NSW GOVERNMENT

New South Wales
Law Reform Commission

Report
134

Sentencing

Interim report on standard minimum non-parole periods

May 2012
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Law Reform Commission
Attorney General & Justice

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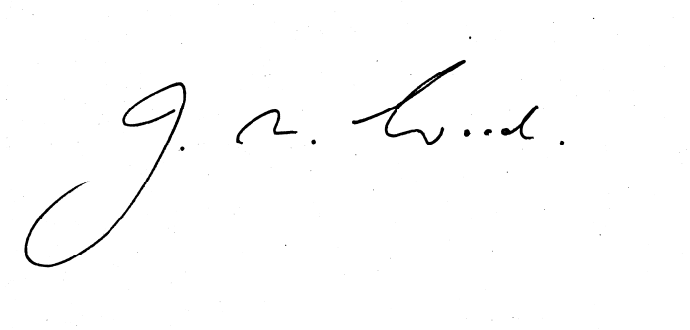
Dear Attorney

Sentencing – Interim report on standard minimum non-parole periods

We make this report pursuant to the reference to this Commission received 21 September 2011.



The Hon James Wood AO QC
Chairperson
May 2012

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Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967*, the Law Reform Commission is to review the *Crimes (Sentencing Procedure) Act 1999*. In undertaking this inquiry, the Commission should have regard to:

1. current sentencing principles including those contained in the common law

2. the need to ensure that sentencing courts are provided with adequate options and discretions

3. opportunities to simplify the law, whilst providing a framework that ensures transparency and consistency

4. the operation of the standard minimum non-parole scheme; and

5. any other related matter.

[Received 21 September 2011]

Executive Summary

0.1 This interim report on the standard minimum non-parole period ('SNPP') scheme is part of our wider review of the *Crimes Sentencing Procedure Act 1999* (NSW) (the 'Sentencing Act'). It makes recommendations to ensure the continued operation of the SNPP scheme following the High Court's decision in *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120.

0.2 The High Court overruled the NSW Court of Criminal Appeal (CCA) authority of *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 which had governed the imposition of sentences for SNPP offences for the previous seven years. It affirmed the instinctive synthesis approach to sentencing and identified an SNPP as a guidepost or marker to which the court may refer in sentencing for an SNPP offence. However, some uncertainties have arisen in relation to the application of *Muldrock*, in particular concerning the nature of the offending by reference to which the objective seriousness of the offence is to be assessed and the facts or circumstances that are to be regarded as "matters personal to a particular offender or class of offenders" that are to be excluded from such an assessment.

0.3 We have identified six possible options for the reform of the SNPP scheme:

Option 1 – retain the SNPP scheme in its present form, leaving the application of *Muldrock* to be worked out by the CCA, and deferring any review or amendment pending monitoring and analysis of post *Muldrock* sentencing trends, and consideration of our final report. (para 2.54-2.59)

Option 2 – retain the SNPP scheme and, pending the monitoring and analysis referred to in Option 1, legislate to clarify aspects of the interpretation of *Muldrock*. (para 2.60-2.79)

Option 3 – retain the SNPP scheme and legislate to confirm the interpretation of *Way*. (para 2.80-2.85)

Option 4 – retain the SNPP scheme and rationalise both the offences covered by the scheme and the ratios of individual SNPPs to their respective maximum penalties. (para 2.86-2.110)

Option 5 – abolish the SNPP scheme without any replacement. (para 2.111-2.114)

Option 6 – abolish the SNPP scheme and replace it with an alternative and simpler form of legislative guidance in relation to the imposition of appropriate non-parole periods for serious offences. (para 2.115-2.133)

0.4 We recommend the adoption of **Option 2**, on an interim basis, to preserve the approach in *Muldrock* and to clarify the uncertainties that have arisen. Part 4 Division 1A of the Sentencing Act should, therefore, be amended as follows:

- To confirm that the standard non-parole period represents the non-parole period for an offence which, "by reference to the nature and circumstances of its

commission", is in the middle of the range of objective seriousness for the relevant SNPP offence. This will make it clear that, when determining the seriousness of an 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 purely subjective matters that are not causally connected with the offence).

- To provide that, in determining the sentence for an SNPP offence, the court is to have regard to the SNPP for the offence and the relevant matters referred to in s 21A of the Sentencing Act. This will allow the court to have regard to the SNPP for an offence in a way that is consistent with its use as a guidepost or marker and with the instinctive synthesis approach that has been approved by the High Court and that is currently applied in sentencing for all other offences, that is by reference to all of the matters referred to in s 21A of the Sentencing Act that are relevant to the offence before the court.

0.5 In our view this option simplifies the sentencing process in accordance with the instinctive synthesis approach, without diluting the intended legislative objective of the SNPP scheme, and without resulting in an overall reduction in sentencing levels. It would also ensure that the sentencing process that is employed in relation to SNPP offences is the same as that employed in respect of all other offences. As a general proposition it would seem desirable that there be consistency in relation to the sentencing process generally that accords with the High Court's unequivocal stand on the use of the instinctive synthesis approach in preference to the two-step approach. We note that there was support in consultations for option 1 and concerns were expressed, during the consultations, that any attempt to amend the relevant provisions could further unsettle the law. However, we are of the view that the relatively simple amendments recommended would not have that effect. Rather we expect them to simplify the sentencing exercise and remove the residual uncertainty as to the interpretation of *Muldrock.*

0.6 In rejecting options to repeal the SNPP scheme we note that it was introduced to ensure adequacy, consistency and transparency in sentencing, in relation to a group of serious offences, while avoiding the dangers involved in grid sentencing or mandatory sentencing. The SNPP scheme should, therefore, remain in place in accordance with our recommendation, subject to further consideration of possible reforms to the SNPP scheme after a period of monitoring and analysis of post-*Muldrock* sentencing trends, and the release and consideration of our final report.

0.7 If it is decided to retain an SNPP scheme on a longer-term basis, we are of the view that, any review of the offences that should be included in such a scheme, and any rationalisation of the SNPP levels relative to maximum penalties, should be deferred until the monitoring and analysis of post-*Muldrock* sentencing trends has been undertaken and consideration can be given to any necessary amendments arising out of our final report.

0.8 In order to deal with any sentence that, as a consequence of *Muldrock,* is challenged on the basis of an incorrect application of the SNPP scheme, we encourage, in the interim, the use of the review procedure contained in Part 7 of the *Crimes (Appeal and Review Act) 2001* (NSW). (para 2.134-2.146)

Recommendation

Chapter 2 – Reform of the SNPP scheme	page
On an interim basis, pending monitoring and review of the standard minimum non-parole period scheme and consideration of our final report, we recommend the amendment of s 54A and s 54B of the C*rimes (Sentencing Procedure) Act 1999* (NSW) as follows:	37

54A What is the standard non-parole period?

(1) For the purposes of this Division, the standard non-parole period for an offence is the non-parole period set out opposite the offence in the Table to this Division.

(2) For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence ***which, by reference to the nature and circumstances of its commission, is*** in the middle of the range of objective seriousness for offences in the Table to this Division.

54B Sentencing procedure

(1) This section applies when a court imposes a sentence of imprisonment for an offence, or an aggregate sentence of imprisonment with respect to one or more offences, set out in the Table to this Division.

(2) When determining the sentence for the offence (not being an aggregate sentence), ***including the non-parole period the court is to have regard to:***

(a) the standard non-parole period for the offence, and

(b) the matters referred to in section 21A, as they apply to the offence.

(3) ***(Deleted)***

(4) The court must make a record of its reasons for increasing or reducing the standard non-parole period. The court must identify in the record of its reasons each factor that it took into account, ***but is not required to classify the offence by reference to its position in a range of objective seriousness.***

(4A) When determining an aggregate sentence of imprisonment for one or more offences, the court is to indicate, for those offences to which a standard non-parole period applies, the standard non-parole period (or a longer or shorter non-parole period) that it would have set in accordance with ***subsection (2)*** for each such offence to which the aggregate sentence relates had it set a separate sentence of imprisonment for that offence.

(4B) If the court indicates that it would have set a longer or shorter non-parole period for an offence under subsection (4A), it must make a record of the reasons why it would have increased or reduced the standard non-parole period. The court must identify in the record each factor that it would have taken into account.

(5) The failure of a court to comply with this section does not invalidate the sentence.

1. Introduction

Background

1.1 In September 2011, the Attorney General asked the NSW Law Reform Commission to review the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('the Sentencing Act') and to consult closely with the NSW Sentencing Council during the review. We have been asked to report by October 2012. The terms of reference state that we should have regard to:

1. current sentencing principles including those contained in the common law
2. the need to ensure that sentencing courts are provided with adequate options and discretions
3. opportunities to simplify the law, whilst providing a framework that ensures transparency and consistency
4. the operation of the standard minimum non-parole scheme; and
5. any other related matter.

1.2 In March 2012 the Attorney General asked us to provide an interim report on the operation of the standard minimum non-parole period ('SNPP') scheme.

1.3 This report comprises our interim report on the SNPP scheme. In preparing it, we have relied upon the NSW Sentencing Council's background report on the SNPP scheme ('Sentencing Council background report'[1]), which was published in 2011 and which should be read in conjunction with this report. We have taken into account a number of preliminary submissions from stakeholders that address the

1. NSW Sentencing Council, *Standard Non-parole Periods: A Background Report* (2011).

SNPP scheme and other aspects of the Sentencing Act, comments made by stakeholders to the Sentencing Council, and comments and submissions received during our consultations specifically on the SNPP scheme.

1.4 In making recommendations in this interim report, we have borne in mind our terms of reference that require a review of the Sentencing Act as a whole. We have endeavoured to avoid making any recommendations that would constrain the scope of our final Report pursuant to those terms of reference.

Brief overview of the SNPP scheme

1.5 The SNPP scheme was intended to provide statutory guidance to sentencing courts in relation to the setting of appropriate standard non-parole periods initially for more than 20 categories of serious indictable offences. It has been in force in NSW since 1 February 2003. Thousands of offenders have been sentenced under the scheme. It has come into sharp focus in recent months as a result of the decision of the High Court of *Muldrock v The Queen*.[2] *Muldrock* overruled the NSW Court of Criminal Appeal ('CCA') authority of *R v Way*,[3] which had been the leading and unchallenged authority on how to apply the SNPP scheme for more than seven years.

1.6 Some uncertainties arise in relation to the application of *Muldrock* and in relation to the extent to which the SNPP scheme or some variation of it can continue to play a practical role in sentencing for serious crimes.

1.7 In this report we discuss the origin and development of the SNPP scheme and note the possible impact of *Muldrock* on sentencing trends in NSW. We outline several possible options for reform, and identify the approach that we consider should be adopted.

1.8 We also make a recommendation in relation to the way in which the courts might review in an efficient manner any SNPP cases determined before *Muldrock*, where they are subject to challenge.

Stakeholders' views on the SNPP scheme

1.9 During our consultation process, not every participant expressed a view on whether reform of the SNPP scheme was warranted. There was some support for legislating *Way* in place of *Muldrock*. There was support among defence practitioners for maintaining the *status quo* pending a period of monitoring of sentencing post *Muldrock*. Other stakeholders favoured the abolition of the SNPP scheme, or at least confining its reach to more serious offences; yet other stakeholders favoured its retention and expansion so as to apply to a wider group of offences, while others encouraged addressing the problem through guideline judgments. Those stakeholders who favoured some form of SNPP scheme were in almost universal agreement that there was a need to bring greater transparency to the scheme, and in particular to review the levels at which each SNPP had been set.

2. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120.
3. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168.

1.10 In short, there is no single view amongst stakeholders on how to approach the possible reform of the SNPP scheme. On one approach, it would be appropriate to let the courts and particularly the CCA deal with *Muldrock* and to monitor the situation over the coming months. On the other hand, there are some fundamental difficulties with the SNPP scheme that *Muldrock has* not solved. Our recommendations seek to strike a balance between the competing approaches, while keeping in mind the need for flexibility for our final report.

Resource implications of incarcerating offenders

1.11 In considering possible reforms to the SNPP scheme, it is vital in our view to keep in focus the very substantial cost to taxpayers of maintaining the State's prison system.

1.12 To the extent that the SNPP scheme has contributed to an increase in the prison population, it has been part of a much wider and longer trend towards higher levels of incarceration in NSW in recent decades. Since the 1990s, the incarceration rate of sentenced prisoners in NSW has climbed steadily. For example, in 1990-1991 it was 110.4 inmates per 100,000 adult population.[4] By 2009, it peaked at 139.9 inmates per 100,000, falling to some degree in 2011 to 127.7 inmates per 100,000.[5]

1.13 In 2009/10, the total net operating expenditure and capital cost of NSW prisons was $1.029 billion.[6] The cost per prisoner per day in 2010/11 was $276, slightly below the national average of $289.11 per day. This was far in excess of the average cost per offender per day in 2010/11 of $27.17 for community corrections.[7]

Analysis of the SNPP scheme

Overview

1.14 The SNPP scheme commenced operation on 1 February 2003[8] with the stated aim of giving further guidance and structure to judicial sentencing discretion. The second reading speech stressed that the scheme was not a form of "mandatory sentencing" but was intended to provide "a further important reference point" when judges sentence offenders for SNPP offences. It was also said that the legislation "seeks to meet the community's legitimate expectation that the courts should impose sentences that are appropriate to the gravity of the offences".[9]

4. J Walker, *Australian Prisoners 1991* (Australian Institute of Criminology, 1992) 113.
5. Australian Bureau of Statistics, *Corrective Services Australia*, December quarter 2011 (4512.0, 2012) 19.
6. Australia, Productivity Commission, *Report on Government Services 2011* (2012) Table 8A.25.
7. Australia, Productivity Commission, *Report on Government Services 2011* (2012) Table 8A.7.
8. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, inserted by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW).
9. NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813, 5817-9 (Bob Debus, Attorney General).

1.15 The genesis of the SNPP scheme was linked to a statement issued by the then Premier, in September 2002.[10] The Premier announced that the Government's intention was to have "tougher, more consistent sentences and to make judges more accountable to the community". The Premier said, "Judges will have a new statutory duty to give explicit reasons, justifying the sentence they hand out and making them more accountable. Sentences will be tougher and more consistent because judges will have to apply the same rules to every case".[11]

1.16 The statement was accompanied by a table, entitled "Fact Sheet: Standard Minimum Sentences", which contained a list of offences, noted the "average" (more correctly, the "median") non-parole period for selected offences between 1994 and 2001, and the new SNPP for each offence. In almost every case, these nominated SNPPs made their way into the final legislation. The SNPPs generally were at least double the median non-parole periods between 1994 and 2001, and in some cases, such as sexual offences and supplying a commercial quantity of a prohibited drug, they were triple the existing median periods. For murder, the median non-parole period between 1994 and 2001 was stated to be 14 years, compared with a nominated SNPP of 25 years for the murder of a prescribed victim (such as the murder of a police officer which arose because of his or her occupation), and a 20 year SNPP in other cases of murder.[12]

1.17 Significantly, there was no reference in the statement to the maximum penalties for the offences. As a result, the impact of changing the ratios between existing non-parole period levels and the respective maximum penalties for the offences was not discussed, nor was the significance of having differing ratios of SNPP to maximum penalty for different offences which carried the same maximum penalty. The related question of the appropriateness of the existing maximum penalties for some of the SNPP offences had also not been considered.

1.18 The SNPP scheme is contained in Part 4 Division 1A of the Sentencing Act. Relevantly it provides:

> **54A What is the standard non-parole period?**
> (1) For the purposes of this Division, the standard non-parole period for an offence is the non-parole period set out opposite the offence in the Table to this Division.
>
> (2) For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for offences in the Table to this Division.
>
> **54B Sentencing procedure**
> (1) This section applies when a court imposes a sentence of imprisonment for an offence, or an aggregate sentence of imprisonment with respect to one or more offences, set out in the Table to this Division.

10. R Carr, "Premier Carr Releases Plan for Tougher and More Consistent Sentences" (News Release, 4 September 2002).
11. R Carr, "Premier Carr Releases Plan for Tougher and More Consistent Sentences" (News Release, 4 September 2002) 1-2.
12. R Carr, "Premier Carr Releases Plan for Tougher and More Consistent Sentences" (News Release, 4 September 2002) 3-4.

(2) When determining the sentence for the offence (not being an aggregate sentence), the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period.

(3) The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in section 21A.

(4) The court must make a record of its reasons for increasing or reducing the standard non-parole period. The court must identify in the record of its reasons each factor that it took into account.

(4A) When determining an aggregate sentence of imprisonment for one or more offences, the court is to indicate, for those offences to which a standard non-parole period applies, the standard non-parole period (or a longer or shorter non-parole period) that it would have set in accordance with subsections (2) and (3) for each such offence to which the aggregate sentence relates had it set a separate sentence of imprisonment for that offence.

(4B) If the court indicates that it would have set a longer or shorter non-parole period for an offence under subsection (4A), it must make a record of the reasons why it would have increased or reduced the standard non-parole period. The court must identify in the record each factor that it would have taken into account.

(5) The failure of a court to comply with this section does not invalidate the sentence.

54C Court to give reasons if non-custodial sentence imposed

(1) If the court imposes a non-custodial sentence for an offence set out in the Table to this Division, the court must make a record of its reasons for doing so. The court must identify in the record of its reasons each mitigating factor that it took into account.

(2) The failure of a court to comply with this section does not invalidate the sentence.

(3) In this section:

non-custodial sentence means a sentence referred to in Division 3 of Part 2 or a fine.

1.19 Excluded from an application of the Division is the sentencing of an offender to imprisonment for life or for any other indeterminate period or to detention under the *Mental Health (Forensic Provisions) Act 1990* (NSW).[13]

1.20 The Division does not apply if the offence for which the offender is sentenced is dealt with summarily,[14] or if the offence was committed when the offender was

13. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(1).
14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(2).

under the age of 18 years.[15] It also does not apply to offences committed before its commencement date, 1 February 2003.[16]

1.21 The Table of SNPP offences inserted into the Sentencing Act[17] initially included more than 20 offence categories and was expanded over the following years to include more than 30 offence categories. Although not all serious offences are included in the Table, the offence categories cover the majority of serious crimes that have a relatively high volume.

1.22 At the outset it is important to note that the Division which gives rise to the SNPP scheme sits within the wider framework of the Sentencing Act and its application is subject to settled principles of sentencing law and practice, including any relevant guideline judgment.

1.23 For example, in its application the court needs to take into account the purposes of sentencing specified in the Sentencing Act[18] as well as the requirement that a sentence of imprisonment should not be imposed unless the court is satisfied, after considering all possible alternatives, that no other penalty is appropriate.[19]

1.24 Its application also remains subject to the provisions contained in Part 4 Division 1 of the Sentencing Act, including s 44 which relevantly provides:

> **44 Court to set non-parole period**
> (1) Unless imposing an aggregate sentence of imprisonment, when sentencing an offender to imprisonment for an offence, the court is first required to set a non-parole period for the sentence (that is, the minimum period for which the offender must be kept in detention in relation to the offence).
>
> (2) The balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more (in which case the court must make a record of its reasons for that decision).

