

Dear Sir / Madam

## **Standard minimum non-parole periods: submission from the Shopfront Youth Legal Centre**

The Shopfront Youth Legal Centre welcomes the opportunity to make a submission to this review.

### **About the Shopfront Youth Legal Centre**

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront employs 4 solicitors (3.1 full-time equivalent), 2 legal assistants, a paralegal (0.4 full-time equivalent) and a social worker. We are also assisted by a number of volunteers. Two of our solicitors are accredited specialists in criminal law; one is also a specialist accredited in children's law.

The Shopfront represents young people in criminal matters, mainly in the Local, Children's and District Courts. We prioritise those young people who are the most vulnerable, including those in need of more intensive support and continuity of representation than the Legal Aid system can provide.

The Shopfront also assists clients to pursue victims' compensation claims and deal with unpaid fines. We also provide advice and referrals on a range of legal issues including family law, child welfare, administrative and civil matters.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to most of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Moreover, most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

### **Scope of this submission**

Due to time constraints, this submission will be very brief.

The Shopfront represents many young adults who have committed offences which are subject to the standard non-parole period provisions, particularly aggravated break enter and steal and offences involving wounding or inflicting grievous bodily harm.

It is our view that the standard non-parole period scheme be abolished, for the reasons outlined in the attached submission.

We are of the view that sentencing legislation, guideline judgments, common law and the existence of a transparent appeal process provides adequate guidance for judicial officers in the exercise of their sentencing discretion.

**Further comments**

We would welcome the opportunity to make further comments or to attend consultations if you consider this would be helpful. In this regard, please do not hesitate to contact me, preferably by email at [jane.sanders@freehills.com](mailto:jane.sanders@freehills.com).

Yours sincerely

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## Standard minimum non-parole periods: submission to NSWLRC

### 1 Concerns about standard non-parole periods

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#### 1.1 Unnecessary complexity

The available evidence suggests that there has been a raft of appeals due to the fact that the Standard Minimum Non-Parole Period (**SNPP**) provisions are complex and often misapplied<sup>1</sup>.

Of particular concern is the tendency of some judges to apply artificial and convoluted reasoning in order to justify departure from or adherence to the relevant SNPP.

The recent High Court decision of *Muldrock v The Queen* [2011] HCA 39 (**Muldrock**) is said to have resolved some of the problems with the application of standard non-parole periods, having clarified that SNPPs are not always the starting point of the sentencing process<sup>2</sup>. However, to our mind *Muldrock* is also evidence of the confusion and error the scheme has itself caused.

#### 1.2 Difficulty in assessing objective seriousness

The requirement that judges consider whether an offence falls within, above or below the mid-range of objective seriousness is problematic. A single offence can often have multiple factors (subjective and objective) bearing upon its commission, making an assessment of “objective seriousness” difficult to arrive at without vastly simplifying the nature of the offence.

Indeed, for offences which do not carry SNPPs, the Court of Criminal Appeal has emphasised that the court must not consider the objective seriousness of the offence in isolation when conducting the sentencing exercise.<sup>3</sup>

For some of the most common SNPP offences, such as the offence of aggravated break and enter and commit serious indictable offence, the concept of “mid-range objective seriousness” is virtually meaningless. Such an offence can involve so many different serious indictable offences and so many different aggravating factors – ranging from, for example, two young people breaking into a tuckshop and stealing food, to a full-scale home invasion involving weapons and serious physical or sexual assaults upon the occupants.

Further to the consideration of objective seriousness, *Muldrock*’s revision of the earlier decision by the Court of Criminal Appeal in *R v Way* (2004) NSWLR 168 (**Way**) has caused confusion regarding the ability of the court to consider matters personal to a defendant or a class of defendant. Under *Way*, “some” of the relevant circumstances in determining objective seriousness could be personal to the offender, provided they became relevant by causal connection to the commission of the offence.<sup>4</sup>

The court held in *Muldrock* that “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”.<sup>5</sup>

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<sup>1</sup> See discussion in of NSW Sentencing Council’s background report on standard non-parole periods, November 2011, at pp17-18

<sup>2</sup> *Muldrock v The Queen* [2011] HCA 39

<sup>3</sup> *Sivell v R* [2009] NSWCCA 286 at [2]-[5]; *R v Field* [2011] NSWCCA 13 at [49]

<sup>4</sup> *Ibid* at [86]

<sup>5</sup> Above n 2 at [27]

### 1.3 Transparency in sentencing

Transparency in sentencing is generally seen as desirable. We understand “transparency” to mean that judicial officers’ sentencing decisions are readily understood, not only by the affected parties but by the public at large. In our view, the complex and often convoluted reasoning discussed above is at odds with transparency in sentencing.

