable.[57]

106. Sentencing Council December 2013 was written on the basis that the SNPP scheme had taken its place as a guidepost in the sentencing process following *Muldrock* and amendments.[58] The six offences recommended for additional inclusion that did not involve sexual offending against children were all bar one (use of intoxicating substance to commit an indictable offence) firearms offences, with a recommended SNPP around 37.5% of the maximum penalty.

107. The report confirms that Public Defenders, Law Society, Bar Association, and Young Lawyers object in principle to the scheme and the addition of any offences although have offered suggestions for application if retained.[59] The ongoing opposition of Legal Aid and the ALS should also be noted.

108. Chapter 4 is the section on setting standard non-parole periods. As with the interim report it was noted that this issue is 'complex and controversial' and that the interim report had identified two potential methods. At 4.3, 4.4 it is emphasised again that courts and submissions mirror criticism of the way they have been set, the fact that no method was stated at the tie the scheme was established, that the reference invites placement of the scheme on a stronger conceptual and policy basis, and that 'retro-fitting' a coherent policy basis is likely to be fruitless.

109. The final report, after quoting again from Howie J's judgment in *Marshall*, and acknowledging that the 'attractive simplicity' is not clearly logically justified in all cases,[60] nonetheless proceeded to recommend utilisation of this simplistic assumption, as '..the time has arrived to place the method by which SNPPs are set on a more transparent basis.'[61]

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[56] Sentencing Council November 2013,4.51 – 4.56.
[57] Sentencing Council November 2013, 4.63.
[58] Sentencing Council December 2013 0.2.
[59] Sentencing Council December 2013 1.30.
[60] Sentencing Council December 2013, 4.09 – 4.11.
[61] Sentencing Council December 2013, 4.13.

110. The complexity of the offence by offence method was discussed again, and the common starting point method recommended instead.[62] The basis for recommendation seems to be that it is simple, transparent, and permits a level of flexibility.[63] It was suggested that it reflects 'in some respects' the approach favoured in submissions – but this seems to be only the fact that numerous stakeholders had, in response to the Sentencing Council's 2008 suggestion of a band of 40 – 60% (itself responsive to an actual band of 21 – 80%) queried how a figure over 40% could ever be appropriate, simultaneously called for the abolition of the scheme and offered an alternate cap of 25 – 40% for the figure instead. The report correctly notes that this approach could assist standardising SNPPs and introducing a degree of consistency and transparency.[64]

111. As noted in the current CP, the preferred formula is derived from general propositions that assume: a 'midrange offence' should attract a head sentence in the order of 50% of the maximum sentence (which must be clarified to strict objective seriousness to correspond with the legislation) and the NPP absent special circumstances should be in the order of 75% of the head sentence in accordance with s 44.[65]

112. Apart from *Maxwell* and the cases footnoted in the Sentencing Council's reference to it, a judgment of McCallum J (as her Honour then was, Allsop P and Price J agreeing) in *Barlow v The Queen* [2010] NSWCCA 215; 204 A Crim R 111 invoked similar reasoning about a numerical scale linking time in years with objective seriousness, to reject a Crown appeal (essentially because the subjective case was so strong the putative 'starting point' of the sentence for objective seriousness was in fact quite high). This was not necessarily dispositive of the result in the case, was inconsistent with the already existing law in *Markarian*, and not known to have been subsequently followed. It was heavily criticised by Adams J in *Gore v The Queen* [2010] NSWCCA 330; 208 A Crim R 551. *Barlow*, as with *Maxwell*, was decided prior to *Muldrock* (2011) when McHugh J's position

[62] Sentencing Council December 2013, 4.18 ff.
[63] Sentencing Council December 2013, 4.34.
[64] Sentencing Council December 2013, 4.35.
[65] Sentencing Council December 2013, 4.28.

in *Markarian* was unequivocally endorsed (and from which time the *Way* inclusion of features personal to an offender causally connected with the offending was not included in assessment of objective seriousness), and prior to *Kilic* (2016). It is not accepted that these very broad-brush analogies were intended as statements of substantive law. They were also concerned with offences with 20 year or greater maximum penalties (so no meaningful component of non-custodial sentencing options in the appropriate range).