1.25 As a result of recent amendments that section allows the court, when imposing an aggregate sentence of imprisonment in respect of two or more offences, to impose one non-parole period ('NPP') for all of those offences to which the sentence relates, after setting the term of that sentence.[20]

1.26 However, if the offences for which the aggregate sentence is imposed include an SNPP offence, then the court is required to indicate the NPP that it would have fixed for that offence had separate sentences been imposed.[21]

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15. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(3).
16. *Crimes (Sentencing Procedure) Act 1999* (NSW) sch 2 cl 45(1).
17. At the end of *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A.
18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.
19. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1).
20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2A).
21. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2C) and s 54B(4A).

1.27 Similarly a court will be required in any such case to have regard to, or give effect to:

- the fundamental common law principles of proportionality,[22] parity,[23] totality, avoidance of double punishment[24] and so on;
- those "discounting provisions" of the Sentencing Act that require the court to take into account the fact that the offender has pleaded guilty,[25] or has cooperated in making pre-trial disclosure,[26] or has provided assistance to law enforcement authorities;[27]
- those provisions that preclude it from taking into account the consequences of the sentence in relation to registration and prohibitions on employment that apply to certain sexual offenders;[28] or the consequences arising under confiscation or forfeiture legislation;[29] or, in the case of child sexual offences, the fact that the offender was of good character or lacked prior convictions if either of those factors was of assistance to the offender in the commission of the offence.[30]

1.28 Returning to s 21A of the Sentencing Act, it is noted that it provides, by way of introduction:[31]

> **21A Aggravating, mitigating and other factors in sentencing**
> (1) General
>
> In determining the appropriate sentence for an offence, the court is to take into account the following matters:
>
> (a) the aggravating factors referred to in subsection (2) that are relevant and known to the court,
>
> (b) the mitigating factors referred to in subsection (3) that are relevant and known to the court,
>
> (c) any other objective or subjective factor that affects the relative seriousness of the offence.
>
> The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.

Thereafter follows a lengthy list of aggravating and mitigating factors that are "to be taken into account in determining the appropriate sentence for an offence".[32]

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22. *Hoare v The Queen* (1989) 167 CLR 348, 354.
23. *Green v The Queen* [2011] HCA 49; 86 ALJR 36; *Lowe v The Queen* (1984) 154 CLR 606.
24. *Pearce v The Queen* (1998) 194 CLR 610.
25. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22.
26. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22A.
27. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23.
28. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 24A.
29. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 24B.
30. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A).
31. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1).
32. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)-(3).

1.29 It is helpful to note that the current version of s 21A was introduced at the same time as the SNPP scheme. It replaced an original version that contained a non-exhaustive list of relevant factors that was not separated into 'aggravating' and 'mitigating' factors. The original s 21A also contained some of what are now described as the 'purposes' of sentencing that appear in the current s 3A. The original s 21A(1) provided that "a court must impose a sentence of a severity that is appropriate in all the circumstances of the case", and required it to take into account the relevant factors listed in the section. These were divided into the current binary list of 'aggravating' and 'mitigating' factors when the SNPP scheme was introduced in 2003.

1.30 The table at Appendix A includes the SNPP for each offence, the relevant maximum penalty and the SNPP expressed as a percentage of the maximum penalty (except where this is not possible because the maximum penalty is life imprisonment). As can be seen, there is no fixed ratio between the nominated SNPPs and the maximum penalties for the offences. The ratios vary from as low as 21% to as high as 80%.

The interpretation of the SNPP scheme in *R v Way*

1.31 The CCA interpreted s 54B(2) of the Sentencing Act as having been framed in mandatory terms.[33] In order to give the Division practical utility, it said that a judge, when sentencing an offender for an SNPP offence, must ask and answer the question whether there are reasons for not imposing the SNPP. That question, it held, was to be answered by considering:

- the objective seriousness of the offence considered in the light of the facts that related directly to its commission, including those that may explain why it was committed, so as to determine whether it answers the description of one that falls into the mid range of seriousness for an offence of the relevant kind, and
- the circumstances of aggravation, and of mitigation, that are present, or that apply to the particular offender, as specified or incorporated by reason of the provisions of s 21A of the Sentencing Act.[34]

1.32 If this question is answered in the affirmative, then the court should exercise its sentencing discretion in accordance with established sentencing practice and by reference to the matters identified in s 3A, 21A, 22, 22A and 23 of the Sentencing Act.[35]

1.33 Approached in this way, it observed that the SNPP scheme could properly take its place as a "reference point, or benchmark, or sounding board, or guidepost";[36] and did not require a departure from the intuitive or instinctive synthesis approach to

33. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [62].
34. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [118].
35. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [121].
36. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [122].

sentencing or resort to a rigid two-tiered approach that involved determining an objective sentence and then adjusting it to take account of subjective factors.[37]

1.34 Relevantly it pointed out that the SNPP scheme does not stand alone, but takes its place alongside guideline judgments, the prescribed maximum sentence (which it noted continued to provide a statutory guidepost) and the provisions elsewhere contained in the Act, as well as any applicable common law factors.[38]

1.35 Significantly, it observed:

> What is not appropriate, in our view, is for a sentencing judge to commence the process for every offence (irrespective of its seriousness, and irrespective of whether the offender's guilt was established after trial or by a plea), at the standard non-parole period, and then to oscillate about it by reference to the aggravating and mitigating factors. The problem with that approach is that the standard non-parole period will tend to dominate the remainder of the exercise, thereby fettering the important discretion which has been preserved by the Act.[39]

1.36 It assumed that in order to apply the SNPP scheme it would be necessary for the judge to focus not only on the objective seriousness of the offence before the court but also upon the putative or abstract offence in the middle of the range of objective seriousness for that offence.[40] Although it recognised that no statutory definition or guide had been given as to what is an "offence in the middle range of objective seriousness",[41] it observed that unless some understanding is reached as to what is a midrange offence then it could not see how any meaningful comparison could be made between the offence at hand and the offence for which the SNPP *represents* the appropriate NPP.[42]

1.37 It added:

> We do not however consider that the exercise which is required will differ, to any material extent, from that which has always been necessary in evaluating the objective seriousness of a subject offence. Judges are well accustomed to considering and stating that a particular case falls into the worst category, or into the category of offences at a lower level of objective seriousness...
>
> While it may not be the case that particular attention has been given to the precise process of reasoning involved in this kind of assessment, it would appear to us to depend upon a combination of sentencing experience, which is based upon the range of instances which go to make up cases of the relevant kind that come before the courts, combined with an understanding of the facts which are necessary elements of the offence, as well as those which are concerned with its consequences, and the reasons for its commission.[43]

37. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [127].
38. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [55]-[57].
39. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [131].
40. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [72].
41. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [73].
42. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [76].
43. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [77], [79].

1.38 It 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.[44]

1.39 Further, it observed, the 'mid-range' does not necessarily constitute a narrow band in the continuum between the least and the most serious cases – although it may be that for a given offence a significant number of cases occupy the mid-range of seriousness.[45]

1.40 It held that the assessment of the objective seriousness of the offence at hand cannot be confined to a consideration of the physical acts of the offender and their consequences. Rather the inquiry required is one that would take into account the *actus reus*, the consequences of the conduct, and those factors that impinge on the *mens rea* of the offender.[46] It noted:

> Some of the relevant circumstances which can be said "objectively" to affect the "seriousness" of the offence will be personal to the offender at the time of the offence but become relevant because of their causal connection with its commission. This would extend to matters of motivation (for example duress, provocation, robbery to feed a drug addiction), mental state (for example, intention is more serious than recklessness), and mental illness, or intellectual disability, where that is causally related to the commission of the offence, in so far as the offender's capacity to reason, or to appreciate fully the rightness or wrongness of a particular act, or to exercise appropriate powers of control has been affected … Such matters can be classified as circumstances of the offence and not merely circumstances of the offender that might go to the appropriate level of punishment. Other matters which may be said to explain or influence the conduct of the offender or otherwise impinge on her or his moral culpability, for example, youth or prior sexual abuse, are more accurately described as circumstances of the offender and not the offence.
>
> ...
>
> [I]t is necessary to reflect the distinction between circumstances which go to the seriousness of the offence considered in a general way, and matters that are more appropriately directed to the objectives of punishment.
>
> If that distinction is respected then the spectrum of offences, and the identification of those which fall in the mid range of seriousness can be confined to matters which are directly or causally related to its commission.
>
> For instance, while the antecedent criminal history, or the fact that the offender has reoffended while on conditional liberty can be relevant for a determination of an appropriate level of punishment … considerations of this kind are more relevant to the measure of *punishment* for the individual offender, than they are to a consideration of where the offence before the Court falls within the spectrum of conduct which may constitute the offence in the abstract.[47]

44. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [101].
45. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [100] and [102].
46. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [85].
47. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [86], [90]-[92].

1.41 Two further findings of the CCA may be noted. First, the court held that s 54B(2) was not to be confined-in its application to offences that fell in the mid range, and accordingly observed that it had a relevance for cases across the range.[48]

1.42 Secondly, it confirmed that s 44 of the Sentencing Act continued to play a role in the sentencing for SNPP offences, although it cautioned that if special circumstances within the meaning of that section were found, then there was a need to avoid double counting.[49]

1.43 Subsequent decisions of the CCA, applying *Way* in relation to the 'objective seriousness' issue, accepted that it was relevant for such assessment to take into account the *actus reus* constituting the bare elements of the offence, and its consequences, as well as any matters that bear on the offender's *mens rea*, such as intoxication, and mental illness or intellectual disability where that is causally related to the commission of the offence. Excluded matters have been held to concern factors such as the offender's criminal antecedents; the offender's youth; and the fact that the offender was at conditional liberty when the offence was committed.[50]

1.44 Notwithstanding the finding in *Way* that the SNPP scheme had been intended to apply only to cases decided following conviction after trial,[51] subsequent decisions of the CCA held that the SNPP remained relevant as a guidepost generally.[52]

1.45 Although subsequent decisions accepted the continued relevance of s 44, and the availability of a finding of special circumstances of the kind that might justify a reduction of the NPP,[53] in a number of cases error was found to have occurred through double counting.[54]

The High Court's decision in *Muldrock*

1.46 In October 2011, the High Court's decision in *Muldrock v The Queen*[55] overturned the interpretation given to the SNPP scheme by the decision in *Way*.

1.47 The Court rejected the appellant's submission that the SNPP scheme was confined to a case where the offence fell into the middle of the range of objective seriousness and confirmed that it had a role in sentencing offenders for Table offences across the full range of objective seriousness.[56]

48. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [65]-[67].
49. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [109]-[110].
50. Judicial Commission of NSW, *Sentencing Bench Book* [7-970].
51. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [71].
52. *R v Davies* [2004] NSWCCA 319 [122]; *R v AJP* [2004] NSWCCA 434; 150 A Crim R 575 [13].
53. *MLP v The Queen* [2006] NSWCCA 271; 164 A Crim R 93.
54. *R v Achurch* [2011] NSWCCA 186 [82], [158]; *R v LP* [2010] NSWCCA 154; and *R v Rudd* [2010] NSWCCA 71; see also the discussion in *Gersbach v The Queen* [2009] NSWCCA 132 [77]-[78]; *R v Quin* [2009] NSWCCA 16 [34]-[37], [40]-[41].
55. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120.
56. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 [24].

1.48 Next it noted, and accepted, the respondent's submission that the effect of s 54B(2) is not to "mandate a particular non-parole period for a particular category of offence rather it preserves the full scope of the judicial discretion to impose a non-parole period longer or shorter than the [standard non-parole period]". It observed:

> It follows from that acceptance that *Way* was wrongly decided. As will appear, it was an error to characterise s 54B(2) as framed in mandatory terms. The court is not required when sentencing for a Div 1A offence to commence by asking whether there are reasons for not imposing the standard non-parole period nor to proceed to an assessment of whether the offence is within the midrange of objective seriousness.[57]

1.49 Importantly, the Court observed (emphasis added):

> Section 54B applies whenever a court imposes a sentence of imprisonment for a Div 1A offence. The provision must be read as a whole. It is a mistake to give primary, let alone determinative, significance to so much of s 54B(2) as appears before the word "unless". Section 54B(2), read with ss 54B(3) and 21A, requires an approach to sentencing for Div 1A offences that is consistent with the approach to sentencing described by McHugh J in *Markarian v The Queen*:
>
> > "[T]he 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." (emphasis added)[58]
>
> Section 54B(2) and s 54B(3) oblige the court to take into account the full range of factors in determining the appropriate sentence for the offence. In so doing, the court is mindful of two legislative guideposts: the maximum sentence and the standard non-parole period. ***The latter requires that content be given to its specification as "the non-parole period for an offence in the middle of the range of objective seriousness". Meaningful content cannot be given to the concept by taking into account characteristics of the offender. The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending.***[59]
>
> Nothing in the amendments introduced by the Amending Act requires or permits the court to engage in a two-stage approach to the sentencing of offenders for Div 1A offences, commencing with an assessment of whether the offence falls within the middle range of objective seriousness by comparison with an hypothesized offence answering that description and, in the event that it does, by inquiring if there are matters justifying a longer or shorter period.[60]

1.50 In relation to the requirement that sentencing judges state fully the reasons for arriving at the sentence imposed, the Court stated:

> The reference in s 54B(4) to "mak[ing] a record of its reasons for increasing or reducing the standard non-parole period" is not to be understood as suggesting either the need to attribute particular mathematical values to matters regarded as significant to the formation of a sentence that differs from the standard nonparole period, or the need to classify the objective seriousness of the offending. It does require the judge to identify fully the facts, matters and

57. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 [25].
58. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 [26].
59. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 [27].
60. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 [28].

> circumstances which the judge concludes bear upon the judgment that is reached about the appropriate sentence to be imposed. The obligation applies in sentencing for all [SNPP] offences regardless of whether the offender has been convicted after trial or whether the offence might be characterised as falling in the low, middle or high range of objective seriousness for such offences.[61]

1.51 In substance *Muldrock* removed the mandatory element of the SNPP scheme that *Way* considered had been intended by Parliament, noted that the SNPP operated as a guide to sentencing along with the maximum sentence, and reemphasised the need for an application of the instinctive synthesis approach rather than one requiring a two-step approach.

Reaction to *Muldrock*

1.52 The Sentencing Council has noted some of the conceptual difficulties that arise in relation to *Muldrock*, observing:

> … a question does arise as to the content of the putative mid-range offence for which the SNPP is to be a guidepost. Unless some assessment is made of the content of a putative mid-range offence, it is difficult to determine its relevance or value as a guidepost, or to determine what needs to be provided by way of reasons in compliance with s 54B(2) of the [Act].

Adding:

> … insofar as some form of comparison between the case at hand, and a putative mid-range offence, needs to be made in order to give the necessary reasons, a question remains as to whether *Way* was correctly decided in requiring attention to be given to the factors personal to the offender that were causally connected to the commission of the offence, such as matters of motivation, the presence of provocation or duress, as well as cognitive or mental impairment, and so on. The observation of the High Court that the objective seriousness of an offence is to be assessed without reference to matters personal to 'a particular offender or class of offenders', but is to be determined 'wholly by reference to the nature of the offending' raises this as an issue for further consideration.[62]

1.53 Hugh Donnelly of the Judicial Commission of NSW has observed that "[f]ew High Court decisions have had [as significant] an impact on sentencing practice as *Muldrock*".[63] Donnelly argued that while the High Court clearly had downgraded the role for SNPPs, it left "at large" the central issue of whether a court should make a finding as to where an offence fits relative to an offence in the middle of the range of objective seriousness. He also pointed out that the NSW Supreme Court had

61. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 [29].
62. NSW Sentencing Council, *Standard Non-parole Periods: A Background Report* (2011) [2.55]-[2.58].
63. H Donnelly, "The Diminished Role of Standard Non-parole Periods" (2012) 24(1) *Judicial Officers' Bulletin* 1. See also T Spohr, "Changing the *Way* We Sentence" (2012) 50(1) *Law Society Journal* 63.

already split on whether subjective factors of the offender may bear upon the objective seriousness of the offence or the moral culpability of the offender.[64]

1.54 In a recent CCA decision, Justice Basten observed that *Muldrock* "weakens the link between the standard non-parole period and the sentence imposed in a particular case".[65] His Honour said that "a sentencing judge will need to bear the standard non-parole period in mind as a marker, whether or not there are reasons why it should not be applied". But "more importantly", the nominated SNPP cannot have determinative significance and, depending on the circumstances of the case, it may not have "much weight at all".[66]

1.55 Consistently with this observation is the suggestion that, although there was an increase upwards in sentences following introduction of the SNPP scheme, now:

> partly unshackled from the burden of the SNPP as the most central (or indeed, the very first) issue in the sentencing process, it would seem more likely that courts will place renewed focus on subjective factors, with the consequence that sentences will taper off to some degree.[67]

Statistical studies of the impact of the SNPP scheme on sentencing levels

1.56 Before dealing with the issues that arise in relation to the application and value of the SNPP scheme post *Muldrock*, we consider it helpful to refer briefly to a statistical study published by the Judicial Commission in 2010 and to some earlier research carried out by the NSW Sentencing Council concerning the impact of the SNPP scheme on sentencing levels.

NSW Judicial Commission study in 2010

1.57 A statistical study by the Judicial Commission of NSW published in 2010 analysed the impact between 2000 and 2007 on sentencing patterns for SNPP offences under *Way* (bearing in mind that the SNPP scheme came into effect on 1 February 2003).[68] A table showing the median non-parole periods for selected SNPP offences in the pre-SNPP period 3 April 2000 to 31 January 2003, and in the post-SNPP period 1 February 2003 to 31 December 2007 is set out in Appendix B. For

64. H Donnelly, "The Diminished Role of Standard Non-parole Periods" (2012) 24(1) *Judicial Officers' Bulletin* 1, 3. The CCA in *MDZ v The Queen* [2011] NSWCCA 243 [67] held that the offender's mental condition at the time of the offence may bear upon the objective seriousness of the offending and his or her moral culpability. See also *R v Tran* [2011] NSWSC 1480 [13], where Rothman J considered that the objective seriousness included "the physical acts of the offender and their consequences together with the circumstances personal to the offender that are causally connected to the commission of the offence such as his state of mind". Johnson J concluded that the offender's mental condition bore upon his moral culpability in *Ayshow v The Queen* [2011] NSWCCA 240 [39]. By contrast, Garling J excluded the offender's mental condition from the assessment of objective seriousness in *R v Biddle* [2011] NSWSC 1262 [23].

65. *R v Koloamatangi* [2011] NSWCCA 288 [18].

66. *R v Koloamatangi* [2011] NSWCCA 288 [21].

67. T Spohr, "Changing the *Way* We Sentence" (2012) 50(1) *Law Society Journal* 63, 66.

68. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010).

completeness Appendix B also provides an update of this data which we have drawn from the Judicial Information Research System (JIRS).

Increases in terms of imprisonment

1.58 The Judicial Commission found that there had been increases in the terms of imprisonment for many SNPP offences, including:

- murder;
- wounding or causing grievous bodily harm with intent;
- sexual assault;
- aggravated sexual assault;
- aggravated indecent assault (when the offender pleaded guilty);
- sexual intercourse with a child under the age of 10 years;
- armed robbery or robbery in company with wounding or grievous bodily harm;
- aggravated break, enter and steal;
- specially aggravated break, enter and commit serious indictable offence;
- supply not less than the commercial quantity of a prohibited drug (where the drug was heroin or amphetamines); and
- supply not less than the large commercial quantity of a prohibited drug (for prohibited drugs generally).

