

FIREARMS OFFENCES

AND THE

STANDARD NON-PAROLE SENTENCING SCHEME

A REPORT OF THE NEW SOUTH WALES SENTENCING COUNCIL

Pursuant to s100J(1)(a) and (d) of the *Crimes (Sentencing Procedure) Act 1999*

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The views expressed in this report do not necessarily reflect the private or professional views of individual Council members or the views of their individual organisations.

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1 Terms of Reference

In a letter to the NSW Sentencing Council (“*the Sentencing Council*”) dated 26 November 2003, the Attorney General, the Hon Bob Debus MP (“*the Attorney General*”) requested that the Sentencing Council consider firearms offences and the standard non-parole sentencing scheme. The Attorney General noted that there has been a number of recent shootings in Western Sydney, and further noted the current inclusion of offences against section 7 of the *Firearms Act 1996* in the standard non-parole sentencing scheme.

The Attorney General also noted the recent amendment to section 7 of the *Firearms Act 1996* separating the two offences into 2 separate sections: sections 7 and 7A. The recent amendments clearly indicate the standard non-parole period of 3 years applies to offences against the “new” section 7 involving prohibited firearms.

The Attorney General specifically referred the following matters for consideration by the Sentencing Council:¹

“It would be of great assistance if the Sentencing Council would consider whether any other firearm offences (whether in the Crimes Act 1900 or Firearms Act 1996) should be included in the standard non-parole sentencing regime.

In preparation of its report the Council may wish to consider, where appropriate, issues such as:

- 1. The effect of standard non-parole sentences on section 7 offences to date;*
- 2. Recent changes to the relevant legislation;*
- 3. Whether the perception of inconsistent sentences is valid for firearm offences.”*

The Sentencing Council’s report has specifically concentrated on firearms offences contained in the *Crimes Act 1900* and the *Firearms Act 1996*. The definition of a “firearms offence” is further considered below at paragraph 6.1.

The Hon. Gordon Samuels AC CVO QC was requested by the NSW Attorney General to undertake a review to consider the merits of establishing a gun court in NSW. The terms of reference of that review included consideration of the manner in which gun related crime is prosecuted and dealt with in New South Wales courts, including sentencing with respect to gun related crime. The Hon. Gordon Samuels reported on his Review on 12 March 2004, and the Sentencing Council has considered that Review in preparing this Report.

2 Methodology and Submissions

Letters inviting written submissions on the topic were sent specifically to the individuals and organisations listed in *Schedule 1*. The text of the letter is set out in *Schedule 2*.

In response, the Sentencing Council received 11 replies. The individuals and organisations that replied to the invitation or made submissions are listed in *Schedule 3*.

¹ The Hon Bob Debus MP, letter to the Sentencing Council, 26 November 2003

Overwhelmingly, the majority of submissions were against inclusion of further firearms offences in the standard non-parole scheme, at least for the time being. Only one submission favoured inclusion of further firearms offences in the standard non-parole scheme.²

3 The NSW Sentencing Council

Generally speaking, the Sentencing Council consults with, and advises the Attorney General in connection with sentencing matters.³ In particular, the Sentencing Council advises in relation to guideline judgments and in relation to offences suitable for standard non-parole periods and their length.⁴ Section 100J(1) (a) of the *Crimes (Sentencing Procedure) Act 1999* provides that “[the sentencing council is to] *advise and consult with the Minister in relation to offences suitable for standard non-parole periods and their proposed length.*” Section 100J (1)(d) of the *Crimes (Sentencing Procedure) Act 1999* provides that “*at the request of the Minister, [the sentencing council is] to prepare research papers or reports on particular subjects in connection with sentencing*”.

