

Your Ref: Community Consultation: Standard Non-Parole Periods

Our Ref: Criminal Law Committee: 21000339/142

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The Honourable Paul Lucas MP
Attorney-General, Minister for Local Government and Special Minister of State
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Dear Attorney-General

COMMUNITY CONSULTATION- STANDARD NON-PAROLE PERIODS

The Queensland Law Society ("the Society") thanks you for the opportunity to provide feedback to the Government's community consultation on standard non-parole periods.

We welcome comments made in the report released by the Sentencing Advisory Council which discourage the adoption of standard non-parole periods. In particular, the report states:

"After closely examining the issues, a majority of the Council does not support the introduction of a SNPP scheme in Queensland. In particular, a majority of the Council is concerned there is limited evidence of the effectiveness of SNPP schemes in meeting their objectives, beyond making sentencing more punitive and the sentencing process more complex, costly and time consuming. It also risks having a disproportionate impact on vulnerable offenders, including Aboriginal and Torres Strait Islander offenders and offenders with a mental illness or intellectual impairment.

The Council is further concerned that there are possible policy tensions between the objectives of a Queensland SNPP scheme and the policy objectives of other Queensland and Commonwealth government initiatives including the National Indigenous Law and Justice Framework 2009–2015 the proposed Queensland Aboriginal and Torres Strait Islander Justice Strategy 2011–2014 and the National Disability Strategy 2010–2020; the potential of a SNPP to support the objectives of these strategies would appear to be limited."

We note that the Council was not asked to advise the Government on the appropriateness of introducing a SNPP scheme. Rather, the terms of reference appear to assume the introduction of such a scheme and ask the Council to report on aspects of how it should be implemented. Despite this, the Council determined that it was important to establish that the majority of Council members found that a SNPP

scheme should not be introduced. We encourage the Government to seriously consider the value of standard non-parole periods in light of what the Sentencing Advisory Council has ascertained.

The Society notes that the web page for this community consultation states:

"It is anticipated that legislation implementing a new minimum standard mandatory non-parole period will be introduced into the Parliament by the end of the year."

The Society is disappointed to see that the Government has already set a timeline for the implementation of a SNPP scheme even before the community consultation has taken place, and despite the comments of the Sentencing Advisory Council.

1. The Society's Position

The Queensland Law Society does not support the introduction of a SNPP Scheme, by whatever means one might be implemented.

The Society's long-held position is that the current sentencing regime in Queensland, having at its core a system of judicial discretion exercised within the bounds of precedent, is the most appropriate means by which justice can be attained on a case by case basis.

The Society has also had a long-held objection to any form of mandatory sentencing¹. The practical reality of the implementation of an SNPP scheme is that, in some cases at least, there will be an erosion of judicial discretion and a mandatory component of sentencing to be applied. The Society cannot support such an approach.

We also point to the fact that the SNPP schemes that have been introduced in other states could not be said, on any objective measure, to have been successful. The NSW regime in particular has been the subject of significant (and, we say, entirely valid) criticism. The NSW SNPP, which has been in place for some years now, is the subject of a current review by the NSW Sentencing Council. The Victorian Government has recently announced the introduction of baseline sentences (an equivalent to SNPPs) and that matter is the subject of consideration by the Victorian Sentencing Advisory Council. In those circumstances, it is difficult to see why the Queensland Government feels a need to press ahead with this type of reform in advance of seeing the results of the significant work being done elsewhere in Australia. A more prudent approach would be to await the outcome of the interstate reviews, before determining our state's position.

With the Society's opposition to a scheme of this nature understood, and in keeping with the Society's position as a significant stakeholder in the criminal justice system, we will nonetheless provide comments on the key features that are necessary in a standard non-parole period scheme, despite our fundamental opposition to such.

2. A standard percentage scheme

The Society is of the view that if a SNPP scheme were to be introduced in Queensland, a standard percentage scheme would be preferable to (or at least less objectionable than) a defined term scheme. We have considered the defined term scheme as it is currently applied in NSW, through the personal experiences of our own members and our discussions with interstate colleagues. It is fair to say that there is a great deal of concern and criticism (valid we say) about the operation of the NSW scheme.

¹ We would hope that the many compelling arguments against mandatory sentencing are so well known as to not need to be stated.

The principal objection to a defined term scheme is that it more closely resembles a mandatory sentencing scheme, and has many of the same unwanted and undesirable consequences. The consistency that is achieved by such a scheme is a consistency of sentencing result only. For those who are caught by the scheme, matters of personal mitigation which would otherwise shape the ultimate sentence are overshadowed by the forced consistency imposed by the scheme. Such a scheme provides insufficient recognition of the many different types of offending behaviour that can be encompassed within a charge. There is a 'one size fits all' flavour to such a scheme which is fundamentally at odds with the notion of doing individual justice in each case.