Sentences for some offences became more consistent

1.59 The Judicial Commission found that sentence lengths generally had become more consistent for the following SNPP offences, that is to say, there was less variability or spread of sentences around the median length of sentence:[69]

- murder (when the offender pleaded guilty);
- wounding or causing grievous bodily harm with intent;
- sexual assault (when the offender pleaded guilty);
- armed robbery or robbery in company with wounding or grievous bodily harm; and
- aggravated break, enter and steal.

69. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010) 17. The *median* refers to the midpoint in the distribution, in which as many of the sentences are above the median as are below it.

Sentences for some offences became less consistent

1.60 On the other hand, the Judicial Commission found that sentencing became less consistent for some SNPP offences including:

- murder (when the offender pleaded not guilty);
- sexual intercourse with a child under the age of 10 years;
- specially aggravated break, enter and commit serious indictable offence;
- supply not less than the commercial quantity of heroin; and
- supply not less than the large commercial quantity of a prohibited drug.

1.61 The study also reported that:

- The guilty plea rate for what are now SNPP offences increased from 78.2% to 86.1% after the commencement of the scheme, while the guilty plea rate for non-SNPP offences remained relatively stable.[70]
- While most SNPP offences already had a high rate of imprisonment before the introduction of the scheme, there was a substantial increase in the use of fulltime imprisonment for Items 9A and 9B in the SNPP Table, increasing from 37.3% to 59.3% for aggravated indecent assault, and from 57.1% to 81.3% for aggravated indecent assault (child under 10).[71]
- There had been an increase in the number of cases in which the balance of the term of the sentence had exceeded one-third of the non-parole period, from 80% of the cases before introduction of the scheme to 87.3% of cases after its introduction.[72]

1.62 The Report inferred that this represented an increase in the incidence of cases in which *special circumstances* had been found to have existed under s 44 of the Sentencing Act. However we understand that this conclusion was derived from the bare statistical comparison of the proportions between the non-parole period and balance of term for the cohort of cases included in the analysis, and not from a perusal of the remarks on sentence.

1.63 The apparent increase in the rate of guilty pleas is also of interest. Anecdotally it has been suggested that this increase was due to advice given, or an understanding acquired, that the consequences of the SNPP scheme in the light of *Way*, would be reduced by avoiding going to trial. So far as it had the effect of encouraging the entry of early guilty pleas to take advantage of a discount, then that was a laudable outcome.

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70. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010) 19.
71. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010) 56.
72. Although it described this increase as statistically significant, it noted that this finding may be explained by the increase in the number of cases involving consecutive sentences, where the sentencing judge set a relatively short non-parole period (less than 75%) due to accumulation, rather than as a consequence of the commencement of the statutory scheme: Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010) 55-56.

1.64 In overall terms, the Judicial Commission observed:

- The findings "support the conclusion that the greater the proportion of the standard non-parole period to the maximum penalty, the greater the increase in the sentences imposed".
- Sentences tended to become relatively more severe for offenders who pleaded not guilty compared to those who pleaded guilty.
- In terms of consistency of sentencing, "[g]enerally it can be said that where the statutory scheme did not have a significant effect on the severity of sentences, there is evidence that sentencing outcomes became more uniform".

1.65 However, the Judicial Commission provided this important rider:

> Of course, it is not possible to conclude that the statutory scheme has only resulted in a benign form of consistency or uniformity whereby like cases are being treated alike and dissimilar cases differently. To put it another way, it is not possible to tell whether dissimilar cases are now being treated uniformly in order to comply with the statutory scheme.[73]

1.66 It is clear from the Judicial Commission analysis that the SNPP scheme has generally resulted in significant increases in sentence levels for the Table offences especially the offences involving violence, including sexual violence. This does not mean, however, that the median or average sentences actually given for these offences have approximated their SNPPs (as demonstrated by the analysis in Appendix B). We do not view this as being of concern or a failing in the scheme. There are likely to be many reasons for the existence of a difference. The SNPP is intended to represent the NPP for offences in the mid-range of seriousness and it may well be that a large number of offences comprised in the database were of lower seriousness than mid-range. Additionally, the presence of a plea of guilty or favourable subjective factors will lead to an appropriate reduction in the sentence. The Judicial Commission study shows, however, that SNPPs have had a significant impact on sentencing levels, and to this extent it would seem to have operated as expected.

Sentencing Council studies in the mid-2000s

1.67 The Sentencing Council background report provides a summary of its earlier research on the impact of the SNPP scheme from the mid-2000s, noting that it had:

> Observed that, subsequent to the introduction of the scheme:
>
> - there was no obvious change in the percentage of offenders sentenced to fulltime imprisonment, with the exception of Items 9A and 9B [aggravated indecent assault], which respectively had a 15 and 20% increase in the percentage of offenders sentenced to prison;
> - there was some increase in the NPPs for [SNPP] Table offences;
> - there was greater consistency in sentences imposed for Table offences;

73. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010) 59-61.

- the majority of cases had been assessed as falling below the mid-range of criminality, as the NPP applied generally fell below the SNPP;
- for the majority of Table offences, there was no significant difference between the median NPP imposed for all cases and that imposed for cases where there had been a guilty plea; and that
- of the 62 matters appealed to the CCA between 1 September 2006 and 31 August 2007 on the basis of error in the application of the SNPP scheme, 41 were defence appeals, of which 18 (44%) were successful; and 21 were brought by the Crown, of which 17 (81%) were successful. This represented an increase from the 73% success rate of relevant Crown appeals for the preceding year.[74]

It also drew attention to the fact that a 2005 study by the Judicial Commission of NSW had considered the impact of SNPPs on the use of suspended sentences. Although it noted that generally there was little impact, there was a noticeable reduction in the use of suspended sentences in relation to aggravated indecent assault, aggravated indecent assault with a child under 10, and unauthorised possession or use of firearm subsequent to the introduction of the SNPP scheme.[75]

Post-Muldrock review of SNPP cases

1.68 Since 5 October 2011, the CCA has decided at least 14 sentence appeals involving a ground of appeal or an argument that the sentencing court erred under *Muldrock*.[76]

1.69 Of those appeals, five were allowed by the CCA and the offender was re-sentenced,[77] while the remaining nine appeals were dismissed.[78]

1.70 When dismissing the applicants' sentence appeals, the CCA has held that notwithstanding any purported *Muldrock* error, no lesser sentence was warranted. The following observations of Justice Davies illustrate the approach which the CCA has adopted in cases of this kind:

> In my opinion no error has been shown in relation to the way the Sentencing Judge approached the standard non-parole period. Merely showing that a sentencing judge sentenced pre-*Muldrock* following the dictates of *Way* will not

74. NSW Sentencing Council, *Standard Non-parole Periods: A Background Report* (2011) [2.40].
75. NSW Sentencing Council, *Standard Non-parole Periods: A Background Report* (2011) [2.41].
76. As at 19 April 2012. The CCA often reserves its decisions in sentence appeals and, as a matter of course in its judgments in 2011 which it delivered after *Muldrock* was handed down, it considered any argument that the sentencing judge may have erred under *Muldrock*, even if it was not raised formally as a ground of appeal.
77. *Butler v The Queen* [2012] NSWCCA 54; *Bolt v The Queen* [2012] NSWCCA 50; *Foster v The Queen* [2011] NSWCCA 285; *Dionys v The Queen* [2011] NSWCCA 272; and *Sheen v The Queen* [2011] NSWCCA 259.
78. *Lawson v The Queen* [2012] NSWCCA 56; *Zreika v The Queen* [2012] NSWCCA 44; *Calcutt v The Queen* [2012] NSWCCA 40; *Butler v The Queen* [2012] NSWCCA 23; *RSW v The Queen* [2012] NSWCCA 13; *RR v The Queen* [2011] NSWCCA 235 (by majority); *Madden v The Queen* [2011] NSWCCA 254; *Beveridge v The Queen* [2011] NSWCCA 249 and *Ayshow v The Queen* [2011] NSWCCA 240. Two Crown appeals against leniency made reference to *Muldrock* but neither decision turned upon a misapplication of the SNPP scheme: *R v Ehrlich* [2012] NSWCCA 38 and *R v Koloamatangi* [2011] NSWCCA 288.

> be sufficient to demonstrate error. What should be ascertained in each case is whether a reliance on *Way* has sufficiently infected a sentence with such error that this Court must intervene. Ordinarily this might occur in cases where an applicant is found guilty by a jury, with the result that the sentencing judge will have considered that a two-stage process must be applied and that the standard non-parole period is mandatory unless factors can be found to justify a variation from it. It is far less likely that intervention will be required from this Court where a sentence has been imposed following a plea of guilty and the sentencing judge has referred to the standard non-parole period as simply a guideline or yardstick.
>
> In the present case the remarks of the Sentencing Judge suggest that little can be pointed to as constituting error. The Sentencing Judge referred both to the maximum penalty and the standard non-parole period as two factors to be considered (*Muldrock* at [27]), did not engage a two stage process to sentencing (*Muldrock* at [28]), and did not point to any factors to justify any departure from the standard non-parole period even used only as a guideline or yardstick. To suggest that the words "yardstick" or "guideline" might now carry some different emphasis or meaning by reason of matters in *Muldrock* is to apply an overly analytical approach to the use of those terms.
>
> Even if, as the Applicant submitted, those words now bear a different meaning as a result of the decision in *Muldrock*, they do so for two reasons irrelevant to the present case - first, because the Sentencing Judge did not make reference to objective circumstances and secondly, because he did not refer to the mandatory nature of a the standard non-parole period nor did he consider factors showing a need to depart from it.[79]

1.71 To date (as at 19 April 2012), the High Court has dealt with one application for special leave to appeal involving *Muldrock*.[80] The application was similarly dismissed on the basis that, whether or not the SNPP was applied correctly, the application did not have sufficient prospects of success to grant special leave.

1.72 The Legal Aid Commission of NSW and the Public Defenders' Office have instituted a review of approximately 3000 additional cases of offenders who were sentenced under the SNPP scheme prior to *Muldrock*, with a view to the possible review or appeal of some of those decisions. We understand that it is anticipated that a limited number of those matters (perhaps 10%) would be the subject of an application to the courts.[81] There are many other offenders who were represented privately or by the Aboriginal Legal Service, as well as a smaller number of unrepresented offenders who could also seek to have their sentences reviewed. This could potentially add for review another 1000 or so cases that were decided under the SNPP scheme as interpreted by *Way*.

1.73 While it may become apparent after a preliminary assessment that, for a majority of these cases, there would be no merit in an appeal or application for judicial review, the time and resources that would need to be devoted to that assessment, and the number of possible applications that could proceed, should not be underestimated. It is well known that unrepresented matters take up a disproportionate amount of time and resources, both for the courts and the prosecution. There may be

79. *Butler v The Queen* [2012] NSWCCA 23 [26]-[28].

80. *Nguyen v The Queen* [2012] HCASL 61 (29 March 2012).

81. G Jacobsen, "Early Get Out of Jail Card in Sight for Prisoners with Chance of Appeal", *Sydney Morning Herald*, 2 April 2012, 1.

consequent delays to current matters as well. For example, if the Court Reporting Service is requested to produce a transcript of sentencing proceedings and remarks on sentence for past matters, this may delay the provision of transcript for current proceedings. It is also entirely possible that some pre-*Muldrock* sentences will be reduced, thereby attracting publicity and motivating reviews by other offenders who may not yet be aware of the implications of the decision.

1.74 The impact of *Muldrock* on offenders previously dealt with under the SNPP scheme cannot be ignored. The length of the NPP that was fixed could have considerable ongoing importance. This could be the case for example where a sentence imposed at some later date for an unrelated offence was directed to be served cumulatively upon the expiry of the NPP period for the SNPP offence. It could also be relevant so far as the length of the NPP fixed may become relevant as part of the offender's antecedents, when next appearing for sentence.

1.75 At the end of this Report we will discuss the review/appeal options that are potentially available and will make a recommendation that is designed to facilitate this process.

2. Reform of the SNPP scheme

2.1 In this chapter we note the criticisms that have been made in relation to the Standard Minimum Non-Parole Period ('SNPP') scheme, describe the schemes having similar objectives that have been introduced or proposed in other jurisdictions, and finally identify the possible options for reform.

Criticisms of the SNPP scheme by stakeholders

2.2 In preparing its background report,[1] the Sentencing Council received a number of submissions that were critical of the SNPP scheme. We received a number of similar preliminary submissions in response to the general sentencing reference, and again during the consultations held specifically on the SNPP scheme in March and April 2012. Stakeholders' concerns are summarised below. It must be kept in

1. NSW Sentencing Council, *Standard Non-parole Periods: A Background Report* (2011).

mind that some of these concerns arose before *Muldrock v The Queen*[2] and must be read subject to the way in which *Muldrock* now impacts on sentencing practice in NSW.

The SNPP scheme is too complicated

2.3 Several submissions criticised the SNPP scheme as being too complicated and time consuming, resulting in various problems such as: confusion, delays to the finalisation of sentencing, unnecessary restriction on judicial sentencing discretion and increased risk of error on the part of the parties as well as on the part of the court.[3]

2.4 We note that *Muldrock* may have addressed some of these concerns by simplifying the way in which courts will take into account SNPPs as guideposts or markers within the instinctive synthesis of all the relevant factors in each case. However, as we note later in this section this does not resolve all the difficulties concerning the factors that must be taken into account when considering objective seriousness, or the extent to which courts need to give their reasons for departing from an SNPP.

No consistent pattern in the SNPP Table

2.5 There has been almost universal comment and criticism in the submissions to both the Law Reform Commission and the NSW Sentencing Council concerning the absence of any consistent pattern in the relationship between the terms nominated for the SNPP offences and the maximum penalties available for those offences.[4] Clearly the maximum penalty is relevant because it is reserved for the worst category of cases.[5] Parliament ranks the relative seriousness of offences as perceived by the public by fixing different maximum penalties for different offences.[6] However, the SNPP Table seems to indicate that Parliament views some offences as requiring more time in custody than is required for other offences by reason of the higher SNPP that is nominated, even though they share the same maximum

2. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120.

3. RO Blanch, *Preliminary Submission PSE3*, 1; I Temby, *Preliminary Submission PSE2*, 1; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PSE10*, 4-5; The Shopfront Youth Legal Centre, *Preliminary Submission PSE13*, 5; Legal Aid NSW, *Preliminary Submission PSE18*, 9; Police Association of NSW, *Submission SES9*, 3-4; Probation and Parole Officers' Association of NSW, *Submission SES8*, 1, 3; The Shopfront Youth Legal Centre, *Submission SES10*, 3; NSW Police Force, *Submission SES11*, 3; NSW Office of the Director of Public Prosecutions, *Submission to the NSW Sentencing Council SNPP10*, 6; R N Madgwick, *Submission to the NSW Sentencing Council SNPP11*,10.

4. RO Blanch, *Preliminary Submission PSE3*, 1-2; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PSE10*, 4-5; Legal Aid NSW, *Preliminary Submission PSE18*, 9; Law Society of NSW, Criminal Law Committee, *Submission SES4*, 1; Police Association of NSW, *Submission SES9*, 3; R N Madgwick, *Submission to the NSW Sentencing Council SNPP11*, 1; NSW Bar Association, *Submission to the NSW Sentencing Council SNPP02*, 2 (supported by Law Society of NSW, *Submission to the NSW Sentencing Council SNPP04*, 1 and Legal Aid NSW, *Submission to the NSW Sentencing Council SNPP08*, 1); NSW Office of the Director of Public Prosecutions, *Submission to Sentencing Council SNPP10*, 2; P McClellan (*Submission SES5,* 2) observed that some SNPPs "do not seem to be justified or appropriate"; RO Blanch (*Submission SES1*, 2) described the present statutory provisions as "nonsensical".

5. *Ibbs v The Queen* (1987) 163 CLR 447.

6. *R v H* (1980) 3 A Crim R 53, 65.

penalty. This is not something that the legislature has stated clearly and it has been observed that it "would involve concepts which are new to the law of sentencing".[7]

2.6 *Muldrock* does not overcome the issue of the great disparity of the ratios of nominated SNPPs to maximum penalties.

Inconsistency in dealing with SNPP offences in the Local Court and higher courts

2.7 The official policy of the NSW Office of the Director of Public Prosecutions, where the option is available, is to elect for SNPP offences of at least middle range seriousness to be finalised in the higher courts.[8] However, the Local Court has noticed serious SNPP cases being left in the Local Court. This has occurred even though the lower available maximum penalty (arising from the general jurisdictional limit of imprisonment for two years for a single offence) is clearly inadequate to deal with the seriousness of an offence that is near or well above the mid-range of objective seriousness. This has led to the Chief Magistrate's submission in support of increasing the Local Court's jurisdictional limit.[9] This may have been a consequence of the difficulty experienced by the prosecution in assessing whether an offence is in the middle range of objective seriousness,[10] a problem also encountered by the courts. However it also raises an important question about the appropriateness of a prosecutorial discretion which results in similar cases being treated in very dissimilar ways. Unlike judicial decision-making, the exercise of the prosecution's discretion is not reviewable or readily accessible by the public.

Guilty pleas

2.8 As noted above it has been suggested that some people have pleaded guilty to SNPP offences instead of taking their chances at trial, in order not only to gain the statutory discount for a plea, but also to provide a reason for the court to depart from the nominated SNPP.[11]

2.9 It remains unclear at present whether *Muldrock* will lead to any change in this respect. It would still appear to be incumbent upon defence representatives to advise clients that contested proceedings may well result in them receiving the SNPP if there are no reasons, falling within s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('Sentencing Act'), justifying a departure from the scheme.

