IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY No. S121 of 2011

BETWEEN: **DEREK MULDROCK**
Appellant

AND: **THE QUEEN**
Respondent

APPELLANT'S REPLY

1. The Respondent states at Part II (ii) that the second issue raised by the appeal is whether the CCA erred in taking the standard non-parole period ('SNPP') into account in determining the appropriate sentence in this case. The second issue raises the question: if it was appropriate for the CCA to consider the SNPP in determining the appropriate sentence, what is the *extent* to which the SNPP should influence that process.

Ground 1

2. While it is correct to say that the imposition of the SNPP requires a mid-range offence in the absence of a plea of guilty, it also requires a complete absence of factors in mitigation. The Appellant does not contend that the SNPP was not relevant to his sentencing because he fell below the mid-range *and* because he had pleaded guilty [RWS 6.21]. Either reason was sufficient.

3. The legislation does not require a two step process [RWS 6.20]. *Reyes,* at [44], asked whether the offence lay within the middle of the range. It did not require, as a first step, an assessment of the objective seriousness.

4. The legislation does not require a precise finding of objective seriousness. Simpson J did not require the degree of precision in *McEvoy* that has been suggested in other cases. Importantly, her Honour specifically said that the relationship between the SNPP and the objective factors assumed that the subjective factors had been left to one side. The other decisions cited by the Respondent at RWS 6.22 have misapplied the legislation. Therefore what is submitted at RWS 6.23 is, with respect, incorrect.

5. The degree to which an offence falls outside the mid-range does not determine the extent to which the SNPP applies and the degree of departure warranted [RWS 6.23]. The submission places an undue emphasis on the SNPP and the objective

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seriousness of the offence. It fails to recognise the importance of the subjective factors. It is inconsistent with the legislation, the general sentencing principles that have emanated from the Court and *Way*.

6. There is a further problem with placing any emphasis on the SNPP as a reference point. It reflects the objective factors only [RWS 6.11]. But what are those objective factors? Unlike a guideline judgment, that question is left entirely unresolved. The objective mid-range offence, if it is to operate as a benchmark, needs to be assessed consistently. A benchmark without guiding factors can only promote inconsistency.

7. The process of sentencing remains one of instinctive synthesis with a wide discretion to be given to the sentencing judge. All relevant factors are considered when determining a sentence. Once the sentence is determined, the Court may need to consider the SNPP (if a mid-range offence or, in the Appellant's alternative submission, for a SNPP offence) as a final check. In circumstances such as the present, there would be little need or utility in having regard to the SNPP, even as a final check. All that is required (on the alternative argument) is for the sentencing judge to give reasons for the departure from the SNPP. On the primary argument, the SNPP provisions do not apply to an offence below the mid-range and therefore no requirement to give reasons for departure exists.

8. At RWS 6.24 – 6.25 it is contended that after *Way* a two stage approach to sentencing has developed, contrary to the principles enunciated by this Court in *Markarian v The Queen*[1]. Whilst subsequent decisions of the CCA have suggested this approach is required, *Way* was to the opposite effect: [41] – [46], [49], [50], [55], [56], [57], [59], [66], [68], [104], [109], [112], [120], [121], [122], [126], [128] and [129].

9. At RWS 6.25 the Respondent argues that the approach 'after *Way* has been to separate 'objective seriousness' and use it to determine a particular range of non-parole period, which is then varied up or down depending on other factors personal to the offender with care not to stray too far from the SNPP determined in the first step'. The references to *Way* relate to a different dichotomy, not to a separation of objective and subjective circumstances. The dichotomy referred to in *Way* is between pure matters of objective seriousness (that applies to the actual conduct irrespective of the offender) and matters which are personal to the offender but which may be relevant to objective seriousness. Such latter factors include prior criminal history and committing the offence which on bail. These factors were said not to be relevant to the determination of whether or not the offence lay within the mid-range [see also RWS 6.27].

10. That this development has occurred is not disputed, however it is not accepted that this is the consequence of the decision in *Way*. Instead, it is a consequence of subsequent decisions[2] that have given undue prominence to the relevance of the SNPP. The Appellant's case is an example of precisely this problem. It is a practice that is inconsistent with this Court's decisions in *AB v The Queen* (1999)

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[1] (2006) 228 CLR 357

[2] For example *R v Knight; R v Biuvanua* (2007) 176 A Crim R 338

198 CLR 111 and *Markarian v The Queen* (2006) 228 CLR 357. A useful example of the proper application of *Way* to the sentencing of an offender convicted of a SNPP offence can be found in *MLP v R* (2006) 164 A Crim R 93 at [32]-[34].

11. At RWS 6.28, the Respondent submitted that the Appellant represented a 'continuing danger' and his prospects of rehabilitation 'may be limited'. It was suggested his previous conviction for a like offence and 'the failure of treatment' provided confirmation of this. It should be noted that the 'treatment' provided to the Appellant consequent to the 2000 offence consisted of a recommendation from that he be kept on 'a tight leash in terms of probation'.[3] By that time, he was not taking any medication to suppress his sex drive. Dr Muir expressed the opinion that the trauma of prosecution would probably be sufficient to contain his behaviour.[4]

12. However, the treatment proposed in the subject proceedings amounted to intensive supervision and rehabilitation in a purpose built programme for intellectually disabled sex offenders. It was to occur in a quasi-custodial setting and would have been able to continue indefinitely, subject only to the length of the overall sentence. At the time of assessment by Professor Hayes in 2008, the Appellant was receiving Androcur, an anti-libidinal medication, and dexamphetamine. This followed a diagnosis of attention deficit hyperactivity disorder. He was under the supervision of a general practitioner and a psychiatrist.[5]

Ground 2

13. At RWS 6.35 – 6.40 the Respondent identifies various features of the Appellant's lifestyle and his reaction to the offences in both 2000 and in 2007. The Crown suggests that the CCA was entitled to reject the sentencing judge's finding that the Appellant had a 'significant' intellectual disability and was thus a suitable vehicle for general deterrence.