In our view, a member of the general public is unlikely to understand the significance of “objective seriousness” in the context of a SNPP sentencing exercise. They are also unlikely to comprehend why, in assessing “objective seriousness”, the court could once consider an offender’s personal circumstances, but can no longer. It is easy to see how this misunderstanding could lead to significant confusion and mistrust of the criminal justice system.

### 1.4 Consistency in sentencing

Standard non-parole periods (SNPPs) were apparently introduced in an attempt to achieve appropriate consistency, but the evidence is questionable as to whether this purpose has been achieved.

In particular, the study undertaken by the Judicial Commission ‘*The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales*’ (Monograph 33, May 2010) compared patterns of sentencing in District and Supreme Courts before and after the standard non-parole period legislation was introduced on 1 February 2003.

Whilst the study found that standard non-parole periods have had the effect of creating greater uniformity and consistency in sentencing, it was unable to determine whether such consistency reflected like cases being treated alike, or whether all cases, dissimilar or not, were being “treated uniformly in order to comply with the statutory scheme”.<sup>6</sup>

### 1.5 Constraint on judicial discretion

We submit that SNPP provisions have had the effect of constraining judicial discretion in sentencing, and reflect a moving away from the principle that judges be accorded flexibility in taking into account all relevant considerations and sentencing principles in each individual case.

We refer to the comment by Spigelman CJ in *R v Whyte* (2002) 55 NSWLR 252 at 147, “*The maintenance of a broad judicial discretion is essential to ensure that all of the wide variations of circumstances of the offence and offender are taken into account. Sentences must be individualised.*”

### 1.6 Increase in sentencing tariffs for SNPP offences

Of particular concern is the findings by the Judicial Commission in its 2010 study<sup>7</sup>, which found that SNPPs have increased sentencing tariffs in relation to certain classes of SNPP offences. We submit that a general increase in sentencing tariffs is not a desirable outcome, unless there was previously a demonstrated pattern of unreasonably lenient sentencing.

## 2 Preference for guideline judgments over SNPPs

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If it is considered that sentencing courts require more guidance than the general common law affords, we submit that the use of guideline judgments is preferable to SNPPs.

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<sup>6</sup> Patrizia Poletti, Hugh Donnelly, ‘The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales’, (Research Monograph 33, Judicial Commission of NSW, 10 April 2012) p4

<sup>7</sup> Ibid, p61

Guideline judgments provide guidance to judicial officers and appear to have improved consistency in sentencing, without unduly interfering with judicial discretion. For example, research showed that the guideline judgment relating to driving with a high-range prescribed concentration of alcohol (HRPCA) evened out the treatment of HRPCA offenders when sentenced by different courts in different regions across NSW<sup>8</sup>.

Unlike SNPPs, guideline judgments do not depend on the artificial and difficult exercise of assessing “mid-range objective seriousness”.

The Shopfront Youth Legal Centre has acted for large numbers of young adults sentenced for armed robbery and robbery in company, to which the *Henry*<sup>9</sup> guideline applies. As previously mentioned, we have also acted for significant numbers of offenders being sentenced for SNPP offences. In our experience, guideline judgments provide appropriate guidance for the court, without unnecessary rigidity or complexity.

### 3 Conclusion

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We are of the view that standard non-parole periods are not necessary in order to guide judicial discretion and promote consistency in sentencing. The numerous appeals to the Court of Criminal Appeal, and the recent high court decision in *Muldrock*, have demonstrated that there is much uncertainty around the SNPP provisions.

We submit that the SNPP provisions in the *Crimes (Sentencing Procedure) Act 1999* should be repealed. We are of the view that the existing sentencing framework and principles reflected in legislation and in common law, combined with guideline judgments, provide ample guidance to judicial officers and address any concerns about consistency in sentencing.

The Shopfront Youth Legal Centre  
April 2012

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<sup>8</sup> Patrizia Poletti, ‘Sentencing Trends and Issues: Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW’ (10 April 2012) Judicial Commission of NSW: <http://www.judcom.nsw.gov.au/publications/st/st35/st35.pdf>

<sup>9</sup> *R v Henry* (1999) 46 NSWLR 346