2.10 The Chief Judge of the Common Law Division has submitted that, in relation to murder trials, the combination of the guideline judgement for a plea of guilty[12] and

7. P Johnson, "Reforms to New South Wales Sentencing Law: The Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002" (2003) 6 *Judicial Review* 314, 335.
8. See the list of Table 1 and Table 2 offences in *Criminal Procedure Act 1986* (NSW) sch 1 and Prosecution Guideline 8 of the NSW Office of the Director of Public Prosecutions.
9. G Henson, *Preliminary Submission PSE5*, 13-14; G Henson, *Submission SES2*, 1.
10. N Cowdery, "Minimum Sentencing: The Australian Prosecutorial Experience" (Paper presented as OSF-SA Sentencing Conference, Cape Town, South Africa, 25-26 October 2009) 9.
11. R O Blanch, *Preliminary Submission PSE3*, 2; RO Blanch, Submission to the NSW Sentencing Council SNPP1A, 1; see also L Flannery, "A Defence Lawyer's Perspective" (2005) 28 *UNSW Law Journal* 252, 254; and NSW Sentencing Council, *Standard Non-parole Periods: A Background Report* (2011) [2.49].
12. *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383.

the SNPP for the offence of murder has resulted in an increase in guilty pleas for murder. However, he noted that the rate of such guilty pleas is important in terms of efficiency for the Supreme Court, given the average length of murder trials, and noted that there was no perception among the judges of the Supreme Court that the pleas of guilty were not justified, commenting that "the opposite would be the case".[13]

Difficulty of applying aggravated indecent assault SNPPs

2.11 A submission pointed out that in cases of aggravated indecent assault, the SNPPs are so close to the maximum penalties as to make a literal application of the SNPP legislation "quite irregular and illogical" because it effectively treats offences in the middle range of objective seriousness as being close to the most serious of their kind.[14]

2.12 It was pointed out during consultations that it is conceivable (although perhaps unlikely) that an offender could be sentenced to one of the relatively high SNPPs; for example, the eight-year SNPP for an offence of aggravated indecent assault under s 61M(2) of the *Crimes Act 1900* (NSW), which carries a maximum sentence of 10 years imprisonment. If that offender is sentenced after being found guilty at trial and the sentencing judge concludes on reasonable grounds that there is no reason to depart from the SNPP, it would be extremely difficult, if not impossible, to overturn the decision on appeal.[15]

2.13 To develop this example to its logical conclusion, such a sentencing outcome would be entirely in accordance with the SNPP system, but well out of line with general sentencing practice. First, this is the case because the specified SNPP for an offence in the midrange of objective seriousness equates to 80% of the maximum penalty although normally that would only apply to an offence in the top range of seriousness. Secondly it preserves little opportunity for the period of release on parole that is otherwise the norm under the Sentencing Act.

'Flawed premise' of community expectations of higher sentences

2.14 The Sentencing Council[16] noted that a view commonly expressed was that the SNPP scheme was founded on a 'flawed premise' that the community expected there to be higher penalties for serious crimes. The Council referred to research by the NSW Bureau of Crime Statistics and Research which tended to suggest that the NSW public was generally poorly informed about the true state of crime statistics, and that "distorted, selective and sensationalist" media reporting had fuelled an ill-informed perception that higher penalties needed to be imposed.[17] The Council also referred to research by the Victorian Sentencing Advisory Council which, like other similar studies, found that, when members of the public were given more complete

13. P McClellan, *Submission SES5,* 2. The NSW Police Force also submitted that a higher percentage of guilty pleas increases the efficiency of the criminal justice system: NSW Police Force, *Submission SES11*, 3.
14. R O Blanch, *Preliminary Submission PSE3,* 2.
15. *Roundtable Consultation SEC2*.
16. NSW Sentencing Council, *Standard Non-parole Periods: A Background Report* (2011) [4.10]-[4.14].
17. C Jones, D Weatherburn and K McFarlane, *Public Confidence in the New South Wales Criminal Justice System*, Crime and Justice Bulletin 118 (NSW Bureau of Crime Statistics and Research, 2008) 13.

information about all the facts of a case, sometimes there was a "strong mitigating effect on severity", for example, in instances of young offenders or first time offenders.[18]

Determining objective seriousness

2.15 The Shopfront Youth Legal Centre submitted that the requirement that judges determine where an offence lies in reference to the mid range is problematic. The Centre submitted that the assessment of "objective seriousness" may be difficult to determine "without vastly simplifying the nature of the offence". The Centre also commented that the circumstances involved in some SNPP offences are so wide-ranging that the concept of mid-range objective seriousness is "virtually meaningless".[19]

2.16 The Police Association of NSW submitted that there has been confusion in the determination of objective seriousness.[20]

2.17 The Office of the Director of Public Prosecutions noted in its submission to the Sentencing Council that the SNPP legislation has increased the focus on the need to find where in the range of objective seriousness an offence falls, which has resulted in much appellate case law.[21]

2.18 The Chief Judge of the District Court submitted that *Muldrock* has made the work of judges much simpler. However, he also submitted that if SNPPs are to remain, their operation could be simplified further by repealing s 54A(2) of the Sentencing Act, which refers to the SNPPs as representing the non-parole period ('NPP') of an offence in "the middle of the range of objective seriousness". He submitted that this provision has resulted in the Court of Criminal Appeal ('CCA') suggesting that judges must make some assessment of where the offence sits in relation to the mid range of seriousness, which he contends is a "completely pointless exercise and simply allows another basis for challenging the assessment made by the judge".[22]

2.19 *Muldrock* establishes that the SNPP is not the starting point in sentencing for an SNPP offence, and that it is not necessary to classify the offence before the court by reference to its position in a range of seriousness.[23] However, aspects of the reasoning remain unclear, as was identified in subsequent decisions and in our consultations.

2.20 *Muldrock's* recognition that the SNPP provides a guidepost or marker for a sentence requires that it still be given some work to do. Justice Basten has observed:

18. K Gelb, *More Myths and Misconceptions* (Victoria, Sentencing Advisory Council, 2008) 4–7.
19. The Shopfront Youth Legal Centre, *Preliminary Submission PSE13*, 3.
20. Police Association of NSW, *Submission SES9*, 3.
21. NSW Office of the Director of Public Prosecutions, *Submission to Sentencing Council SNPP10*, 3.
22. R O Blanch, *Submission SES1*, 1.
23. *R v Biddle* [2011] NSWSC 1262 [87]; *Foster v The Queen* [2011] NSWCCA 285 [27]; *Butler v The Queen* [2012] NSWCCA 23 [23]; *Butler v The Queen* [2012] NSWCCA 54 [25].

> What remains in doubt, however, is whether the sentencing court is required or permitted to classify, or prohibited from classifying, the particular offence by reference to a low, middle or high range of objective seriousness. The statements at [25] and [29] indicate that the sentencing judge is not required to undertake such an assessment or classification. The statement at [28] indicates that it would be wrong to adopt a two-stage approach which commenced with such an assessment and then sought reasons for departure. On the other hand, to treat the standard non-parole period as a guidepost requires that the phrase "the middle of the range of objective seriousness" must be given content: see [27]. Further, the Court recognised the need for a sentencing judge to maintain "awareness" of the standard non-parole period as an additional consideration bearing on the appropriate sentence: at [31]. That exercise must include reference to the statutory context for its consideration. Nor did the Court suggest that a conventional assessment of the objective offending, according to a scale of seriousness, was to be eschewed. The diminished role accorded the standard non-parole period is, in effect, a function of the fact that it involves an hypothetical offence, ascertained by reference to a limited range of considerations.[24]

2.21 To regard *Muldrock* as removing the need for a court to assess the objective seriousness of the offence at hand would be to turn the traditional approach to sentencing on its head. That assessment has always been an essential aspect of the sentencing process[25] and it clearly must continue to be the case, whether applying the instinctive synthesis method or otherwise.[26]

2.22 As noted above, *R v Way*[27] held that matters personal to the offender that were causally connected with the commission of the offence were to be taken into account in assessing the level of objective seriousness involved, but that purely subjective matters that were causally unrelated to its occurrence were not to be taken into account. This would seem to have been entirely unobjectionable in the light of long standing sentencing practice.

2.23 The question which has remained open for debate is whether the holding of the High Court in *Muldrock* to the effect that the objective seriousness of an offence is to be assessed without reference to matters "personal to a particular offender or class of offenders", but rather is to be determined wholly by reference to the "nature of the offending"[28] means that this aspect of the decision in *Way* was also overruled.

2.24 The relevant passages in *Way* were referred to in *Muldrock*, although without approval or disapproval, and without further explanation as to the content of the expression "the nature of the offending".

2.25 The courts that have applied *Muldrock* have recognised that the two-step approach required by *Way* is not to be employed and that the SNPP does not have "determinative significance".[29] However, different views have emerged as to whether or, perhaps more correctly, at what point in the sentencing exercise, regard can or cannot be had to matters personal to the offender that were causally

24. *R v Koloamatangi* [2011] NSWCCA 288 [19].
25. *R v Dodd* (1991) 57 A Crim R 349, 354; *Khoury v The Queen* [2011] NSWCCA 118 [71] and [76]; *R v Moon* [2000] NSWCCA 534 [68].
26. *R v Ehrlich* [2012] NSWCCA 38 [86]-[87] (Johnson J); and *Zreika v The Queen* [2012] NSWCCA 44 [46].
27. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168.
28. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 [27].
29. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 [32]; *R v Koloamatangi* [2011] NSWCCA 288 [21].

connected with the offending, or that explained why it occurred. This question has arisen principally in the context of the offender's state of mind or mental condition at the time that the offence was committed.

2.26 Some decisions have suggested that *Muldrock* does not permit regard to be had to the offender's mental condition for the purpose of assessing the objective seriousness of the relevant offence, although they have recognised that this factor will need to be taken into account at some stage of the sentencing exercise, either as a s 21A(3) factor or as a special circumstance under s 44 of the Sentencing Act.[30] Although not specifically holding this to be the case, there are observations in the CCA that could be understood as pointing in this direction.[31]

2.27 Other decisions suggest that *Muldrock* has not altered the practice approved in *Way* of taking into account, when assessing the objective seriousness of the offence, factors personal to the offender that were causally connected to the commission of the offence, or that contributed to it in a material way.[32]

2.28 What has emerged in some of the post-*Muldrock* decisions has been a reference to the "moral culpability" of the offender, sometimes expressed in terms of that person's "moral responsibility" or "moral turpitude",[33] although without any clear indication as to whether that has been assumed to be an incident of the nature of the offending or is to be otherwise taken into account as a s 21A factor.

2.29 Whether or not the difference in opinion or residual uncertainties that arise in this respect should be left to be worked out by the courts, or resolved by legislative direction, is discussed in more detail as part of our consideration of Option 2.

Has the SNPP scheme delivered on its objectives?

2.30 Of relevance for any decision to reform the SNPP scheme is whether it has delivered on its proposed objectives. The second reading speech in 2002 made it clear that what was proposed was not a form of mandatory or grid sentencing. Rather its purpose was to provide, for selected serious crimes, a reference point in addition to that provided by the maximum available sentence; and to bring about sentences that would meet the community's legitimate expectation for the imposition of sentences that matched the gravity of those crimes.[34] As was made more explicit by the Premier, the system was intended to deliver tougher and more consistent sentences and to make judges more accountable to the community.[35]

30. *R v Biddle* [2011] NSWSC 1262 [88].
31. *Foster v The Queen* [2011] NSWCCA 285 [26] (Adams J); *R v Koloamatangi* [2011] NSWCCA 288 [18] (Basten JA).
32. *Ayshow v The Queen* [2011] NSWCCA 240 [39]; *R v Cotterill* [2012] NSWSC 89 [30]; *R v Tran* [2011] NSWSC 1480 [13]; *R v Fahda* [2012] NSWSC 114 [50]; *MDZ v The Queen* [2011] NSWCCA 243 [67]; *Yang v The Queen* [2012] NSWCCA 49 [37]-[38] and *Lawson v The Queen* [2012] NSWCCA 56.
33. *Ayshow v The Queen* [2011] NSWCCA 240 [39]. See also *MDZ v The Queen* [2011] NSWCCA 243; *R v Koloamatangi* [2011] NSWCCA 288 and *Yang v The Queen* [2012] NSWCCA 49.
34. NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5815 (Bob Debus, Attorney General).
35. R Carr, "Premier Carr Releases Plan for Tougher and More Consistent Sentences" (News Release, 4 September 2002).

2.31 As noted above,[36] the Judicial Commission's report in 2010 and the JIRS statistics give a mixed report on whether these stated aims were met before *Muldrock*. It also remains questionable whether the system has enhanced a consistency of approach, in which like cases are treated in a like manner, and unlike cases are treated with due allowance for the differences between them – or whether it has encouraged an emphasis being placed on achieving statistical consistency at the expense of consistency in the application of sentencing principle.

2.32 The Chief Judge at Common Law of the Supreme Court of NSW favoured retention of an SNPP scheme because of the guidance which it has provided in an important and complex area of sentencing in respect of a group of serious offences, particularly for newly-appointed judges.[37]

2.33 It does appear that whatever the scheme has achieved to date has come at the cost of much time and effort in its application by the judiciary at first instance and appellate level, and by practitioners. In part this may have been due to the finding in *Way* that the scheme was intended to be mandatory rather than directory in its application. It may also have been due to the complexity of the "two step process" that became the norm, and the need for the court, when deciding whether to impose an NPP that differed from the SNPP, to refer to and balance the considerations enunciated in s 21A of the Sentencing Act, which overlap and point in different directions.

2.34 It continues to be of concern that there was an absence of transparency in relation to the reasons for which the individual SNPP offences were selected for the scheme, or in relation to the way in which the relevant SNPP levels were set. So far as can be ascertained there was little in the way of consultation, or explanation as to why the new SNPPs were set generally at double or even triple the pre-existing median NPPs, or as to why there was such a wide divergence between the SNPPs in terms of their relativity to the maximum available sentence for the individual SNPP offences. In this regard it is also noted that there are a number of offences attracting maximum sentences of 20 years imprisonment or longer that have not been included in the scheme while several offences attracting sentences of less than 20 years have been brought within its reach.[38]

2.35 As will be apparent from our discussion of the options, we favour the approach of allowing the SNPP scheme an opportunity to work itself out broadly in accordance with the *Muldrock* approach, although subject to some clarifying amendments to s 54B of the Sentencing Act before any final decision is made for its abolition or replacement. In coming to that conclusion we have taken into account the considerations mentioned above, as well as the fact that the other more general reforms, that will be considered in our overall sentencing reference, will have a bearing on its future. Of particular relevance in this respect is the much vexed application of the provisions contained in s 21A of the Sentencing Act that have contributed significantly to the incidence of appeals.

2.36 NSW alone has followed the path of adopting a 'defined term scheme'. Its future, post *Muldrock,* will depend on a consideration whether, after a period of review, it brings about consistency in the application of principle and avoids the undue complexity that has accompanied its application to date. If its retention is assessed as worthwhile, consideration can then be given, after an appropriate process of

36. Para 1.66.
37. P McClellan, *Submission SES5*, 2.
38. See Appendix C.

consultation, to the offences to which it should apply, and to a rationalisation of the levels at which the SNPPs are set.

The approaches taken to non-parole periods in other jurisdictions

2.37 We provide this brief summary of legislation that provides guidance or other forms of direction in relation to setting NPPs in other jurisdictions, by way of a contrast to the approach in NSW. Some of these jurisdictions permit indefinite or disproportionate sentences for dangerous or high-risk sexual offenders, but we have excluded any reference to those provisions as their objectives are somewhat different and apply to individual offenders.

South Australia

2.38 In South Australia a mandatory minimum NPP of 20 years is legislated for murder where a court imposes a sentence of life imprisonment.[39]

2.39 The court may set a lesser NPP if there are "special reasons" for doing so.[40] In determining whether "special reasons" exist, the court must consider only whether the victim's conduct or condition substantially mitigated the offender's conduct, whether there was a plea of guilty and the circumstances surrounding it, and the degree of the offender's co-operation with the authorities.[41]

Northern Territory

2.40 In the Northern Territory a specified 20-year NPP (this is increased to 25 years in some circumstances[42]) is legislated for murder where life imprisonment is imposed.[43]

2.41 The specified NPP can only be reduced in defined "exceptional circumstances".[44] In determining whether there are "exceptional circumstances", the court must be satisfied that the offender is of good character and is unlikely to re-offend and whether the victim's conduct, or conduct and condition substantially mitigate the offender's conduct, and cannot have regard to any other matters.[45] A court may decline to set the legislated NPP in situations where the offender's culpability is of an extreme level such that the community interest in retribution, punishment, protection and deterrence can only be satisfied by a sentence of imprisonment for the term of the offender's natural life without the possibility of release on parole.[46]

39. *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(ab). Section 32A(1) also provides that any mandatory minimum NPP stated in the Act or any other Act "represents the non-parole period for an offence at the lower end of the range of objective seriousness".
40. *Criminal Law (Sentencing) Act 1988* (SA) s 32A(2)(b).
41. *Criminal Law (Sentencing) Act 1988* (SA) s 32A(3).
42. *Sentencing Act* (NT) s 53A(1)(b), s 53A(3).
43. *Sentencing Act* (NT) s 53A(1).
44. *Sentencing Act* (NT) s 53A(4).
45. *Sentencing Act* (NT) s 53A(7).
46. *Sentencing Act* (NT) s 53A(5).

Victoria

2.42 The Attorney General made a request to the Victorian Sentencing Advisory Council in April 2011 for advice on the introduction of "baseline sentences" for particular offences.[47] The Council approached this task on the basis that a "baseline sentence" would be a starting point in determining the NPP only if the sentencing court first determined that it was appropriate to sentence the offender to a term of imprisonment and to impose a non-parole period.[48] The baseline for a particular sentence represents the NPP for an offence in the middle of the "custodial range", taking into account factors relevant to the offence alone.[49] The Council recommended that sentencing courts use the baseline as a starting point and adjust it according to the relevant aggravating and mitigating factors and any relevant discount for a guilty plea and/or assistance to authorities.[50] Baseline sentences would apply to all "significant" and "serious" offences under s 3(1) of the *Sentencing Act 1991* (Vic).[51]

2.43 By way of example, the Victorian Government indicated that a 10-year baseline should apply to trafficking in a large commercial quantity of drugs and a 20-year baseline should apply to murder.[52]

2.44 The Council acknowledged that the implementation of such a baseline sentencing scheme would involve a staged approach to sentencing that can be contrasted with the instinctive synthesis approach favoured by the High Court and would represent a "departure" from that approach.[53] However, the Council was of the view that "this will not necessarily exclude the use of a sentencing synthesis completely".[54]

Queensland

2.45 In 2010, the Queensland Government announced its intention to introduce an SNPP scheme for serious violent offences and sexual offences. The Queensland Attorney-General asked the Queensland Sentencing Advisory Council to report on the introduction of the scheme, including the offences to which it should apply and the appropriate length of the SNPPs. However, after examining other jurisdictions and in particular the NSW SNPP scheme, a majority of the Council concluded, in its 2011 report, that they did not favour the introduction of an approach similar to that adopted in NSW.[55] The majority expressed concern about SNPPs meeting their

47. Victoria, Sentencing Advisory Council, *Baseline Sentencing*, Report (2012).
48. Victoria, Sentencing Advisory Council, *Baseline Sentencing*, Report (2012) 19, 21.
49. Victoria, Sentencing Advisory Council, *Baseline Sentencing*, Report (2012) Executive Summary, xvii.
50. Victoria, Sentencing Advisory Council, *Baseline Sentencing*, Report (2012) Executive Summary, xiv, 3.
51. Victoria, Sentencing Advisory Council, *Baseline Sentencing*, Report (2012) xi, xvi, 2, 59, 142-143; *Baseline Sentences*, Issues Paper (2011), 21. In addition, the Council suggested that it apply to culpable driving causing death, dangerous driving causing death, kidnapping and proposed offences involving intentionally or recklessly causing severe injury: *Baseline Sentencing*, Report (2012) xv-xvi, 64-66. The Council recommended, however, that it not apply to matters dealt with summarily, younger offenders aged under 18 years (or between 18 and 20 years if sentenced to detention in a youth justice centre): Victoria, Sentencing Advisory Council, *Baseline Sentencing*, Report (2012) xviii, 52-57.
52. Victoria, Sentencing Advisory Council, *Baseline Sentencing*, Report (2012) xi.
53. Victoria, Sentencing Advisory Council, *Baseline Sentencing*, Report (2012) xiii, 19.
54. Victoria, Sentencing Advisory Council, *Baseline Sentencing*, Report (2012) 20.
55. Queensland Sentencing Advisory Council, *Final Report: Minimum Standard Non-parole Periods* (2011).

objectives "beyond making sentencing more punitive and the sentencing process more costly and time consuming", as well as "possible negative impacts of such a scheme on vulnerable offenders".[56]

2.46 The Council nonetheless examined what form of SNPP scheme might be introduced and considered two possibilities comprising:

- a 'defined term scheme' where the SNPP was defined in terms of years and months; or
- a 'standard percentage scheme' whereby the Parliament would specify that the non-parole period for an offender should be set as a percentage of the total sentence that was imposed.