A “*standard non-parole period*” is defined by the *Crimes (Sentencing Procedure) Act 1999* to represent “*the non-parole period for an offence in the middle range of objective seriousness.*”⁵ It provides a “*reference point or benchmark*”⁶ within the sentencing range. The standard non-parole sentencing scheme has been described as “*a new concept in sentencing*”.⁷

3.1 The Sentencing Council and “Community Expectations”

The NSW Attorney General, when introducing the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill* stated:

*“The standard non-parole periods set out in the Table to the Bill have been set taking into account the seriousness of the offence, the maximum penalty for the offence and current sentencing trends for the offence as shown by sentencing statistics compiled by the Judicial Commission of New South Wales. The community expectation that an appropriate penalty will be imposed having regard to the objective seriousness of the offence has also been taken into account in setting standard non-parole periods. The Bill provides in section 54A (2) that the standard non-parole period for an offence represents the non-parole period for an offence in the middle of the range of objective seriousness for such an offence.”*⁸

These comments provide some assistance as to matters relevant to a decision of what offences may be suitable for a standard non-parole period and its proposed length. These remarks are to be seen in context and do not apply to newly created statutory offences for which there are no statistics. Nevertheless, the absence of statistics is not a reason in itself to decline from recommending new offences to the table. The fact that the legislature has

² Joint submission of the NSW Police and the Ministry for Police.

³ Section 100J *Crimes (Sentencing Procedure) Act 1999*

⁴ Section 100J *Crimes (Sentencing Procedure) Act 1999*

⁵ Section 54A *Crimes (Sentencing Procedure) Act 1999*

⁶ The Hon Bob Debus MP Attorney General, *Hansard*, Legislative Assembly, 23 October 2002, p5813 at 5816

⁷ See *Attorney General’s Application no 2 of 2002* [2002] NSWCCA 515 at [16]

⁸ *Ibid* at p 5814

introduced new offences reflects *community expectation*. In relation to new offences and the appropriate standard non-parole period, the Sentencing Council considers itself well qualified to express its views. The *community expectation*, whilst relevant to the question of setting the length of the standard non-parole period, would also be relevant to the preliminary question of whether an offence should be included in the standard non-parole sentencing scheme. The *community expectation* may be regarded as well reflected in the membership of the Sentencing Council. The Sentencing Council comprises 10 members of wide and diverse backgrounds, including 4 representatives of the general community, 3 of which have expertise or experience in matters associated with victims of crime.⁹ In preparing this report, there has not been, for example, any survey of members of the public or any need for such. In any event, when considering the results of a community survey, “*a degree of caution has to be exercised when using the results of a survey of members of the public as to what sentence is appropriate*”.¹⁰ In many ways, the Sentencing Council, as constituted, is well qualified to reflect public perceptions and community expectations in relation to sentencing.

4 Summary of Conclusions and Recommendations

Although NSW Courts (including the Court of Criminal Appeal) lack of opportunity to consider or experience in dealing with the offence of “*unauthorised possession or use of prohibited firearms or pistols*”¹¹ (already set forth in the standard non-parole period sentencing scheme)¹² the Sentencing Council, by majority, recommends that the following further firearms offences should be added to the standard non-parole sentencing scheme:

- **50A(2): Unauthorised manufacture of prohibited firearms (20 years maximum).**
- **51(1A): Restrictions on sale of firearms (prohibited firearms or pistols) (20 years maximum).**
- **51(2A): Restrictions on sale of firearms (prohibited firearms or pistols) (20 years maximum).**
- **51B: Selling firearms on an ongoing basis (20 years maximum).**
- **51BA(2): Restrictions on sale of firearm parts (prohibited firearms or pistols) (10 years maximum).**
- **51BB: Selling firearms parts on an ongoing basis (20 years maximum).**
- **51D(2): Unauthorised possession of firearms in aggravated circumstances (prohibited firearm or pistol) (20 years maximum).**

⁹ By section 100 I(2)(e) of the *Crimes (Sentencing Procedure) Act 1999*, two members are to have expertise or experience in matters associated with victims of crime. As the Sentencing Council is presently constituted, 3 of its members have such experience or expertise.