The Society would oppose the adoption of a defined term SNPP scheme. We see such a scheme as not only more difficult to implement, bringing with it most if not all of the logistical and practical difficulties that have been experienced in NSW, more likely to produce unjust results in particular circumstances.

By contrast, a standard percentage scheme, with the SNPP representing a set proportion of the head sentence, has less of these difficulties. Firstly, it still provides for complete judicial discretion in relation to the setting of the head sentence. It also has the advantage of being more familiar territory for Queensland practitioners who have experienced standard percentage schemes at least in relation to serious violent offenders in Queensland.

A standard percentage scheme would involve the continuation of Queensland's current approach of first determining the overall sentence before considering the non-parole period to be served (in contrast to the "bottom up" approach that is involved in the application of a defined term scheme).

3. Who a SNPP scheme should apply to

It is the Society's position that any scheme should only apply to adults who are jailed after having been found guilty upon indictment of a serious offence, and sentenced to a term of full-time imprisonment. It should only apply to repeat offenders.

A non-parole period regime effectively applies currently to offenders sentenced to life imprisonment in Queensland pursuant to section 181 of the *Corrective Services Act*. There seems little need to alter that current position.

Because non-parole periods are not set for indefinite sentences, it is unlikely that an SNPP scheme would be relevant where an indefinite sentence is imposed.

The Society would also object to any inclusion of detention under mental health legislation as forming part of an SNPP scheme in Queensland.

The Society would also object to any application of a SNPP scheme which detracted from the certainty of release provided to prisoners by court-ordered parole. Particularly for shorter sentences, it is vital that prisoners are released on a known day without the complications and vagaries associated with parole applications.

4. Magistrates Court proceedings must be excluded

The Society's firm view is that Magistrates Court proceedings should be excluded from any SNPP scheme. Given the jurisdictional limits and the penalties that can be imposed by magistrates, such a scheme would be particularly problematic if operating on a defined term basis.

Even if an SNPP scheme adopted a standard percentage basis, the Society's concerns about applying such a scheme to the Magistrates Court include:

- (a) Sentencing for such a scheme is likely to be slower and more complex, which would have particular impact on the Magistrates Court given the volume of work processed in that jurisdiction;
- (b) It is a jurisdiction with significantly more self-represented people, who would be at a significant disadvantage in their ability to make submissions in relation to the application of the scheme; and
- (c) In the Society's experience sentencing decisions by magistrates are not generally productive of the same level of "*community concern*" (at least as expressed through the media) as decisions in the superior courts.

5. Young people under the age of 18 must be excluded from a SNPP scheme

The Society is strongly of the view that young offenders, *including* 17 year olds, should be excluded from the operation of any SNPP scheme. To do otherwise would be to run counter to the very principles of youth justice in Queensland's *Youth Justice Act 1992*. Any truly just system of criminal justice must recognise that youth and inexperience is a fundamental factor of mitigation in the assessment of wrongdoing. People of this age are simply more prone to offending based on misjudgement, ignorance, and lack of maturity and life experience. To have offences committed by such youths made the subject of a standard non-parole period scheme would be to effectively ignore that fundamental issue.

The Society has long campaigned for 17 year olds to be regarded as children for the purposes of the criminal law in Queensland. The fact that Queensland is the only state to not do so is a matter of shame for this state. The exclusion of 17 year olds from a scheme (even if the law doesn't otherwise change about treating them as adults for the purposes of the criminal law) would signal the government's understanding that youth and inexperience are important features of mitigation.

6. A SNPP scheme should only apply to repeat offenders

If a SNPP scheme were to be introduced in Queensland, the Society's preference would be that it apply only to repeat offenders, drawing on the recently introduced New Zealand provisions.

Given the Society's reservations generally about the introduction and impact of such schemes, our submission is that the scheme should be applied narrowly and in a focused manner to address those areas of greatest concern. It may well be that public disquiet in respect of sentencing outcomes is most obvious in circumstances where the courts are dealing with repeat offenders who are considered to have been given an inadequate sentence.

If the scheme were to be limited to repeat offenders, we consider that this would be best defined by a further conviction for another scheme offence of a like nature committed after the conviction for the first offence, with both offences having occurred after the implementation of the SNPP scheme (and the offender having been warned after the first offence of the likely application of the scheme if re-offending).

7. Ability to depart from a SNPP

The Society's view is that for justice to be achieved in every case, any scheme must be sufficiently flexible to allow, for defined reasons, a longer or shorter non-parole period. The starting point for any

such departure can probably be found in the principles located in section 9 of the *Penalties & Sentences Act*.