2.47 The Council resolved that it favoured the 'standard percentage scheme'[57] and recommended that it be incorporated into the existing Serious Violent Offences Scheme so that, in broad terms, that prisoners would have to serve a minimum of between 65% and 80% of the total sentence imposed before being eligible to apply for parole.[58] Scope was permitted in some circumstances to impose a shorter or longer period if it would be unjust to impose the stated minimum for a specified offence.

2.48 In 2011, the Queensland Government adopted the Council's report (subject to extending the proposal to cover 17-year-old offenders) and introduced the Law Reform Amendment Bill 2011 to implement the Council's recommendations.[59] However, the Bill lapsed with the 2012 Queensland State election.

2.49 On 30 April 2012, the new Queensland Government signalled that it had resolved in principle to introduce mandatory minimum non-parole periods of between one and five years for a variety of illegal firearm offences, "subject to more detailed consideration and consultation".[60]

2.50 In relation to the Queensland Sentencing Advisory Council's recommendations it is noted that a 'standard percentage scheme' is not the same as the NSW 'defined term scheme'. The model favoured by the Queensland Sentencing Advisory Council more closely resembles s 44 of the NSW Sentencing Act that requires the NPP imposed for any one offence to be at least three-quarters of the total sentence for that offence in the absence of "special circumstances". In NSW, the 'standard percentage' of 75% is not a guarantee that NPPs will be set at that level in practice. The high frequency of findings of 'special circumstances' by NSW courts, and consequent reduction in the level of NPPs, led Chief Justice Spigelman to query in 2004 whether many offenders' circumstances really were sufficiently 'special' to justify lowering their NPPs. He observed, "There is evidence that findings of special

56. Queensland Sentencing Advisory Council, *Final Report: Minimum Standard Non-parole Periods* (2011) xiv-xv.
57. Queensland Sentencing Advisory Council, *Final Report: Minimum Standard Non-parole Periods* (2011) xvi.
58. Queensland Sentencing Advisory Council, *Final Report: Minimum Standard Non-parole Periods* (2011) xvii, 37.
59. Explanatory Memorandum, Law Reform Amendment Bill 2011 (Qld) 2-3.
60. C Newman, "New Minimum Penalties for Gun Crime" (Ministerial Media Statement, 30 April 2012) 1-2.

circumstances have become so common that it appears likely that there can be nothing 'special' about many cases in which the finding is made".[61]

2.51 The Queensland Sentencing Advisory Council noted that there were already in effect three forms of specified minimum NPPs under Queensland legislation, although they were not formally termed as such:

- 15 years for offenders sentenced to life imprisonment (or 20 years for murder in some circumstances);
- 15 years or 80% of the total sentence, whichever was the lesser, for a declared 'serious violent offence'; and
- 50% of the total sentence where the sentence exceeded three years and the court did not set a parole eligibility date, or in other specified circumstances such as in the case of a breach of a suspended sentence.[62]

Tasmania

2.52 In a 2008 report, the Tasmanian Law Reform Institute concluded that SNPPs should not be introduced, noting among other difficulties with the SNPP approach, that multiple sentences in Tasmania are usually dealt with by way of a global sentence, and that an SNPP scheme would not fit within this approach. Further, the Institute concluded:

> there is no reason to believe that specifying standard non-parole periods in legislation will have any impact on improving public understanding of, and public confidence in, sentencing practices.[63]

Options for reform

2.53 The report now sets out six possible options for reform. Our preferred choice is Option 2, however for each option we will make recommendations on the steps that we believe should be taken if that option is endorsed by the Government.

Option 1: Retain the SNPP scheme allowing the courts to develop the law in accordance with *Muldrock* subject to later review

2.54 The first option would be to take no legislative action at this time, allowing the courts to develop the law in accordance with *Muldrock*, subject to ongoing monitoring of the case law to determine the way in which the modified system is working in practice, and the consequences in terms of consistency and sentencing trends.

2.55 The argument in favour of this approach is that there is the possibility that *Muldrock* will streamline the operation of the SNPP system, while preserving for courts a useful guidepost in accordance with the original legislative intention.

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61. *Fidow v The Queen* [2004] NSWCCA 172 [20].
62. Queensland Sentencing Advisory Council, *Final Report: Minimum Standard Non-parole Periods* (2011) xvii, 36.
63. Tasmanian Law Reform Institute, *Sentencing*, Final Report (2008) [6.4.8].

2.56 There was agreement among some stakeholders at the consultations that the courts should be allowed a reasonable period of time to implement *Muldrock* before any change is considered.[64]

2.57 The contrary arguments are that:

- There are some significant residual conceptual issues arising from *Muldrock*, that, from a policy point of view, should be resolved as soon as possible by legislation in order to reduce the risk of first instance error.
- The diminished role of the SNPPs may lead to a reduction in sentencing levels and in the transparency and consistency of sentencing, inviting community disquiet and calls for the SNPP scheme to be strengthened.

2.58 If Option 1 is adopted subject to later review then undoubtedly it would be helpful to start that review process now. The Bureau of Crime Statistics and Research and the Judicial Commission could undertake this in a formal and co-ordinated manner so that a clearer statistical picture is obtained both in relation to post-*Muldrock* decisions and any redeterminations of pre-*Muldrock* sentences. As noted earlier there may be a considerable number of cases of the latter kind that could take some time to be finally resolved.

2.59 The need for any such review would impact upon the timing of the completion of our general report on sentencing. That could, however, be met by reserving this aspect of our reference for a subsequent report in which consideration could be given to the repeal, replacement or strengthening of the SNPP scheme. This could be of assistance since, in our more general review, we will specifically consider the retention or amendment of s 21A and s 44 of the Sentencing Act. Any recommendations that are made concerning those provisions would need to be taken into account, in relation to the continuation or amendment of the SNPP scheme in the light of the monitoring process mentioned above, since each is of critical relevance to its application.

Option 2: Retain the SNPP scheme and legislate to clarify *Muldrock*

2.60 This option would provide for retention of the SNPP scheme pending a period for monitoring and review of post *Muldrock* sentencing trends and pending the release and consideration of our final report. What is proposed involves a simple legislative amendment, in the interim, to clarify certain aspects of the decision. It would amount to a holding position that would simplify the application of the SNPP scheme, without necessarily entrenching it in law on a permanent basis. Of importance in this respect is the fact that, if the scheme is maintained, amendment may still be required, depending on any changes that are made to s 21A and s 44 of the Sentencing Act.

2.61 Some stakeholders do not support such legislative action.[65]

64. *Roundtable Consultation SEC2*. However, the NSW Police Force are critical of a "wait and see" approach: Police Force, *Submission SES11*, 3. The NSW Bar Association submitted that Muldrock needs no clarification, and any arguable uncertainties that remain may be left to be resolved in future cases: NSW Bar Association, *Submission SES3*, 2. The Law Society of NSW is not concerned about the "perceived issues of interpretation of Muldrock" and also submitted that any difficulties that may arise would be best resolved by appellate courts: Law Society of NSW, *Submission SES4*, 1.

2.62 As we have discussed earlier it is not entirely clear what the High Court meant by the expression "*nature of the offending*" by reference to which the "*objective seriousness*" of an offence *is* to be assessed. Nor is it entirely clear what facts or circumstances are to be regarded as "*matters personal to a particular offender or class of offenders*" that are to be excluded from any such assessment.

2.63 Added to the difficulty is the uncertainty whether, in these paragraphs, the Court was referring to a hypothesised or abstract offence (as might be indicated by the reference to a "*class of offenders*"), or to the index offence before the Court; and/or whether if, referable to the index offence, *Muldrock* overruled *Way* in its holding that matters personal to the offender that were *causally connected* to the offending behaviour (such as motivation, provocation, duress, and mental or cognitive impairment that affected the offender's reasoning or control of the actions that constituted the offence) were to be taken into account when assessing its objective seriousness.

2.64 Any dilemma that arises in this regard is not simplified by the fact that the s 21A factors, which are the only reasons[66] that the court is permitted to take into account when setting a NPP that differs from the SNPP:

- are equally relevant for the determination of the overall term of the sentence; and
- comprise a mixture of aggravating and mitigating circumstances that point in different directions.

2.65 None of the foregoing might be relevant in relation to the development of a suitable amendment so long as Part 4 Division 1A of the Sentencing Act preserves the essence of the *Muldrock* approach which requires that:

- the Division be interpreted as having a directory rather mandatory application;
- the SNPP not be used as a starting point for the sentencing exercise, as distinct from a guidepost or marker to which the court is to refer, in which role it would act in a similar fashion to that provided by the maximum sentence for the index offence;[67]
- the sentencing process follow the instinctive synthesis approach that has consistently been approved by the High Court in recent years[68] rather than a two-step approach; and
- sufficient reasons are provided for the sentence that is imposed, which include a reference to the guidepost provided by s 54A(2), and the factors identified in

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65. The NSW Bar Association acknowledges that there may be some arguable uncertainties remaining after *Muldrock*, however it considers that these may be left to be resolved in future cases and they do not require legislative action, particularly if it might undermine *Muldrock*: NSW Bar Association, *Submission SES3*, 2; The Law Society of NSW was not concerned about any perceived issues of interpretation of *Muldrock*, submitting that appellate courts should be allowed to resolve any difficulties that may arise: Law Society of NSW, *Submission SES4*, 1.
66. In accordance with of the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(3).
67. *Markarian v The Queen* [2005] HCA 25 [31], 228 CLR 357 where Gleeson CJ, Gummow, Hayne, Callinan JJ noted [30] in relation to the maximum penalty that "judges need sentencing yardsticks"; and, for the role performed by the maximum sentence as a yardstick, see also *Ibbs v The Queen* (1987) 163 CLR 447.
68. *Wong v The Queen* [2001] HCA 64; 207 CLR 584; *Markarian v The Queen* [2005] HCA 25, 228 CLR 357.

s 21A of the Sentencing Act, as well as an assessment of the seriousness of the offence, although without any attempt at ranking its precise position on a scale of seriousness or its relativity to an abstract offence in the middle of the range of objective seriousness.

2.66 What would also need to be identified specifically would be the extent of any discount given in relation to a plea of guilty, assistance to the authorities, or pre-trial assistance, although that may have to be done in a rolled up manner where more than one discounting factor was present. Additionally, there would need to be a reference to any adjustment of the statutory ratio concerning the NPP and the balance of the term of the sentence, consequent upon a finding of "*special circumstances*", within the meaning of s 44(2) and (2B) of the Sentencing Act, together with an identification of those matters.

2.67 A possible solution that would clarify the application of the scheme, on an interim basis, would be to reword s 54A and s 54B to the following or similar effect:[69]

54A What is the standard non-parole period?

(1) For the purposes of this Division, the standard non-parole period for an offence is the non-parole period set out opposite the offence in the Table to this Division.

(2) For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence ***which, by reference to the nature and circumstances of its commission, is*** in the middle of the range of objective seriousness for offences in the Table to this Division.

54B Sentencing procedure

(1) This section applies when a court imposes a sentence of imprisonment for an offence, or an aggregate sentence of imprisonment with respect to one or more offences, set out in the Table to this Division.

(2) When determining the sentence for the offence (not being an aggregate sentence)***, including the non-parole period the court is to have regard to:***

(a) the standard non-parole period for the offence, and

(b) the matters referred to in section 21A, as they apply to the offence.

(3) ***(Deleted)***

(4) The court must make a record of its reasons for increasing or reducing the standard non-parole period. The court must identify in the record of its reasons each factor that it took into account, ***but is not required to classify the offence by reference to its position in a range of objective seriousness*****.**

(4A) When determining an aggregate sentence of imprisonment for one or more offences, the court is to indicate, for those offences to which a standard non-parole period applies, the standard non-parole period (or a longer or shorter non-parole period) that it would have set in accordance with ***subsection (2)*** for each such offence to which the aggregate

69. Suggested changes italicised.

sentence relates had it set a separate sentence of imprisonment for that offence.

(4B) If the court indicates that it would have set a longer or shorter non-parole period for an offence under subsection (4A), it must make a record of the reasons why it would have increased or reduced the standard non-parole period. The court must identify in the record each factor that it would have taken into account.

(5) The failure of a court to comply with this section does not invalidate the sentence.

2.68 The reference to "*the nature and circumstances of its commission*" is intended to incorporate matters personal to the offender that are causally connected with, or that materially contributed to the commission of the offence.

2.69 These would include matters relating to the offender's motivation, for example whether he or she acted out of revenge or racial hatred, or out of a desire to interfere with the criminal justice process or to achieve a terrorist objective, or out of profit or greed, or out of fear for the personal safety of himself or others, or as the result of provocation or duress. These would also include matters affecting an offender's capacity to reason or ability to control his or her actions consequent upon the presence of a mental or cognitive impairment, but only where they were causally related to the offence.

2.70 There is ample precedent for treating the presence of a mental disorder that contributed to the commission of the offence in a material way as a factor that reduces the offender's "*moral culpability*", or the level of criminality involved, and as one that transcends the matter of mitigation contained in s 21A(3)(j) of the Sentencing Act.[70]

2.71 In *Muldrock*, the Court appears to have accepted that the appellant's mental condition had been causally connected to the commission of the offence.[71]

2.72 These decisions are consistent with the observation of Chief Justice Spigelman in *R v Whyte* that the degree of moral culpability involved in an offence is a "*critical component of the objective circumstances of [that] offence*".[72] The approach taken accordingly accords with conventional sentencing practice, which inevitably requires that an assessment be made of the seriousness of the index offence, by reference not only to what was done by the offender and its consequences, but also as to the mental state of the offender and the reasons for his actions.

2.73 The suggested expression would exclude purely subjective matters that would still have a relevance for sentencing but that were not causally connected with the commission of the offence such as the offender's youth, character and criminal antecedents; the presence of a plea of guilty or assistance to the authorities; the commission of the offence while on conditional liberty; undue hardship consequent upon imprisonment; prospects of rehabilitation, remorse and reparations. Evidence of the existence of some form of mental or cognitive impairment, that was not causally related to the offence, but that might impact on questions of deterrence and

70. *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194 [177]; and see *R v Israil* [2002] NSWCCA 255 [23].

71. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 [54] and [55].

72. *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252 [205].

rehabilitation would be treated as subjective factors in accordance with conventional sentencing practice.

2.74 Notwithstanding the concerns that were expressed, during a consultation, that any attempt to amend the relevant provisions could further unsettle the law,[73] we are of the view that the relatively simple amendments proposed would not have that effect. On the contrary they might serve to simplify the process in accordance with the instinctive synthesis approach, without diluting the intended legislative objective of the SNPP scheme, and without resulting in an overall reduction in sentencing levels.

2.75 We recommend the deletion of s 54B(3). It is doubtful whether it ever had any meaningful work to do since the "reasons . . . referred to in s 21A" of the Sentencing Act embrace all of the factors that are relevant to sentencing, including those that become applicable under the common law or pursuant to s 3A of the Sentencing Act or consequent upon the guideline judgements. In any event the suggested redraft of s 54B(2) would make s 54B(3) redundant.

2.76 The preservation of s 54B(4), subject to an amendment that gives effect to *Muldrock*, would accord with the settled approach to sentencing that regards the supply of reasons as an important aspect of the administration of the criminal law.[74]

2.77 The amendments suggested to s 54B(2), (4) and (4A) would be consistent with the instinctive synthesis approach that requires a value judgment to be made after taking into account all of the factors that are relevant to the sentencing process, and that discourages or precludes the court from assigning specific values to any one factor, or engaging in some form of arithmetic process based on a series of increments to, or decrements from, a selected starting point. This would then ensure that the sentencing process that is employed in relation to SNPP offences is the same as that employed in respect of all other offences.

2.78 As a general proposition it would seem desirable that there be only one approach to the sentencing process that accords with the High Court's unequivocal stand.

2.79 We note that, if this option is implemented, an issue could arise as to the basis for resentencing an offender in respect of an SNPP offence following a successful appeal against a sentence that was handed down before the amendments took effect. In such a case we would expect that the court would follow the decision of the High Court in *Radenkovic v The Queen,*[75] and apply the regime that was more favourable to the offender. We do not, however, see this as an issue as the recommended amendments are intended as a clarification of the *Muldrock* approach.

73. *Roundtable Consultation SEC2*.

74. *R v Thomson* [2000] NSWCCA 309, (2000) 49 NSWLR 383 [42]-[44]; *R v JCE* [2000] NSWCCA 498, 120 ACrimR 18 [19]-[20]; *Jackson v The Queen* [2011] NSWCCA 124 [26].

75. *Radenkovic v The Queen* (1990) 170 CLR 623.

Recommendation

On an interim basis, pending monitoring and review of the standard minimum non-parole period scheme and consideration of our final report, we recommend the amendment of s 54A and s 54B of the *Crimes (Sentencing Procedure) Act 1999* (NSW) as follows:

54A What is the standard non-parole period?

(1) For the purposes of this Division, the standard non-parole period for an offence is the non-parole period set out opposite the offence in the Table to this Division.

(2) For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence ***which, by reference to the nature and circumstances of its commission, is*** in the middle of the range of objective seriousness for offences in the Table to this Division.

54B Sentencing procedure

(1) This section applies when a court imposes a sentence of imprisonment for an offence, or an aggregate sentence of imprisonment with respect to one or more offences, set out in the Table to this Division.

(2) When determining the sentence for the offence (not being an aggregate sentence), ***including the non-parole period the court is to have regard to:***

(a) the standard non-parole period for the offence, and

(b) the matters referred to in section 21A, as they apply to the offence.

(3) ***(Deleted)***

(4) The court must make a record of its reasons for increasing or reducing the standard non-parole period. The court must identify in the record of its reasons each factor that it took into account, ***but is not required to classify the offence by reference to its position in a range of objective seriousness*.**

(4A) When determining an aggregate sentence of imprisonment for one or more offences, the court is to indicate, for those offences to which a standard non-parole period applies, the standard non-parole period (or a longer or shorter non-parole period) that it would have set in accordance with ***subsection (2)*** for each such offence to which the aggregate sentence relates had it set a separate sentence of imprisonment for that offence.

(4B)If the court indicates that it would have set a longer or shorter non-parole period for an offence under subsection (4A), it must make a record of the reasons why it would have increased or reduced the standard non-parole period. The court must identify in the record each factor that it would have taken into account.

(5) The failure of a court to comply with this section does not invalidate the sentence.

Option 3: Retain the SNPP scheme and legislate to confirm the interpretation in *Way*

2.80 This option would involve retention of the SNPP system accompanied by amendments to the Sentencing Act so as to legislate the *Way* approach either for the future or retrospectively.