¹⁰ *R v Keating and McInerney* [2003] All ER (D) 28 (Jan); [2002] EWCA Crim 3003; [2003] 1 All ER 1089; per Lord Woolf at [8]. In *R v Home Secretary ex parte Venables* [1998] AC 407, Lord Goff also considered public “concern” or “perceptions” in relation to sentencing: “*I wish to draw a distinction in the present context between public concern of a general nature with regard to, for example, the prevalence of certain types of offences, and the need that those who commit such offences should be duly punished; and public clamour that a particular offender whose case is under consideration should be singled out for severe punishment. It is legitimate for a sentencing authority to take the former concern into account but not the latter.*” Whilst this observation is made in the different context of guideline judgments it may be considered appropriate in the context of setting standard non-parole periods.

¹¹ Section 7 of the *Firearms Act 1996*

¹² Contained in Part 4, Division 1A of the *Crimes (Sentencing Procedure) Act 1999*

The Sentencing Council, by majority, recommends that the more serious firearms offences with a maximum penalty of 10 years or more, contained within the *Crimes Act 1900* and the *Firearms Act 1996* should be dealt with strictly on indictment. Such provides at least a yardstick or an ordinary reference point or an indication of parliament's attempt to provide condign punishment for persons committing such offences.

Whilst the Sentencing Council considers research might be undertaken, including an analysis of reasons for sentence, in order to ascertain whether a perception of inconsistency or leniency in the sentencing of firearms offences is valid,¹³ it nevertheless does not consider it necessary to wait for such research before providing this report. Nor does the Sentencing Council consider it necessary to wait for the decision in *Mouloudi*.¹⁴

The Sentencing Council has concluded that it is not within the terms of reference to proffer advice at the present time as to what the proposed standard non-parole period length should be for the above offences. The Sentencing Council is happy to consider this matter if and when it arises.

5 Introduction and Overview

The Sentencing Council has been asked to consider firearms offences and the standard non-parole sentencing scheme. In preparing its report, the Sentencing Council has considered the recent review to consider the merits of establishing a gun court in NSW, conducted by the Hon. Gordon Samuels, AC CVO QC.

For the purposes of this report, a "firearms offence" has been defined as an offence which by definition involves the use of a firearm. The vast majority of these offences are sentenced in the Local Court. Further, where they are dealt with on indictment, "firearms offences" are usually dealt with in combination with other, more serious offences. Many of those more serious offences are already included in the standard non-parole sentencing scheme and include offences such as murder, manslaughter, and manufacture and supply of drugs. It seems that many of the firearms offences which are dealt with on indictment arise in the circumstances of drug offences.¹⁵ It also seems clear from the principles applied in the sentencing of firearms offences to date that general deterrence is important.

Statistical data from the Bureau of Crime Statistics and Research ("BOCSAR") and the Australian Institute of Criminology ("AIC") shows the number of firearms incidents and trends over recent years. The Judicial Commission's JIRS statistics deal with the subset of firearms incidents which result in the conviction for an offence, and the statistics show how regularly firearms offences are sentenced, and give an indication of the proportion of matters that are dealt with summarily to those dealt with on indictment. Care must be exercised in the purpose for which JIRS statistics are relied upon. For example, JIRS statistics do not reveal any information regarding the circumstances of the offence, nor can conclusions be drawn such as, for example, the sentence that would be appropriate for an offence "*in the middle of the range of objective seriousness*."

¹³ The Sentencing Council has found no clear evidence to suggest that a perception of inconsistency or leniency with respect to firearms offences is valid.

¹⁴ Crown appeal against sentence for a firearms offence dealt with under the Standard Non-Parole Sentencing Scheme. Argument heard in the Court of Criminal Appeal on 10 March 2004, judgment reserved.

¹⁵ See for example, Schedule 6, and paragraph 8 of this report.

It is difficult to say whether the perceptions of inconsistency or leniency in sentencing for firearms offences are well founded, particularly where the reasons for sentence are unknown. However, an absence of history of appeals¹⁶ tends to suggest that a perception of inconsistency or leniency is unfounded. Further research could be undertaken to ascertain whether the perception of inconsistency or leniency is valid. There are vast variations in the objective seriousness of firearms offences, and this is related to the issue of perceived inconsistency. The community concern regarding the issue of perceived inconsistency or leniency seems to be specifically in relation to shootings involving prohibited firearms in a specific geographic area in Western Sydney.