14. At RWS 6.33 it is submitted that the CCA simply pointed out that the Appellant's disability was 'mild', not 'significant', in accordance with the expert evidence. The CCA's conclusion was much more than a 'restatement' of the evidence; it was a rejection of the expert evidence regarding the extent of the Appellant's intellectual disability. It was plainly the case that the use of the descriptor 'significant' by the sentencing judge was done to provide meaning in lay terms to the disability suffered by the Appellant.

15. That the Appellant denied his conduct to the police, may have understood that his conduct was wrong or that his predilection was a problem he had to address says nothing about whether or not he suffered a significant intellectual disability. Firstly, his understanding was described by Dr Muir as 'superficial'. Secondly, the answers came when confronted or questioned by police and others. In those

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[3] Letter from Dr Keith Muir, Director, Cairns Health Service District to Ms Jo Hughes, Community Corrections, Qld, dated 5 October 2000.
[4] ibid
[5] Report of Professor S Hayes, 25 September 2008, page 3

circumstances, even a child may understand that their conduct is frowned upon, but not understand why. The same submission is made regarding the attempts the Appellant made to minimise his culpability; the excuses proffered might well be regarded as the inept attempts of a person with an IQ of 62, whose adaptive behaviour was in the lowest 0.1% of the population and whose language skills were equivalent to that of a young child.

16. At 6.40 of the RWS, various features of the Appellant's lifestyle are detailed. The following features should also be noted: from year 3 or 4 of primary school his parents were advised he needed to be placed in a special needs unit,[6] he was in special classes throughout school, he was barely able to read or write[7] and could only tell the time by a digital watch.[8] Upon leaving school in year 10 he did not receive a certificate. He is unable to 'make change' or manage his own money. He can write his name but not a letter.[9] Any work he had performed as an adult had been unskilled.[10] He had experienced difficulties in keeping employment because of problems in remembering instructions and in following them.[11] Ms Daniels was of the opinion that he would benefit from employment in a sheltered workshop.[12]

17. The available evidence established that the Appellant suffered, in lay terms, a significant intellectual disability. To find otherwise was to substitute the Court's inexpert opinion for that of a series of experts who were all of the same opinion.

Ground 3

18. The course adopted by the sentencing judge explained the result [RWS 6.48]. The Respondent suggests that important issues concerning the Appellant's predilections and rehabilitation were not addressed by the judge [RWS 6.50]. These were issues that could best be determined and addressed by the experts at Selwood Lane.

19. Protection of the community is not confined to imprisonment. Rehabilitation is an important aspect of that factor: [RWS 6.57].

20. The evidence on which the CCA concluded that the offence was premeditated was thin. The CCA ought not to have so concluded. The Appellant functions in many ways as a young child. His conduct immediately prior to the offence was not inconsistent with normal adolescent conduct. In circumstances where his awareness of wrongdoing is 'superficial', he 'has little control over his acting out behaviour' and has 'little comprehension of what constitutes a criminal act', any finding of premeditation serves little purpose. The CCA ought not to have found, beyond reasonable doubt, the offence was planned and deliberate [RWS 6.39].

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[6] Report of Professor S Hayes 25 September 2008, p2
[7] Dr Muir described him as 'functionally illiterate', report 8 May 2000, p2
[8] Report of Dr Muir dated 8 May 2000, p1
[9] Observations of Dr Wicks, consultant psychiatrist, quote by Dr Muir in his report of 8 May 2000
[10] Report of Professor S Hayes 25 September 2008, p3
[11] Report of Dr Muir, p1
[12] Report of Sharon Daniels 30 June 2000, p2

Ground 4

21. The RWS regarding this ground [6.41 – 6.46] focus entirely on the assertion that the correctional system did have facilities that would provide treatment to the Appellant in prison. Such 'treatment' needed to target the Appellant's particular needs. There was no such treatment available. A program aimed at sex offenders with an intellectual disability 'was being finalised' [RWS 6.45]. 'It was expected it would be trialled in late 2009.' [RWS 6.45]

22. As detailed in the AWS at [80], the evidence available at the hearing of the Crown appeal suggested that the Correctional facility housing the Appellant was unable to meet his needs. There had been 'ongoing management issues', 'refusal to comply with his prescribed medication and failure to abide by his Behavioural Management Plan'. It was predicted that parole would be difficult without the intensive support provided by the Criminal Justice Program.[13]

23. The Respondent has not addressed aspects of the Appellant's circumstances that supported a finding of special circumstances: that he had an intellectual disability and had been sexually assaulted, the connection between his offending and disability, the absence of appropriate rehabilitation in custody, the likelihood that he would endure real hardship in custody because of his disability and the nature of the offences.

24. Each of these matters warranted a finding of special circumstances, as did the obvious need the Appellant would have, upon release, for long term support and supervision by the NSW Probation and Parole Service.

25. The Respondent has not addressed its concession at first instance that the Community Justice Program was a reason to find special circumstances or the failure of the CCA to invite submissions on the issue.

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[13] Pre-release report of Ms Michele Jordan dated 21 August 2009. Professor Hayes had predicted these problems as likely at page 7 of her Report.