2.81 There was some support for this option,[76] although it was opposed by several key stakeholders.[77]

2.82 The advantage of this approach is that, the process of reasoning that came to be understood and applied consequent upon the decision in *Way* would be retained, and the pre-Muldrock sentencing patterns would continue to be available as a guide to courts, subject to the recognised limitations that apply concerning their use as identified by Justice Simpson in *Director of Public Prosecutions (Cth) v De La Rosa.*[78]

2.83 If *Way* was to be given retrospective legislative force then it would provide an incidental benefit in removing the need for a review of the pre-*Muldrock* cases that may have resulted in erroneous sentences.

2.84 However, the principal difficulty with this option is that it runs into conflict with the High Court's approach in relation to any form of sentencing other than one that involves the instinctive synthesis model. It would also require an amendment to make it clear that Division 1A of Part 4 of the Sentencing Act is to be given a mandatory operation, risking a return to the complexity of the two-step process that was required by *Way*, a process the flaws of which Justice McHugh exposed, in considerable detail, in *Markarian v The Queen*.[79]

2.85 We do not favour this approach for the reasons suggested in the preceding paragraph, and because legislating *Way*, at this time, would in a practical sense limit the opportunity for future reform. If it appears, after a period of monitoring and review, that whichever of options 1 or 2 is adopted is not achieving the level of sentencing and consistency that is appropriate for the SNPP offences, then this option, or some variation of it, can be considered.

Option 4: Retain the SNPP scheme and rationalise it

2.86 This option would see the SNPP scheme retained, in accordance with any one of the options discussed earlier but rationalised in relation to the offences to which it applies and in relation to the levels at which the individual SNPPs are fixed.

Rationalise the offences to which the SNPP scheme applies

2.87 At present, the SNPP scheme applies to over 30 offence categories with maximum penalties ranging from 7 years' imprisonment to life imprisonment.

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76. P McClellan, *Submission SES5*, 2-3; The NSW Police Force expressed qualified support for this option: NSW Police Force, *Submission SES11*, 4.
77. NSW Office of the Director of Public Prosecutions, *Submission SES7*, 2; R O Blanch, *Submission SES1*, 1. The NSW Bar Association was critical of the approach in *Way*: NSW Bar Association, *Submission SES3*, 2.
78. *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194 [303]-[305], cited with approval by the High Court: *Hilo v The Queen* [2010] HCA 45 [54]-[55].
79. *Markarian v The Queen* [2005] HCA 25, 228 CLR 357 [55], [56] and [71].

2.88 As Appendix C shows there are, however, a number of serious offences that are not included in the SNPP Table that carry maximum penalties of life imprisonment, 25 years imprisonment, 24 years imprisonment, or 20 years imprisonment; as well as several other serious offences carrying terms of imprisonment of between 15 and 20 years.

2.89 In the event of an SNPP scheme being preserved in some form, there was support in the submissions or consultations variously for:

- extending its reach to additional serious offences of the kind included in Appendix C or otherwise;[80]
- narrowing its reach to those offences that could be regarded as being of the most serious kind[81] including serious offences to the person, sexual offences and serious drug matters; and
- excluding those indictable offences that are specified in Schedule 1 of the *Criminal Procedure Act 1986* (NSW) as capable of being dealt with summarily, subject to election otherwise by:
  - the prosecution or defendant (Table 1 offences); or
  - the prosecution (Table 2 offences).[82]

2.90 It is noted that there are a number of Table 1 and Table 2 offences that are included in the SNPP scheme.[83] As noted in the submission of the Chief Magistrate if dealt with in the Local Court, any NPP fixed will necessarily fall well short of the SNPP because of the jurisdictional limit of that Court.[84] It is no doubt for that reason that the SNPP scheme does not apply when the offence is dealt with summarily.

2.91 Some of the Table 1 and 2 offences that are included in the SNPP scheme are quite serious. Depending on their facts, any jurisdictional limit of the Local Court can obviously be overcome by prosecution election for trial in the District Court. To exclude offences from the SNPP scheme, by reference only to whether or not they are Table 1 or Table 2 offences, would have significant consequences. We do not consider that to be an appropriate approach.

2.92 Whether the reach of the scheme is extended or narrowed, it would seem appropriate for it to be confined to offences of the "more or most serious" kind, for which there is a sufficient incidence of their occurrence to justify their inclusion in the scheme. It is recognised that it would not be easy to draw a bright dividing line based upon a bare evaluation of the potential seriousness of the offences that are currently included in the scheme, or that could be included in the scheme, although

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80. The Police Association of NSW (*Submission SES9*, 7) expressed support for the submission of the NSW Police to the NSW Sentencing Council, that the following offences be added to the scheme: *Crimes Act 1900* (NSW) s 38 s 61K, s 66B, s 66EA, s 66EB, s 80A, s 80D, s 112, s 196, s 198. The NSW Police Force submitted that the following offences be added to the scheme: *Crimes Act 1900* (NSW) s 33A, s 48, s 60(2), (2A), (3), (3A), s 66EA, s 66EB, s 87, s 91G, s 93GA, s 93O: NSW Police Force, *Submission SES11*, 7-8.

81. NSW Office of the Director of Public Prosecutions, *Submission SES7*, 2, 5; R O Blanch. *Submission SES1*, 2.

82. NSW Office of the Director of Public Prosecutions, *Submission SES7,* 5.

83. *Crimes Act 1900* (NSW) s 35, s 60(2), s 154C(1), s 154C(2), s 203E; *Firearms Act 1996* (NSW) s 7; *Weapons Prohibition Act 1998* (NSW) s 7.

84. G Henson, *Preliminary Submission* PSE5, 5; G Henson, *Submission SES2*, 1.

no doubt a starting point for any such exercise would be the available maximum penalty for those offences, accompanied by a consideration of the incidence of their commission and their potential consequences.

2.93 However we consider that any such decision should await a period of monitoring, whichever of Option 1 or 2 is adopted. It would be premature to embark on either exercise at this stage, without engaging in wide consultation with all stakeholders, and without input from the Sentencing Council, so as to ensure transparency in the process and the establishment of a sound rational basis for the retention or addition of each offence.

2.94 Moreover any such exercise could only be conducted contemporaneously with a review and rationalisation of the levels at which the SNPPs were set.

2.95 For the purpose of any subsequent consideration of this issue we identify in Appendix D the current SNPP offences that would be retained, depending respectively on whether the scheme was limited to offences carrying life imprisonment, imprisonment of 25 years, or imprisonment of 20 years. We also note those offences that would be excluded if the scheme was restricted to offences carrying 20 years imprisonment or higher.

2.96 We further note that, save for conspiracy to murder and attempt to murder,[85] it has been held that the offences of conspiracy and attempt to commit an SNPP offence are not treated as SNPP offences.[86] This raises the question for any review as to whether conspiracy or attempt to commit an SNPP offence should be included in the SNPP table either generally, or only in relation to particular SNPP offences.

Standardise the ratios of the SNPPs to the maximum penalties

2.97 As we have noted, submissions and consultations to both the LRC and the NSW Sentencing Council have identified as a matter of concern the apparent inconsistency in the ratios that the SNPPs bear in relation to the maximum available sentences, and the lack of transparency or consultation concerning the manner in which they were set.[87]

2.98 Assuming that the SNPP scheme is to be retained in some form or other, there was general support for a review to be conducted concerning the levels at which the individual SNPPs are currently set, and for the establishment of a clear and transparent mechanism whereby any such process should be conducted.

2.99 Consistently with the views expressed above as to the desirability of deferring any decision concerning the reduction, or enlargement, of the offences brought within

85. Items 2 and 3.

86. *DAC v The Queen* [2006] NSWCCA 265; *Diesing v The Queen* [2007] NSWCCA 326.

87. NSW Bar Association, *Submission to the NSW Sentencing Council SNPP2*, 2 (supported by Law Society of NSW, *Submission to the NSW Sentencing Council SNPP04*, 1; Legal Aid NSW, *Submission to the NSW Sentencing Council SNPP08*, 1); NSW Office of the Director of Public Prosecutions, *Submission to Sentencing Council SNPP10*, 1; R N Madgwick, *Submission to the NSW Sentencing Council SNPP11*, 1; R O Blanch, *Preliminary Submission PSE3*, 1-2; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PSE10*, 4-5; Legal Aid NSW, *Preliminary Submission PSE18*, 9; Police Association of NSW, *Submission SES9*, 2; Law Society of NSW, Criminal Law Committee, *Submission SES4*, 1. The Chief Judge of the Common Law Division submitted that SNPPs do not "seem appropriate for a number of offences": P McClellan, *Submission SES5*, 2.

the SNPP scheme, we consider that any rationalisation of the levels at which SNPPs are set should await the proposed period of monitoring.

2.100 Notwithstanding, we consider it desirable to make some preliminary observations that could be taken into account if it becomes appropriate to undertake that review.

2.101 The current SNPPs for offences carrying a maximum penalty of life imprisonment range between 10 years and 25 years imprisonment. Arguably there is a degree of arbitrariness in the nominated SNPPs, although those for murder occurring in different circumstances are broadly consistent with the models in SA, NT and Queensland.

2.102 Obviously, it is not possible to express the SNPPs for these offences as a percentage of the maximum penalty, because life imprisonment is of indeterminate length. The nomination of a numerical SNPP for each of these offences necessarily involves a policy decision that will have to take into account the potential seriousness of the offence, sentencing patterns and community expectations.

2.103 In relation to the remaining SNPP offences the NSW Sentencing Council, in its 2008 report on sentencing for sexual offences, suggested that the nominated SNPPs be standardised within a range of 40% to 60% of the respective maximum penalties,[88] subject to the possibility of individual exceptions, by reference to an assessment of the incidence of offending and any special considerations relating thereto".[89] It suggested that such an approach could encourage greater consistency in sentencing possibly resulting in fewer appeals.[90]

2.104 The NSW Bar Association (endorsed by the Law Society of NSW[91] and Legal Aid NSW[92]) expressed its concern in a submission to the Sentencing Council that the proposed range of 40% to 60% would be too high, and instead proposed standardising the SNPPs within a band of 25% to 40% of the available maximum penalty. It observed:

> [I]t is very difficult to see any reason for ever adopting a standard non-parole period that is greater than 40% of the available maximum penalty. The maximum penalty is usually reserved for the worst case and, even where imposed, it will be usual sentencing practice to impose a non-parole period that is 75% of that maximum penalty.[93]

2.105 To place these views in perspective it is noted that the SNPPs in the category of offences carrying a maximum penalty of 25 years imprisonment, currently vary from 7 years to 15 years imprisonment. With one exception these SNPPs all fall within the 28-40% range of the maximum penalty. The SNPP of 15 years in respect of the exception - sexual intercourse with a child under the age of 10 years (not in

88. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in NSW* (2008) [3.68].
89. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in NSW* (2008) xxiii.
90. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in NSW* (2008) [3.68].
91. Law Society of NSW, *Submission to the NSW Sentencing Council SNPP4*, 1. However the Law Society submitted to the LRC that while there are anomalies, SNPPs "should be considered with other issues, such as the maximum penalties and section 21A, as part of the Commission's larger review of sentencing": Law Society of NSW, *Submission SES4*, 1.
92. Legal Aid NSW, *Submission to the NSW Sentencing Council SNPP8*, 1.
93. NSW Bar Association, *Submission to NSW Sentencing Council SNPP02*, 1-2. The ODPP in a submission made in relation to our reference similarly supported setting the SNPPs within a range of 25-40% of the maximum penalty if SNPPs are to remain: NSW Office of the Director of Public Prosecutions, *Submission SES7,* 2.

circumstances of aggravation)[94] - stands well outside this range, being set at 60% of the maximum penalty of 25 years. It would be necessary to reduce the SNPP of imprisonment of 15 years for such an offence to between 6.25 years and 10 years in order to bring it within the range suggested for consideration by the Bar Association, or otherwise to increase the maximum penalty.

2.106 It is noted that the SNPP in respect of the aggravated form of the offence,[95] which carries a maximum sentence of imprisonment for life, is also imprisonment for 15 years. This raises a question as to whether the aggravating features of that offence are adequately reflected in the SNPP, or whether the SNPP is too high for the non-aggravated form of the offence.

2.107 It is noted that the existing SNPPs for all of the offences that carry a maximum penalty of 20 years imprisonment are set at 50% of the maximum penalty, except the SNPP for aggravated break and enter, which is set at 25% of the maximum penalty. In order to bring them within the 25 to 40% range, the SNPPs of 10 years would need to be reduced to between 5 and 8 years.

2.108 It is noted finally that the existing SNPPs, for the offences that carry a maximum penalty of less than 20 years imprisonment, are set within a range varying between 21.4% to 80% of the maximum penalty. Reduction in the SNPP would be required for items 4D, 5, 6, 7, 9A and 9B to bring them into the 25% to 40% bracket. The largest reduction would apply to the indecent assault offences contained in items 9A and 9B.

2.109 There would appear to be merit in the Bar Association's observations, particularly having regard to the consequences of setting any SNPP above 50% of the maximum penalty, even allowing for application of s 44 of the Sentencing Act. Otherwise the overall term is likely to be disproportionate to the objective criminality of the offence.

2.110 However, it is noted that the NSW Police Force does not support standardising SNPPs at a fixed percentage or percentage range.[96]

Option 5: Repeal the SNPP scheme

2.111 This option would involve the repeal of Division 1A of Part 4 of the Sentencing Act. It has the attraction of simplicity and of restoring the approach to sentencing for SNPP offences that was applied prior to enactment of this Division. It would bring the sentencing of these offences into line with other offences, and it would preserve the full sentencing discretion that has been considered to be an important component of individualised sentencing.[97]

2.112 It received support in several submissions and also in the consultations.[98] There were other submissions that did not support abolition of the scheme in some cases

94. *Crimes Act 1900* (NSW) s 66A(1).

95. *Crimes Act 1900* (NSW) s 66A(2).

96. NSW Police Force, *Submission SES11,* 8.

97. *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 [51] (McHugh J), endorsed by *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 [26]. See also NSW Law Reform Commission, *Sentencing*, Report 79 (1996) 6.

98. R O Blanch *Submission SES1*, 2; The Probation and Parole Officers Association of NSW*, Submission SES8*, 3; The Shopfront Youth Legal Centre, *Submission SES10.* The repeal of the scheme received qualified support from NSW Office of the Director of Public Prosecutions,

on the ground that it had been beneficial in its application, and in other cases on the grounds that it was preferable to any alternative.

2.113 However, despite the attractions noted above, it is not an option that we would support. It is to be recalled that the SNPP scheme was introduced to ensure adequacy, consistency and transparency in sentencing, in relation to a group of serious offences, while avoiding the dangers involved in grid sentencing or mandatory sentencing.

2.114 Mandatory sentencing provisions that apply to a limited class of offences have been introduced in some Australian jurisdictions. The objections to that form of sentencing, and to grid sentencing, are well documented and this interim Report is not the place for a consideration of their merit or lack of merit.

Option 6: Repeal and replace the SNPP scheme with alternative legislative guidance on non-parole periods for serious offences

2.115 This option would involve the repeal of Division 1A of Part 4 of the Sentencing Act and its replacement with alternative legislative guidance for the fixing of NPPs for serious offences. Three possible approaches have been identified.

Presumptive non-parole period range

2.116 Under this model:

- A presumptive range expressed in terms of years for NPPs would be established, in respect of specific offences.
- In the case of offences carrying imprisonment for a term of years the range would be set as a percentage of the maximum penalty.
- In the case of offences carrying life imprisonment a range would need to be nominated.
- The court would have power to depart from the presumptive range if there was "sufficient reason to do so in the circumstances of the case"; having regard to the subjective circumstances of the offender and any discounting factors arising by reason of a plea of guilty or assistance.
- The range would continue to act as a guidepost even if the court departs from the range.

2.117 A safeguard against inappropriately lenient sentencing could be provided by a requirement, of the kind that appears elsewhere in the Sentencing Act, that if a sentence was reduced below the presumptive range, it nevertheless must not be "unreasonably disproportionate to the nature and circumstances of the offence".[99]

2.118 Under this model, the court would first have to decide that imprisonment was required as a 'last resort'. Custodial alternatives to full-time imprisonment, such as a suspended sentence or home detention, would remain available for consideration.

Submission SES7, 1. Legal Aid NSW submitted that the SNPP system needs to be reviewed with an option to abolish the scheme if it is found to detract from the principles underlying it": Legal Aid NSW, Preliminary *Submission* PSE18, 9.

99. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22A(2), s 23(3).

The same exemptions as those that apply to the current SNPP scheme could be adopted – for example, it would not apply to juvenile offenders or to any matter being dealt with summarily.

2.119 A model of this kind could simplify the present SNPP scheme and replace the inconsistencies in the SNPPs with a presumptive band. Its role as a legislative guidepost from which a court could depart in an appropriate case would not unduly fetter judicial discretion. It would play the role of the original s 21A(1) in the Sentencing Act (before the relevant factors were divided into aggravating and mitigating factors) that required that a sentence be "appropriate" in all the circumstances.[100]

2.120 Such a model would have some similarity to that proposed in Queensland except for the fact that the presumptive range would be set as a percentage of, or by reference to, the maximum penalty for any given offence, rather than as a percentage of the overall term that is imposed.

2.121 It does however have a number of disadvantages. Practical difficulties are likely to arise in setting the appropriate band, particularly in relation to offences that carry a maximum of life imprisonment and in relation to the offence of manslaughter. It may prove too blunt an approach having regard to the inevitable variation in the circumstances that give rise to the commission of any offence that affect its objective criminality. Consideration also would need to be given to the interaction between the model and existing guideline judgments that have a numerical range for periods of full-time imprisonment.

2.122 A presumptive model which is based on a percentage of the maximum penalty for an offence that was set long ago may not reflect contemporary needs or community expectations.

2.123 There was no support in the submissions or consultations for the adoption of a model of this kind.[101] It is not a model that we support at this time Amongst other things, in a practical sense, it would not seem to differ much from Option 2.

Baseline Sentencing

2.124 Earlier we have drawn attention to the baseline sentencing approach examined by the Victorian Sentencing Advisory Council at the request of the Victorian Government. As noted above this model involves the legislative prescription of a 'baseline sentence', that is expressed in terms of years for prescribed offences, and that operates as a starting point for the determination of an NPP once a court determines that a term of imprisonment and non-parole period will be imposed, and from which the court can depart by reference to aggravating and mitigating factors and by applying any relevant discount for a guilty plea and/or assistance to authorities.

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100. Between 15 April 2002 and 1 February 2003, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1) provided that: "In determining the sentence to be imposed on an offender, a court must impose a sentence of a severity that is appropriate in all the circumstances of the case".

101. The option was opposed by the Chief Judge of the District Court: R O Blanch, *Submission SES1*, 2. The ODPP submitted that this option was unnecessary and any new scheme would bring novel considerations and complexity to be resolved by appellate litigation: NSW Office of the Director of Public Prosecutions, *Submission SES7*, 3. The NSW Police Force noted that the option appeared attractive apart from the possible convoluted nature of the option in practice: NSW Police Force, *Submission SES11,* 8.