113. Nothing is put forward in the CP section outlining the proposed process of adjustment as to why these factors warrant adjustment.[66] As to the allowance for some adjustment, it is said to be preferable because 'A universally applied fixed proportion does not recognise differences in the range and seriousness of offending behaviour covered by the offences included in the SNPP scheme.'[67] It is further said that not all offence categories necessarily share sufficiently common characteristics to permit the universal application of a fixed ratio, and that it allows recognition of any special factors that led to the inclusion of the offence in the SNPP scheme.[68] It is said that different circumstances of aggravation do not necessarily share the same degree of seriousness.[69] It is not explained why these factors should have any impact additional to the selection of the maximum penalty.

114. Of direct relevance to the current inquiry, the amendment of the NPPs for s 7 of the *Firearms Act* from 3 years imprisonment to 4 years imprisonment and s 7 of the WPA to 5 years imprisonment were made on the basis of this calculation and recommended methods for adjustment.[70] The previous SNPPs of 3 years for both were 21.4% of the 14 year maximum penalty. No commentary regarding the actual sentencing patterns for either offence was undertaken, although tables at the end of the paper include these: Appendix B Table B34 and B38. The increase to 5 years for the WPA offence was said to be justified because 'prohibited weapons include military-style weapons such as bombs (including

[66] Sentencing Council December 2013 4.30 -
[67] Sentencing Council December 2013, 4.33.
[68] Sentencing Council December 2013, 4.36.
[69] Sentencing Council December 2013, 4.37.
[70] Sentencing Council December 2013, 4.45, 4.56 – 4.58.

improvised explosive devices), grenades, rockets, missiles, mines and tear gas canisters, as well as other articles such as detachable firearm magazines' such that 'The use or possession of these items can give rise to exceptional harm to potentially large numbers of victims, and, accordingly, gives rise to a special need for deterrence.'

115. We submit that s 7 of the WPO should not have been included in the table to begin with (maximum too low, most offences dealt with in Local Court and without custody), should not have had a SNPP as high as 3 year set, and should not have had applied the 37.5% 'rule of thumb' and consideration of the risk of exceptional harm as a basis for not reducing this (despite the fact that this offence is most frequently dealt with by a fine, and the maximum is appropriate because of the prospect of those extreme outlying cases), and so should never have been increased to 4 years.

116. The Public Defenders submit that a number of important decisions of the High Court which are not captured in these reports and this chronology of movement towards the setting of length expose the problems with the scheme and method of calculation proposed. Most fundamentally, there is limited reference to *Markarian* but it was noted albeit briefly in a number of important respects which we have referred to. The judgments in the High Court in support of instinctive synthesis were in the minority at the time the SNPP regime was introduced: *Wong v The Queen* (2001) 207 CLR 584. This changed after the scheme was introduced with *Markarian*, but the joint judgment in obiter remarks allowed for the possibility that a sentencing judge might consider provisionally a sentence appropriate for the objective seriousness of the offence. McHugh J's judgment (also part of the majority disposition of the case) did not permit such reasoning.

117. We submit that the imposition of a 'guidepost' in the form of a SNPP creates false process of reasoning and is likely to be productive of sentencing error. McHugh J said in *Markarian* at [53]:

> …In my view, the judge who purports to compile a benchmark sentence as a starting point inevitably gives undue – even decisive – weight to some only of the factors in the case. Furthermore, the judge falls into the error

> of determining that notional sentence by reference to a hypothetical crime derived from some only of the circumstances of the case. Instead of sentencing this accused for his or her criminality, the judge sentences the person for another crime and adjusts the notional sentence by reference to factors that are additional to the objective circumstances. Indeed, there are some offences – manslaughter is an example – where an attempt to fix a first-tier sentence by reference to the objective circumstances is meaningless. How can a judge possibly fix a first-tier or any sentence for the mother who has killed her newborn baby without taking into account her personal circumstances?'