The Society's firm view is that Section 9 of the *Penalties and Sentences Act* provides appropriate guidelines for any grounds of departure from an SNPP being applied to an offence. The sentencing court may be directed to provide reasons for departing from any SNPP in the legislation so stakeholders can understand how the court arrived at the conclusion that the SNPP was not appropriate.

Sentencing is made more difficult where offenders have combinations of numerous types of offences and lengthy periods of pre-sentence custody (which may not be declarable but must be taken into account). Sentencing courts should have the power to depart from any SNPP not just for circumstances that we can easily identify, but also for unusual combinations of factors that might be unforeseen or unusual.

8. Interaction with current SVO provisions

The Society believes that a standard percentage scheme would operate more effectively with the existing SVO provisions than would a defined term scheme. In fact it seems that there would be little need to include declared SVOs within any SNPP scheme, as it currently operates satisfactorily as its own SNPP scheme. It could be included within the general scheme for the sake of cohesion, but there would otherwise be no reason to consider any wholesale amendment to the current SVO provisions.

9. Offences under a SNPP scheme

The Society's view is that any SNPP scheme should only apply to offences that are already declared as being serious violent offences as outlined in Part 9A of the *Penalties and Sentences Act (Qld)*. As stated earlier, the Society believes that a standard percentage SNPP scheme is preferable and would operate more effectively within the list of offences in Part 9A of the *Penalties and Sentences Act*. Applying any SNPP to the existing SVO offences would be a far less confusing approach to the introduction of such a scheme.

On analysis of the offences currently included as being serious violent offences, the Society does not believe that it is necessary for all of those offences within Part 9A to be included. To this end the appropriate method of distinguishing them would be the maximum penalty. The appropriate maximum penalty that would enable a standard percentage SNPP to apply to a serious violent offence is one of 10 years or higher. Again this would impose a consistent regime and make it clear to the community that those serious violent offences that attract the higher maximum penalties will be subject to the SNPP scheme if found guilty after a trial.

10. Scheme should not be retrospective

The Society is of the view that like any other significant changes to the criminal justice system those changes should apply only to offences that have been committed on or after the commencement date.

The imposition of a retrospective regime would potentially cause great unfairness to some defendants given that the Director of Public Prosecutions still has an ability to withhold a matter for up to 6 months while the indictment is prepared.

11. Monitoring and evaluation

The Society repeats its objection to the implementation of any scheme however if a scheme is implemented then clearly it must be subject to a period of monitoring and evaluation at the end of that period.

The experience in other states has been that SNPP schemes increase the lengths of sentences and the number of appeals, particularly if the scheme imposed is unduly complex or interferes with the overall discretion of the court to fashion a sentence that is fair in all the circumstances. The impact of any SNPP scheme should be carefully monitored with statistics measuring the average length of sentences imposed for a period of 12 months after commencement. This can then be compared to the results of the immediate 12 months proceeding. Statistics should also be kept in relation to the volume of appeals lodged and successful appeals.

12. Current system of sentencing is appropriate

The Society stands firm on the view that the current system of sentencing in Queensland is entirely appropriate and there is no need for an SNPP scheme to be imposed here. Consistency in sentence and guidance to sentencing courts is met adequately by the Court of Appeal. If either party is aggrieved by any sentence imposed then they have an opportunity to appeal and those appeal precedents then promote consistency in approach to sentence.

General criticisms from members of the community regarding the lengths of sentences are often misguided and are the product of media campaigns manufactured to stir emotion, rather than promote an understanding of proper processes undertaken in the criminal justice system. Average terms of imprisonment imposed for particular offences are also misleading as averages do not take into account the circumstances relevant to each individual case.

There are many examples in Queensland criminal justice system where the title of an offence may be misleading as to the conduct that any offending may be constituted by. For example the charge of Rape departs from traditional understanding of the meaning of that term and can include many types of sexual misconduct, some far less serious than what would normally be expected from that charge. For offences such as rape a low average period of imprisonment might only reflect more convictions of less serious offending given the greater range of conduct, and therefore sentences, now appropriate for that charge.

The promotion of public confidence in sentencing can only be achieved through better education of members of the public of how courts sentence. We welcome efforts by the Queensland Sentencing Advisory Council, in accordance with its functions under the *Penalties and Sentences Act 1992*, to provide information to the community to enhance knowledge and understanding of matters relating to sentencing.

Thank you for providing the Society with this opportunity to provide comments on this issue. If you have any questions on the content of this letter, please contact Mr Matt Dunn on (07) 3842 5889 or m.dunn@qls.com.au; or Ms Raylene D'Cruz on (07) 3842 5884 or r.dacruz@qls.com.au.

Yours faithfully

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