2.125 The Victorian Sentencing Advisory Council listed the following factors that it took into account in the determination of its recommended baseline levels:[102]

- the maximum penalty for the baseline offence;
- current sentencing practices and median sentence of imprisonment for the baseline offence;
- the derived non-parole period midpoint, a statistical figure produced by the Council to provide a more accurate representation of the middle of the range of an offence than the median;
- comments by the Court of Appeal (or individual Judges of Appeal) and where relevant the challenge to current sentencing practices by the former Director of Public Prosecutions[103]; and
- the Council's own research on community attitudes to relative offence seriousness.[104]

2.126 The Council's favoured approach was described as the "objective offence seriousness model",[105] or more simply as the "offence seriousness model".[106] The objective seriousness of an offence would be assessed by reference to factors that relate to the offence, rather than the offender (although causally related subjective factors would be relevant in this assessment[107]), and a finding of a lower or higher range of seriousness could justify an NPP below or above the baseline. Once the objective seriousness was established, the court would consider any further subjective aggravating and mitigating factors that could justify a departure, or further departure, from the baseline. The Council recommended against legislating any list of aggravating or mitigating factors, so as to allow some degree of flexibility in the model for individual factors relevant to the case.[108]

2.127 The Council recommended a range of baseline levels for a number of specified offences, from 2 years at the lower end of the spectrum to 20 years for murder.[109] It anticipated that the prison population would increase in the longer term as a result of the baseline scheme, although it was not possible to forecast with accuracy the level or rate of any such increase as this would depend on a number of variables. However, it conservatively estimated an increase in prison population of at least several hundred after a period of 11 years.[110]

2.128 The suggested argument in favour of baseline sentencing is that it would improve consistency, because sentencing judges would start from the same point.

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102. Victoria, Sentencing Advisory Council, *Baseline Sentencing*, Report (2012) Executive Summary, xvii.
103. See Office of Public Prosecutions (Victoria), "Director of Public Prosecutions Calls for Increased Sentences", Media Release (31 August 2010).
104. See Victoria, Sentencing Advisory Council, *Community Attitudes to Offence Seriousness* (2012).
105. Victoria, Sentencing Advisory Council, *Baseline Sentencing*, Report (2012) xiv, 23, 37-38; *Baseline Sentences*, Issues Paper (2011) 8.
106. Victoria, Sentencing Advisory Council, *Baseline Sentencing*, Report (2012) 30.
107. Victoria, Sentencing Advisory Council, *Baseline Sentencing*, Report (2012) 30, 37.
108. Victoria, Sentencing Advisory Council, *Baseline Sentencing*, Report (2012) 30.
109. Victoria, Sentencing Advisory Council, *Baseline Sentencing*, Report (2012) xxiv, 81-103.
110. Victoria, Sentencing Advisory Council, *Baseline Sentencing*, Report (2012) 117.

2.129 The arguments against baseline sentencing are that it risks being overly complex and has the potential to produce a disproportionate sentence. Further, it is unclear how it might apply in practice. It appears to involve oscillating about the baseline depending on the 'measurement' of aggravating and mitigating circumstances in a two-step or even a multi-step approach to sentencing, which is inconsistent with the instinctive synthesis approach to sentencing favoured by the High Court in *Muldrock*.

2.130 This is not an option that received any support in the submissions or consultations, nor is it one that we support.[111]

Guideline judgments

2.131 There was some support for encouraging a greater use of guideline judgments,[112] in place of the SNPP scheme,[113] and also for empowering the NSW Sentencing Council to exercise powers similar to the Sentencing Council for England and Wales,[114] or for otherwise allowing it to have a greater input into the development of guideline judgments.[115] However, the option is not without opposition.[116]

2.132 It is recognised that considerable resources are required to prepare and present a guideline case in the CCA, and that it would not be practicable in the short term to replace the SNPP scheme with a guideline judgment for each of the categories of offences that it currently embraces.

2.133 The value of guideline judgments in achieving consistency and in assisting newly appointed judicial officers with limited criminal trial experience is acknowledged. However we believe that any consideration of the role of guideline judgments generally should await our final report. If, after a period of monitoring, it is seen that the SNPP scheme post *Muldrock* (whichever of Options 1 or 2 is adopted) is not achieving its objective, then a case for developing guideline judgments for specific offences may well be justified.

The efficient review of existing pre-*Muldrock* sentences

2.134 As noted above, the review of pre-*Muldrock* cases that is being conducted by the Legal Aid Commission of NSW, may result in appeals or in applications to the courts to re-open or otherwise to review sentences imposed in some of those cases. Appeals or applications of this kind may also be brought by privately-represented offenders, by those who were represented by the Aboriginal Legal Service and also by unrepresented offenders.

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111. This option was opposed by the Chief Judge of the District Court: R O Blanch, *Submission SES1*, 2; and not supported by the NSW Police Force, *Submission SES11*, 9. The ODPP submitted that this option was unnecessary and any new scheme would bring novel considerations and complexity to be resolved by appellate litigation: NSW Office of the Director of Public Prosecutions, *Submission SES7*, 3.
112. NSW Police Force, *Submission SES11*, 10.
113. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PSE10, 5-6*; The Shopfront Youth Legal Centre, *Submission SES10*, 4-5.
114. *Coroners and Justice Act 2009* (UK) ch 1 pt 4.
115. NSW Office of the Director of Public Prosecutions, *Submission SES7*, 2; NSW Police Force, *Submission SES11*, 10.
116. R O Blanch, *Submission SES1*, 2-3.

2.135 Three possibilities arise in relation to the reconsideration of any cases where concern is entertained as to whether the sentence was affected by pre-*Muldrock* error:

- leave to appeal to the CCA (where such an application has not already been brought and dealt with);
- application to the Court that imposed the relevant sentence (either the first instance Court or the CCA) to reopen the case under s 43 of the Sentencing Act; and
- application under Part 7 of the *Crimes (Appeal and Review) Act 2001* (NSW).

Appeal to the Court of Criminal Appeal

2.136 Obviously any person who wishes to challenge a pre-*Muldrock* sentence has the right to seek leave from the CCA to appeal against that sentence. It is not suggested that any such right should be abrogated in relation to cases that have not already been the subject of an appeal.

Section 43 of the Crimes (Sentencing Procedure) Act 1999

2.137 The power to reopen proceedings in order to correct a sentencing error of law is contained in s 43 of the Sentencing Act which provides:

> **43 Court may reopen proceedings to correct sentencing errors**
> (1) This section applies to criminal proceedings (including proceedings on appeal) in which a court has:
>
> (a) imposed a penalty that is contrary to law, or
>
> (b) failed to impose a penalty that is required to be imposed by law,
>
> and so applies whether or not a person has been convicted of an offence in those proceedings.
>
> (2) The court may reopen the proceedings (either on its own initiative or on the application of a party to the proceedings) and, after giving the parties an opportunity to be heard:
>
> (a) may impose a penalty that is in accordance with the law, and
>
> (b) if necessary, may amend any relevant conviction or order.
>
> (3) For the purposes of this section, the court:
>
> (a) may call on the person to whom the proceedings relate to appear before it and, if the person does not appear, may issue a warrant for the person's arrest, or
>
> (b) if of the opinion that the person will not appear if called on to do so, may, without calling on the person to appear before it, issue a warrant for the person's arrest.
>
> (4) Subject to subsection (5), nothing in this section affects any right of appeal.

> (5) For the purposes of an appeal under any Act against a penalty imposed in the exercise of a power conferred by this section, the time within which such an appeal must be made commences on the date on which the penalty is so imposed.
>
> (6) In this section:
>
> **impose a penalty** includes:
>
> (a) impose a sentence of imprisonment or a fine, or
>
> (b) make an intensive correction order, home detention order or community service order, or
>
> (c) make an order that provides for an offender to enter into a good behaviour bond, or
>
> (c1) make a non-association order or place restriction order, or
>
> (d) make an order under section 10, 11 or 12, or
>
> (e) make an order or direction with respect to restitution, compensation, costs, forfeiture, destruction, disqualification or loss or suspension of a licence or privilege.

2.138 For the most part this power has been used to correct minor sentencing errors of law so as to ensure that the intended purpose of the relevant decision is carried into effect. It has however been held to have a broader reach,[117] and could potentially be engaged in present circumstances. If the threshold error of law is established, then the way can be opened for the Court to have regard to fresh factual matters, including post sentence events that may become relevant for the imposition of a new sentence.

2.139 It is undoubtedly the case that resort to either of these options by any considerable number of those, who were sentenced in accordance with the *Way* understanding of the SNPP scheme, would seriously disrupt the work of the District and Supreme Courts at first instance, and of the CCA.

2.140 In those circumstances there would appear to be merit in the use of the Part 7 option. The relevant provisions of this part of the *Crimes (Appeal and Review) Act 2001* (NSW) are as follows:

> **78 Applications to Supreme Court**
> (1) An application for an inquiry into a conviction or sentence may be made to the Supreme Court by the convicted person or by another person on behalf of the convicted person.
>
> …
>
> **79 Consideration of applications**
> (1) After considering an application under section 78 or on its own motion:
>
> (a) the Supreme Court may direct that an inquiry be conducted by a judicial officer into the conviction or sentence, or

117. *Meakin v DPP* (2011) NSWCCA 374 [29]-[30]; *Erceg v District Court of NSW* (2003) 143 A Crim R 455 [104]-[105]; and see *Siganto v The Queen* [1998] HCA 74; 194 CLR 656.

(b) the Supreme Court may refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the Criminal Appeal Act 1912.

(2) Action under subsection (1) may only be taken if it appears that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case.

82 Action to be taken on completion of inquiry

(1) On completing an inquiry under this Division, the judicial officer must cause a report on the results of the inquiry (incorporating a transcript of the depositions given in the course of the inquiry) to be sent to:

(a) the Governor, in the case of an inquiry held on the direction of the Governor, or

(b) the Chief Justice, in the case of an inquiry held on the direction of the Supreme Court.

2.141 While Part 7 and its predecessor[118] have usually been engaged to review convictions, there is precedent for their use in reviewing sentences.[119] It would accordingly provide an available mechanism for the review of those cases where there was a doubt or question as to the sentence arising from a misapplication of the SNPP scheme as now interpreted by *Muldrock*.

2.142 It is our view that the use of the Part 7 review procedure should be encouraged, as a means of providing an effective response that would not disrupt the work of the Courts.

2.143 Relevant cases could be referred to one or more acting judges who have previously held office as Supreme Court Judges, and dealt with on the papers supported by submissions.

2.144 Proceedings of this kind are not judicial proceedings[120] and can be conducted with a relative lack of formality as the case may require. Where a doubt or question is found to exist then the matter can be referred to the CCA which will have the benefit of the report that is prepared by the judge who conducted the inquiry.

2.145 In these circumstances we encourage the use of this procedure notwithstanding the usual practice that has been adopted of deferring Part 7 inquiries until all appeal options have been exhausted. It is likely to be more timely and less expensive for all involved, and it could operate as an effective screening process carried out by experienced Judges, to exclude those cases where it is apparent, despite any *Muldrock* error that no lesser sentence was warranted than that imposed.

2.146 It is, however, recognised that the approach, which is taken in relation to the review of pre-*Muldrock* decisions, is ultimately a matter for the Courts to determine. We do not recommend legislative intervention in this respect.

118. *Crimes Act 1900* (NSW) s 13A.

119. *Application of El Hani* [2007] NSWSC 330; *Application of Toro-Martinez* [2008] NSWSC 34.

120. *Crimes (Appeal and Review) Act 2001* (NSW) s 79(4).

Appendix A
Offences in the SNPP scheme: SNPPs and maximum penalties

Item No	Offence	SNPP (yrs)	Maximum penalty (yrs)	SNPP as a % of maximum
1A	Murder – where the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work	25	Life	N/A
1B	Murder – where the victim was a child under 18 years of age	25	Life	N/A
1	Murder – in other cases	20	Life	N/A
2	*Crimes Act 1900* s 26 (conspiracy to murder)	10	25	40
3	*Crimes Act 1900* s 27, 28, 29 or 30 (attempt to murder)	10	25	40
4	*Crimes Act 1900* s 33 (wounding etc with intent to do bodily harm or resist arrest)	7	25	28
4A	*Crimes Act 1900* s 35(1) (reckless causing of grievous bodily harm in company)	5	14	35.7
4B	*Crimes Act 1900* s 35(2) (reckless causing of grievous bodily harm)	4	10	40
4C	*Crimes Act 1900* s 35(3) (reckless wounding in company)	4	10	40
4D	*Crimes Act 1900* s 35(4) (reckless wounding)	3	7	42.9
5	*Crimes Act 1900* s 60(2) (assault of police officer occasioning bodily harm)	3	7	42.9
6	*Crimes Act 1900* s 60(3) (wounding or inflicting grievous bodily harm on police officer)	5	12	41.7
7	*Crimes Act 1900* s 61I (sexual assault)	7	14	50
8	*Crimes Act 1900* s 61J (aggravated sexual assault)	10	20	50
9	*Crimes Act 1900* s 61JA (aggravated sexual assault in company)	15	Life	N/A
9A	*Crimes Act 1900* s 61M(1) (aggravated indecent assault)	5	7	71.4
9B	*Crimes Act 1900* s 61M(2) (aggravated indecent assault)	8	10	80
10	*Crimes Act 1900* s 66A(1) or (2) (sexual intercourse – child under 10)	15	s 66A(1) – 25 s 66A(2) – Life	s 66A(1) – 60 s 66A(2) – N/A
11	*Crimes Act 1900* s 98 (robbery with arms etc and wounding)	7	25	28
12	*Crimes Act 1900* s 112(2) (breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation)	5	20	25
13	*Crimes Act 1900* s 112(3) (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation)	7	25	28

Item No	Offence	SNPP (yrs)	Maximum penalty (yrs)	SNPP as a % of maximum
14	*Crimes Act 1900* s 154C(1) (taking motor vehicle or vessel with assault or with occupant on board)	3	10	30
15	*Crimes Act 1900* s 154C(2) (taking motor vehicle or vessel with assault or with occupant on board in circumstances of aggravation)	5	14	35.7
15A	*Crimes Act 1900* s 154G (organising car or boat rebirthing activities)	4	14	28.6
15B	*Crimes Act 1900* s 203E (bushfires)	5	14	35.7
15C	*Drug Misuse and Trafficking Act 1985* s 23(2) of the (cultivation, supply or possession of prohibited plants), being an offence that involves not less than the large commercial quantity (if any) specified for the prohibited plant concerned under that Act	10	Life and/or 5000 penalty units; or 20 and/or 5000 penalty units for cannabis plant	N/A or in case of cannabis plant – 50
16	*Drug Misuse and Trafficking Act 1985* s 24(2) (manufacture or production of commercial quantity of prohibited drug), being an offence that: ▪ does not relate to cannabis leaf, and ▪ if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	10	20 and/or 3500 penalty units	50
17	*Drug Misuse and Trafficking Act 1985* s 24(2) (manufacture or production of commercial quantity of prohibited drug), being an offence that: ▪ does not relate to cannabis leaf, and ▪ if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	15	Life and/or 5000 penalty units	N/A
18	*Drug Misuse and Trafficking Act 1985* s 25(2) (supplying commercial quantity of prohibited drug), being an offence that: ▪ does not relate to cannabis leaf, and ▪ if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	10	20 and/or 3500 penalty units	50
19	*Drug Misuse and Trafficking Act 1985* s 25(2) (supplying commercial quantity of prohibited drug), being an offence that: ▪ does not relate to cannabis leaf, and ▪ if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	15	Life and/or 5000 penalty units	N/A
20	*Firearms Act 1996* s 7 (unauthorised possession or use of firearms)	3	14	21.4
21	*Firearms Act 1996* s 51(1A) or (2A) (unauthorised sale of prohibited firearm or pistol)	10	20	50
22	*Firearms Act 1996* s 51B (unauthorised sale of firearms on an ongoing basis)	10	20	50
23	*Firearms Act 1996* s 51D(2) (unauthorised possession of more than 3 firearms any one of which is a prohibited firearm or pistol)	10	20	50

Item No	Offence	SNPP (yrs)	Maximum penalty (yrs)	SNPP as a % of maximum
24	*Weapons Prohibition Act 1998* s 7 (unauthorised possession or use of prohibited weapon on indictment)	3	14	21.4

Source: *NSW Sentencing Council,* Standard Non-parole Periods: A Background Report *(2011)* 6-7 (with alterations).

Appendix B
SNPPs and median non-parole periods

Offence (Item No in SNPP Table)		3 April 2000 to 31 January 2003		1 February 2003 to 31 December 2007		1 January 2004 to 31 December 2010	
	SNPP (max penalty) (years)	Pre-SNPP period median NPP (years)		Post-SNPP period median NPP (years)		Median non-consecutive NPP (years, with sample size in brackets)	
		Guilty plea	Not guilty plea	Guilty plea	Not guilty plea	Guilty plea	Not guilty plea
Murder – in other cases (Item 1)	**20 (life)**	13.5	14	14.5	16.5	15 (54)	18 (62)
Wounding etc with intent to do bodily harm or arrest (Item 4)	**7 (25)**	3	2.5	3.5	5.625	3.5 (141)	5 (38)
Sexual assault (Item 7)	**7 (14)**	2.25	2.5	2.5	4	2.5 (83)	3.5 (48)
Aggravated sexual assault (Item 8)	**10 (20)**	3.5	4	4.125	4.5	3.5 (55)	4 (28)
Aggravated indecent assault (Item 9A)	**5 (7)**	1	Insufficient data	1.5	Insufficient data	1.5 (32)	1 (8)
Sexual intercourse – child under 10 (Item 10)	**15 (25/life)**	3	Insufficient data	4.25	Insufficient data	4.5 (27)	4 (9)
Robbery with arms etc and wounding (Item 11)	**7 (25)**	3	Insufficient data	3.5	Insufficient data	3.5 (15)	5 (3)
Aggravated break, enter and steal (Item 12)	**5 (20)**	1.5	Insufficient data	1.75	Insufficient data	1.5 (597)	3 (29)
Specially aggravated break, enter and commit serious indictable offence (Item 13)	**7 (25)**	3.125	Insufficient data	3.5	Insufficient data	3.5 (48)	3 (4)
Supply commercial quantity of heroin and amphetamines (Item 18)	**10 (20 and/or 3,500 penalty units)**	2.7 (heroin) 2 (amphetamines)	Insufficient data	4 (heroin) 2.75 (amphetamines)	Insufficient data	4.5 (35) (heroin) 3 (51) (amphetamines)	6 (2) (heroin) 6 (3) (amphetamines)

Supply large commercial quantity of prohibited drug (Item 19)	**15 (life and/or 5,000 penalty units)**	4	Insufficient data	4.75	Insufficient data	6 (3) (heroin) 5 (15) (amphetamines)	5 (2) (heroin) 8 (3) (amphetamines)

Sources: *3 April 2000-31 December 2007: NSW Judicial Commission, The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales, Monograph 33 (2010); 1 January 2004-31 December 2010: LRC analysis of JIRS database*

Appendix C
Examples of serious offences not included in the SNPP table

This table is not an exhaustive list of all the offences that carry each respective maximum penalty. It is also noted that the NSW Parliament referred a number of terrorism offences carrying life or 25 years' imprisonment to the Commonwealth under the *Terrorism (Commonwealth Powers) Act 2002* (NSW) thereby enabling the Commonwealth to enact those offences as part of the *Criminal Code* (Cth).