118. There are a number of references to the instinctive synthesis method of sentencing in the law reform reports but no real analysis of what this means. McHugh J's judgment in *Markarian* is mentioned in passing in Sentencing Council November 2011 in terms of its significance to the decision in *Muldrock.*

119. On June 27 2013 the High Court delivered judgment in *Elias v The Queen* (2013) 248 CLR 483. This does not bear directly on the issues under consideration in respect of the SNPP regime, but the Court endorsed the role of maximum penalty (which will not necessarily play a decisive role in the final determination of sentence), the complex nature of sentencing with factors bearing on the determination pulling in different directions, the requirement to balance often incommensurable factors to arrive at a sentence that is just in all of the circumstances, and the pivotal importance of individualised justice and the exercise of a wide sentencing discretion: 494-5 [27] (the Court). At 495 [29] in dealing directly with the issue before the Court, their Honours held that 'As consistency requires that like cases be treated alike and different cases differently, it does not promote consistency to reduce an appropriate sentence for an offence to take into account the lesser maximum penalty for a different offence.'

120. If not clear enough by the adoption in *Muldrock* of McHugh J's analysis in *Markarian* that a scale where objective seriousness corresponds with a number in years (or proportion of maximum) is completely inapt, this was made crystal clear by the High Court in *Kilic*. On 7 December 2016 the High Court (Bell, Gageler, Keane, Nettle and Gordon JJ) explained at 265-266 [18] that "Both the nature of the crime and the circumstances of the criminal are considered in

determining whether the case is of the worst type." The relevant spectrum to be considered, where the circumstances of an offence and offender do not demonstrate a case of the worst type, is one which arises because "a sentencing judge is bound to consider where the facts of the particular offence and offender lie on the 'spectrum' that extends from the least serious instances of the offence to the worst category, properly so called.": 266 [19].

121. Under section 54A(2) Sentencing Act, a SNPP represents the non-parole period for an offence "that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness." It is submitted that it is difficult, if not impossible, to conceive of what such an offence truly is, and if a sentencing judge is truly approaching the matter from the perspective of an instinctive synthesis, how this concept is of any value to the sentencing exercise. The s 3A purposes of sentencing (the basis for which a sentence is imposed) are not able to be addressed by focus on this narrowed component of a case. Respect for the proportionality principle does not require anything like the consideration of the factor required by the scheme to be taken into account.

122. As outlined above, there have been numerous criticisms of the process for selection of offences for inclusion in the table and requests for the LRC and SC to consider this. In the Sentencing Council's September 2013 Consultation Paper a number of criteria which could be used to assess whether an offence should be included were referred to – these viewed from the perspective of already existing SNPP offences.[71] Factors such as vulnerability of victim, features of aggravation and so on were not included although these and other features which emerged in the late 2013 reports were obliquely mentioned (such as noting reasons given in Parliamentary debates for adding to the list of SNPPs since 2003).[72] Chapter 4 which considered how future SNPP offences could be identified did not suggest the criteria which came out in the November or December 2013 papers, as included in the Council's current Consultation Paper. Rather, options for which principles could apply and who should assess these

[71] Sentencing Council September 2013 Consultation Paper 2.2 – 2.3.
[72] Sentencing Council September 2013 Consultation Paper 2.2-2.3, 2.9, 2.28.

matters considered departmental justice policy personnel, the Sentencing Council, or parliamentary committees. The important role of the Sentencing Council was discussed in some detail.[73]

123. The concepts of aggravation and special vulnerability were introduced as potentially bearing upon how levels for some SNPPs had been set, for example 'At present many of the SNPPs that have a high proportion compared with their statutory maximums are 'aggravated'. It could be argued that a higher proportion was justified where the circumstances call for it, for example, where the victim has a special vulnerability.'[74]

124. In its November 2013 paper the Sentencing Council at 2.2 identified a list of factors which could be considered in determining inclusion in the scheme. This was provisional since it was yet to receive and consider final submissions. The complexity of measuring patterns of inadequate or inconsistent sentencing, and the considerable care required, was discussed.[75]

125. This report nominated offences having elements of aggravation, a vulnerable victim, or special risk of serious consequences as factors supporting inclusion. Although noting at 2.7 that some stakeholders recommended the scheme be confined to offences which have max 20 years or more, the fundamental problem of inclusion of offences with lower maximum penalties (discussed above) was not considered.

126. Any reasoning as to inclusion of offences with elements of aggravation (for example at 2.18 – 2.20) was circular and did not explain why these should be included as distinct from why they should have greater maximum penalty than the basic version of the offence. It is not said that any stakeholders had suggested or endorsed this as a relevant factor. Similarly at 2.21 – 2.23 there is no rational reason suggested for the vulnerable victim factor. Again, for 'special risk of serious consequences' the report states this is accepted as a relevant factor of significant weight without indicating anyone had suggested it or any reason for

[73] Sentencing Council September 2013 Consultation Paper 4.6 ff.
[74] Sentencing Council September 2013 Consultation Paper 3.24.
[75] Sentencing Council November 2013, 2.35 – 2.55.

its inclusion: 2.27. The report draws on 2007 Parliamentary Debates for adding recklessly causing grievous bodily harm and wounding (in which it was said the government will not tolerate crimes of personal violence which destroy lives and tear at the fabric of our community).

127. The Council's November 2013 recommendations used these factors set out in chapter 3 to suggest sexual offences against children suitable for a SNPP. It was not suggested any pattern of inadequacy was relevant to any offence, and expressly acknowledged no pattern of inconsistency was discovered regarding some.[76]

128. The Sentencing Council December 2013 report at 2.1 – 2.2 confirmed the above interim report factors to consider for selecting offences. Nothing was added to the Interim report regarding any explanation of why the factors should determine inclusion as a table offence as distinct from bearing on the maximum penalty.[77]

129. In the section outlining recommended inclusion of additional sexual offences against children there is nothing regarding inconsistency or inadequacy in relation to a single offence.[78] Of concern, a number of these involved offences with relatively low maximum penalties where a significant number of offenders did not receive a custodial sentence.

130. Of more direct concern to the current inquiry is the Council's analysis of additional other offences at base of page 29 onwards. Of the *Crimes Act* offences (including ss 33A and 93GA), none suggested any inconsistency or inadequacy as reasons for inclusion.[79]

131. For the reasons set out above, the Public Defenders submit there should be no further expansion of the SNPP scheme. Rather, consideration should be given to

[76] Sentencing Council November 2013 3.7.
[77] Elements of aggravation Sentencing Council December 2013 2.17 – 2.20, vulnerable victim 2.21 – 2.24, special risk of serious consequences 2.25 – 2.28.
[78] Sentencing Council December 2013 3.10 – 3.29.
[79] Sentencing Council December 2013 3.31 – 3.42.

its abolition. The Public Defenders call for a review of the scheme generally. We do not endorse the method of calculation of SNPP lengths set out in the CP.

Chapter 5

Question 5.8 - Is there a need for any new guideline judgments in relation to weapons offences?

132. The Public Defenders do not consider a new guideline judgment in relation to weapons offences is required. The range of possible circumstances involved in the commission of these offences is too broad to permit the promulgation of a useful guideline. Despite the limitation of guideline judgments because of their consideration of a narrow range of circumstances (see *Jurisic*, *Wong*) they are however capable of more meaningful utility than SNPPs.

Chapter 6

Question 6.2: Summary offences relating to knives

133. The Public Defenders oppose any current summary knife offences being made indictable. This would unnecessarily criminalise individuals in regional areas and would disproportionately impact vulnerable people, including homeless people.

134. Inserting 'homelessness' as a reasonable excuse within section 93IB of the *Crimes Act 1900* (NSW) should be considered.

Question 6.6(1): Are there examples of early intervention programs and education campaigns that we should consider in the context of adult weapon-related offending?

135. The Public Defenders would not support the introduction of a knife crime prevention order scheme in NSW. NSW already has a scheme of Weapons Prohibition Orders largely similar to the proposed prevention orders.

136. In this regard, we are aware that the NSW Police Suspect Target Management Program scheme (STMP) has been discontinued. There is a meaningful risk that

the over-representation of young Aboriginal people selected for targeting by police in the recently discontinued STMP[80] would be mirrored in any knife crime prevention order scheme. We note the evidence at IP 6.30 of the UK experience in relation to the disproportionate effect on minority populations of these orders.

Conclusion

The Public Defenders wish to thank the Sentencing Council for the opportunity to provide submissions on sentencing for weapons-related offences. Please contact Belinda Rigg if you require any assistance or clarification.

Yours sincerely

Belinda Rigg SC	Nicholas Broadbent
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[80] Law Enforcement Conduct Commission, 'An investigation into the use of the NSW Police Force Suspect Targeting Management Plan on children and young people' (*Operation Tepito – Final Report*, October 2023), 9.