Maximum penalty of life imprisonment	
Manufacture or produce (or knowingly take part in) not less than the large commercial quantity of a prohibited drug and expose a child to the manufacturing or production process or to substances being stored for use in that process[1]	*Drug Misuse and Trafficking Act 1985* (NSW) s 24(2A), s 33AC(4)
Adult who procures a person under 16 years of age to supply or take part in the supply of not less than the large commercial quantity of a prohibited drug (other than cannabis leaf)[2]	*Drug Misuse and Trafficking Act 1985* (NSW) s 25(2D), s 33AC(4)
Maximum penalty of 25 years' imprisonment	
Discharge firearm (or attempt to do so) with intent to cause grievous bodily harm or to prevent lawful arrest or detention	*Crimes Act 1900* (NSW) s 33A(1), (2)
Administer, or cause person to take, an intoxicating substance with intent to commit an indictable offence (either personally to assist a third party)	*Crimes Act 1900* (NSW) s 38
Intentionally or recklessly use gunpowder or other explosive substance or corrosive fluid to burn, maim, disfigure or cause grievous bodily harm (including sending such substance or putting or laying it at a place)	Crimes Act 1900 (NSW) s 46, s 47
Attempt to have sexual intercourse with person under 10 years of age, or assault such person with intent to have sexual intercourse	*Crimes Act 1900* (NSW) s 66B
Persistent sexual abuse of a child[3]	Crimes Act 1900 (NSW) s 66EA
Kidnapping in company and involving actual bodily harm	Crimes Act 1900 (NSW) s 86(3)
Contamination of goods intending to cause public alarm or anxiety or economic loss (or threatening to do so) and such contamination results in the death of or grievous bodily harm to any person and that was intended by the offender	Crimes Act 1900 (NSW) s 93O
Aggravated robbery, assault with intent to rob or steal from the person, with wounding or the infliction of grievous bodily harm	*Crimes Act 1900* (NSW) s 96 (see also s 95)
Enter dwelling-house with intent to commit a serious indictable offence (or break out of dwelling house having committed such an offence) with wounding or intentionally or	Crimes Act 1900 (NSW) s 109(3)

1. Or conspire to commit such an offence or aid, abet, counsel, procure, solicit or incite the commission of such an offence.
2. Or conspire to commit such an offence or aid, abet, counsel, procure, solicit or incite the commission of such an offence.
3. The Sentencing Council has recommended that this offence be included in the SNPP Table: NSW Sentencing Council, *Penalties Relating To Sexual Assault Offences In New South Wales - Volume 1* (2008) [2.34]; Recommendation 5 at 35 and [3.58].

recklessly causing grievous bodily harm and/or being armed with a dangerous weapon	
Destroy or damage property with intent to endanger life	*Crimes Act 1900* (NSW) s 198
Sabotage of a public facility	*Crimes Act 1900* (NSW) s 203B
Destroy or damage aircraft or vessel with intent to cause death or with reckless indifference to the safety of a person's life	*Crimes Act 1900* (NSW) s 204
Make a demand of a person together with a threat to destroy, damage or endanger the safety of an aircraft, vessel or transport vehicle or to kill or inflict injury on persons on board, and discharge a firearm, cause an explosion or wound or inflict grievous bodily harm	*Crimes Act 1900* (NSW) s 208(3)
Act (or omission of duty) in connection with the operation of a railway with intent to cause death, inflict grievous bodily harm or endanger safety	*Crimes Act 1900* (NSW) s 211(1)
Adult who supplies (or knowingly takes part in supply) of not less than the commercial quantity of prohibited drug (other than cannabis leaf) to a person under 16 years of age[4]	*Drug Misuse and Trafficking Act 1985* (NSW) s 25(2A), s 33AA(2)(b)
Maximum penalty of 24 years' imprisonment	
Cultivate (or knowingly take part in cultivation of) not less than the large commercial quantity of prohibited plants, or same by enhanced indoor means and for a commercial purpose, and expose a child to that cultivation process or substances being stored for use in that process[5]	*Drug Misuse and Trafficking Act 1985* (NSW) s 23A(2), (3), s 33AD(4)
Maximum penalty of 20 years' imprisonment	
Assault with intent to have sexual intercourse and intentionally or recklessly inflict actual bodily harm or threaten to do so with offensive weapon or instrument	Crimes Act 1900 (NSW) s 61K
Sexual intercourse with person who is of or above the age of 10 years and under the age of 14 years in circumstances of aggravation	*Crimes Act 1900* (NSW) s 66C(2), (5)
Cause or intend to cause (or be reckless thereto) sexual servitude of a person who is under the age of 18 years and/or has a cognitive impairment	*Crimes Act 1900* (NSW) s 80D(2)
Kidnapping in company or involving actual bodily harm	*Crimes Act 1900* (NSW) s 86(2)
Enter dwelling-house with intent to commit a serious indictable offence (or break out of dwelling house having committed such an offence) in circumstances of aggravation[6]	*Crimes Act 1900* (NSW) s 109(2)
Unauthorised manufacture of a prohibited firearm or pistol	*Firearms Act 1996* (NSW) s 50A(2)
Sell firearm parts on an ongoing basis	*Firearms Act 1996* (NSW) s 51BB(1)
Unauthorised sale of military-style weapon	*Weapons Prohibition Act 1998* (NSW) s 23A(2)

4. Or conspire to commit such an offence or aid, abet, counsel, procure, solicit or incite the commission of such an offence.
5. Or conspire to commit such an offence or aid, abet, counsel, procure, solicit or incite the commission of such an offence.
6. Circumstances of aggravation are defined in the *Crimes Act 1900* (NSW) s 105(1) to be one or more of the following: being armed with an offensive weapon or instrument; being in company; using corporal violence; intentionally or recklessly inflicting actual bodily harm; depriving a person of his or her liberty; knowing that there is a person or persons in the premises where the offence occurs.

Sell prohibited weapons on an ongoing basis	*Weapons Prohibition Act 1998* (NSW) s 23B(1)
Unauthorised manufacture of military-style weapon	*Weapons Prohibition Act 1998* (NSW) s 25A(2)
Maximum penalty of less than 20 years' imprisonment (length of penalty noted in each case)	
Fire a firearm at a dwelling-house or building during a public disorder or in the course of an organised criminal activity with reckless disregard for the safety of any person (Maximum penalty: 16 years' imprisonment)	*Crimes Act 1900* (NSW) s 93GA(1A), (1B)
Destroy or damage property by fire or explosives with intent to cause bodily injury (Maximum penalty: 16 years' imprisonment)	*Crimes Act 1900* (NSW) s 196(2)(b)
Adult procures child, or meets child following grooming, under the age of 14 years for unlawful sexual activity (Maximum penalty: 15 years' imprisonment)	*Crimes Act 1900* (NSW) s 66EB(2), (2A)
Participate in a criminal group whose activities are organised and on-going and direct any of the activities of the group, knowing that it is a criminal group and knowing or being reckless as to whether that participation contributes to the occurrence of any criminal activity (Maximum penalty: 15 years' imprisonment)	*Crimes Act 1900* (NSW) s 93T(4A)

Appendix D
SNPP scope analysis

Table D.1: SNPP offences retained if the scheme was limited to offences carrying life imprisonment

Item No	Offence	SNPP (yrs)	Maximum penalty (yrs)	SNPP as a % of maximum
1A	Murder – where the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work	25	Life	N/A
1B	Murder – where the victim was a child under 18 years of age	25	Life	N/A
1	Murder – in other cases	20	Life	N/A
9	*Crimes Act 1900* s 61JA (aggravated sexual assault in company)	15	Life	N/A
10	*Crimes Act 1900* s 66A(2) (aggravated sexual intercourse – child under 10)	15	Life	N/A
15C	*Drug Misuse and Trafficking Act 1985* s 23(2) of the (cultivation, supply or possession of 'prohibited plants' but not including cannabis), being an offence that involves not less than the large commercial quantity (if any) specified for the prohibited plant concerned under that Act	10	Life and/or 5000 penalty units	N/A
17	*Drug Misuse and Trafficking Act 1985* s24(2) (manufacture or production of commercial quantity of prohibited drug), being an offence that: does not relate to cannabis leaf, and if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	15	Life and/or 5000 penalty units	N/A
19	*Drug Misuse and Trafficking Act 1985* s 25(2) (supplying commercial quantity of prohibited drug), being an offence that: does not relate to cannabis leaf, and if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	15	Life and/or 5000 penalty units	N/A

Source: *NSW Sentencing Council, Standard Non-parole Periods: A Background Report (2011) 6-7 (with alterations).*

Table D.2: SNPP offences retained if the scheme was limited to offences carrying at least 25 years' imprisonment

Item No	Offence	SNPP (yrs)	Maximum penalty (yrs)	SNPP as a % of maximum
2	*Crimes Act 1900* s 26 (conspiracy to murder)	10	25	40
3	*Crimes Act 1900* s 27, 28, 29 or 30 (attempt to murder)	10	25	40
4	*Crimes Act 1900* s 33 (wounding etc with intent to do bodily harm or resist arrest)	7	25	28
10	*Crimes Act 1900* s 66A(1) (sexual intercourse – child under 10)	15	25	60
11	*Crimes Act 1900* s 98 (robbery with arms etc & wounding)	7	25	28
13	*Crimes Act 1900* s 112(3) (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation)	7	25	28

Source: *NSW Sentencing Council, Standard Non-parole Periods: A Background Report (2011) 6-7 (with alterations).*

Table D.3: SNPP offences retained if the scheme was limited to offences carrying at least 20 years' imprisonment

Item No	Offence	SNPP (yrs)	Maximum penalty (yrs)	SNPP as a % of maximum
8	*Crimes Act 1900* s 61J (aggravated sexual assault)	10	20	50
12	*Crimes Act 1900* s 112(2) (breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation)	5	20	25
15C	*Drug Misuse and Trafficking Act 1985* s 23(2) of the (cultivation, supply or possession of prohibited plants – in this case, cannabis plants[208]), being an offence that involves not less than the large commercial quantity (if any) specified for the prohibited plant concerned under that Act	10	20 and/or 5000 penalty units for cannabis plant	50
18	*Drug Misuse and Trafficking Act 1985* s 25(2) (supplying commercial quantity of prohibited drug[209]), being an offence that: ▪ does not relate to cannabis leaf, and ▪ if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	10	20 and/or 3500 penalty units	50
21	*Firearms Act 1996* s 51(1A) or (2A) (unauthorised sale of prohibited firearm or pistol)	10	20	50

208. "Prohibited plant" is defined under s 3 of the Drug Misuse and Trafficking Act 1985 (NSW) and does not include cannabis leaf, which is included within the definition of "prohibited drug" in s 3 and Schedule 1. "Prohibited plant" does include a cannabis plant that is cultivated by enhanced means indoor or any other means.

209. "Prohibited drug" is defined under s 3 of the Drug Misuse and Trafficking Act 1985 (NSW) and specifically excludes "prohibited plant", which is defined separately under s 3.

Item No	Offence	SNPP (yrs)	Maximum penalty (yrs)	SNPP as a % of maximum
22	*Firearms Act 1996* s 51B (unauthorised sale of firearms on an ongoing basis)	10	20	50
23	*Firearms Act 1996* s 51D(2) (unauthorised possession of more than 3 firearms any one of which is a prohibited firearm or pistol)	10	20	50

***Source**: NSW Sentencing Council, Standard Non-parole Periods: A Background Report, 2011, 6-7 (with alterations).*

Table D.4: The offences that would be excluded from the SNPP scheme if it was limited to offences carrying at least 20 years' imprisonment or higher

Item No	Offence	SNPP (yrs)	Maximum penalty (yrs)	SNPP as a % of maximum
4A	*Crimes Act 1900* s 35(1) (reckless causing of grievous bodily harm in company)	5	14	35.7
4B	*Crimes Act 1900* s 35(2) (reckless causing of grievous bodily harm)	4	10	40
4C	*Crimes Act 1900* s 35(3) (reckless wounding in company)	4	10	40
4D	*Crimes Act 1900* s 35(4) (reckless wounding)	3	7	42.9
5	*Crimes Act 1900* s 60(2) (assault of police officer occasioning bodily harm)	3	7	42.9
6	*Crimes Act 1900* s 60(3) (wounding or inflicting grievous bodily harm on police officer)	5	12	41.7
7	*Crimes Act 1900* s 61I (sexual assault)	7	14	50
9A	*Crimes Act 1900* s 61M(1) (aggravated indecent assault)	5	7	71.4
9B	*Crimes Act 1900* s 61M(2) (aggravated indecent assault)	8	10	80
14	*Crimes Act 1900* s 154C(1) (taking motor vehicle or vessel with assault or with occupant on board)	3	10	30
15	*Crimes Act 1900* s 154C(2) (taking motor vehicle or vessel with assault or with occupant on board in circumstances of aggravation)	5	14	35.7
15A	*Crimes Act 1900* s 154G (organising car or boat rebirthing activities)	4	14	28.6
15B	*Crimes Act 1900* s 203E (bushfires)	5	14	35.7
20	*Firearms Act 1996* s 7 (unauthorised possession or use of firearms)	3	14	21.4
24	*Weapons Prohibition Act 1998* s 7 (unauthorised possession or use of prohibited weapon on indictment)	3	14	21.4

***Source:** NSW Sentencing Council, Standard Non-parole Periods: A Background Report (2011) 6-7 (with alterations).*

Appendix E
Submissions

Preliminary submissions to the sentencing review

PSE1 Mr Richard Parker
PSE2 Ian Temby AO QC
PSE3 The Hon Justice R O Blanch, Chief Judge of the District Court of NSW
PSE4 NSW Bar Association
PSE5 His Honour Judge Graeme Henson, Chief Magistrate of the Local Court of NSW
PSE6 Magistrate Clare Farnan
PSE7 Homeless Persons Legal Service
PSE8 Law Society of NSW
PSE9 Mental Health Coordinating Council
PSE10 Office of the Director of Public Prosecutions (NSW)
PSE11 Young Lawyers NSW
PSE12 Crime and Justice Reform Committee
PSE13 The Shopfront Youth Legal Centre
PSE14 Intellectual Disability Rights Service
PSE15 Jumbunna Indigenous House of Learning
PSE16 Mr David Shoebridge MLC
PSE17 Women in Prison Advocacy Network
PSE18 Legal Aid NSW
PSE19 Corrective Services NSW Women's Advisory Council
PSE20 Probation and Parole Officers' Association of NSW
CPSE21 *Confidential preliminary submission*
PSE22 Aboriginal Legal Service (NSW/ACT) Limited

Submissions on standard minimum non-parole periods

SES1 The Hon Justice R O Blanch, Chief Judge of the District Court of NSW, 23 March 2012
SES2 His Honour Judge Graeme Henson, Chief Magistrate of the Local Court of NSW, 2 April 2012
SES3 NSW Bar Association, 4 April 2012
SES4 Law Society of NSW, 10 April 2012
SES5 The Hon Justice Peter McClellan, Chief Judge at Common Law, 13 April 2012
SES6 Professor Mirko Bagaric, Deakin Law School, 13 April 2012
SES7 Office of the Director of Public Prosecutions (NSW), 13 April 2012
SES8 Probation and Parole Officers' Association of NSW, 16 April 2012
SES9 Police Association of NSW, 16 April 2012
SES10 The Shopfront Youth Legal Centre, 16 April 2012
SES11 NSW Police Force, 26 April 2012

Appendix F
Consultations

Preliminary consultations on the sentencing review

NSW Sentencing Council – PSEC1

19 October 2011

The Hon Jerrold Cripps QC (Chairperson)
Mr Howard Brown OAM (Victims of Crime Assistance League)
His Honour Acting Judge Paul Cloran
Mr Nicholas Cowdery AM QC
Ms Megan Davis (Director, Indigenous Law Centre, Faculty of Law, UNSW)
Mr Luke Grant (Corrective Services NSW)
Mr Mark Ierace SC (Senior Public Defender)
Ms Martha Jabour (Homicide Victims Support Group)
Acting Assistant Commissioner Malcolm Lanyon (NSW Police Force)
Ms Penny Musgrave (Director, Criminal Law Review, NSW Department of Attorney General and Justice)
Prof David Tait (University of Western Sydney)

Roundtable – PSEC2

24 October 2011

Mr Lloyd Babb, Director of Public Prosecutions
Mr Richard Button, Public Defenders
Mr Leigh Costa, Corrective Services NSW
Ms Amanda Coultas, Legal Aid NSW
Mr Hugh Donnelly, Judicial Commission of NSW
Ms Sally Dowling, NSW Bar Association
Mr Phillip Gibson, Law Society of NSW
Mr Mark Ierace, Senior Public Defender
Ms Jo McAlpin, Corrective Services NSW
Ms Penny Musgrave, Criminal Law Review, NSW Department of Attorney General and Justice
Ms Alicia O'Keefe, Police Prosecutions
Mr Stephen Odgers SC, NSW Bar Association
Mr Ian Rodgers, Aboriginal Legal Service
Ms Jane Sanders, Law Society of NSW
Inspector Brendan Searson, Police Prosecutions
Mr Brett Thomas, Law Society of NSW

Consultations on standard minimum non-parole periods

NSW Sentencing Council – SEC1

28 March 2012

The Hon Jerrold Cripps QC (Chairperson)
Ms Karin Abrams (Community representative)
Mr Lloyd Babb SC (Director of Public Prosecutions)
Mr Howard Brown OAM (Victims of Crime Assistance League)
Mr Nicholas Cowdery AM QC, (Former Director of Public Prosecutions)
Ms Megan Davis (Director, Indigenous Law Centre, Faculty of Law, UNSW)
Mr John Hubby (Chief Executive, Juvenile Justice NSW)
Mr Mark Ierace SC (Senior Public Defender)
Mr Ken Marslew AM (Enough is Enough Anti-Violence Movement)
Ms Penny Musgrave (Director, Criminal Law Review Division, DAGJ)
Professor David Tait (University of Western Sydney)

Roundtable – SEC2

30 March 2012

Mr Lloyd Babb, Director of Public Prosecutions
Mr Richard Button, Public Defenders
Ms Michelle Crowther, Legal Aid NSW
Mr Hugh Donnelly, Judicial Commission of NSW
Ms Sally Dowling, NSW Bar Association
Mr Greg Elks, Law Society of NSW
Mr Tim Game SC, Barrister
Mr David Giddy, Law Society of NSW
Mr Luke Grant, Corrective Services NSW
Mr Mark Ierace, Senior Public Defender
Mr Simon Kritsotakis, Corrective Services NSW
Ms Pierrette Mizzi, Judicial Commission
Ms Penny Musgrave, Criminal Law Review Division
Mr Stephen Odgers SC, NSW Bar Association
Mr Brian Sandiland, Legal Aid NSW
Inspector Brendan Searson, Police Prosecutions
Mr Jeremy Styles, Aboriginal Legal Service
Ms Claire Wasley, Aboriginal Legal Service

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