There have been a number of recent changes to firearms legislation, along with other initiatives such as the recently updated protocol between the Office of the DPP and the NSW Police regarding the circumstances in which an election should be made for a firearms offence to be heard on indictment. Other initiatives are aimed at improving detection and apprehension of firearms offenders. The Sentencing Council views these initiatives as absolutely necessary. As noted by Professor Radzinowicz, the real deterrent to the commission of crime is fear of detection and certainty of punishment rather than ever increasing penalties. Indeed, Professor Radzinowicz suggests that impunity is itself a cause of crime, encouraging offenders to persevere in crime as a profitable course of activity.¹⁷ These comments are most relevant to many firearms offences where significant profits can be made in the trafficking of firearms and their parts.

A major recent legislative change designed to promote consistency generally is the standard non-parole sentencing scheme. The standard non-parole sentencing scheme presently contains one firearms offence, namely possession of a firearm under section 7 of the *Firearms Act 1996*. Section 7 is a "Table 1" offence with a maximum penalty of 14 years. The table of standard non-parole periods contains other offences with the same maximum penalty of 14 years, but with different standard non-parole periods. It is unclear why section 7 was chosen for inclusion in the standard non-parole sentencing scheme, while other firearms offences were not. Indeed, other "Table 1" firearms offences with a maximum penalty of 14 years or more, were not included in the standard non-parole sentencing scheme. The effect of the inclusion of section 7 in the scheme is unclear at this stage. Two firearms matters have been sentenced under the scheme, and both resulted in sentences well below the standard non-parole period. A Crown appeal has been lodged in respect of one of the matters.

The vast majority of submissions received by the Sentencing Council were *against* further offences being included in the standard non-parole sentencing scheme. The reasons put forward in those submissions can be summarised as being firstly that there is no evidence as to the effect of the standard non-parole sentencing scheme on section 7 offences to date, and secondly, that there is no empirical basis for any perception of inconsistency or leniency with respect to firearms offences, and that therefore there is no need to add further firearms offences to the standard non-parole sentencing scheme.

Despite these arguments, the majority of the Sentencing Council favours the approach taken in the joint Police submission, namely that firearms offences involving the manufacture and sale of firearms and their parts, which in turn may facilitate the commission of section 7 offences, should be added to the standard non-parole sentencing scheme. The Sentencing

¹⁶ Crown appeals for firearms offences are further discussed at paragraph 9.3

¹⁷ Radzinowicz, L (Editor), McClintock, and Gibson (1961) "*Robbery in London: An enquiry by the Cambridge Institute of Criminology*" London: Macmillan & Co. At p xi.

Council considers that the offences that it has recommended for inclusion in the standard non-parole sentencing scheme are most relevant to stemming the flow of guns into the community, and are offences where there is a strong need for general deterrence. Save for section 51D(2) the crimes that the Sentencing Council has selected to recommend for inclusion in the standard non-parole sentencing scheme show malignant avarice on the part of the offender.¹⁸ To manufacture and sell is to take criminality to a very high level. It also leads to other crimes of ever escalating gravity including firearms usage and ultimately crimes of violence including armed robbery and even murder.

It seems clear that there are differences in the objective seriousness of firearms offences. As an example, possession of a rifle that is securely stored but without a license, is markedly different to possession of a loaded pistol in a crowded public place. As there seems to be a particular concern with the prevalence of firearms offences in south western Sydney, this must be borne in mind when deciding what changes should or could be made to laws which will apply throughout NSW.

There is variation in the manner in which firearms offences can be disposed. Some offences are listed in Table 1, others in Table 2, and still others are to be dealt with strictly on indictment. Some argue that such variance makes it more difficult to assess whether the perception of inconsistency is valid, or even that such a situation may encourage inconsistency. On the other hand, it could be argued that to make anything other than the more serious firearms offences strictly indictable would mean that offences which could properly be dealt with summarily would be dealt with in the District Court with associated increased costs, decreased incentives to pleas of guilty, possible delays in disposition of matters in the District Court, and flow on effects to the Court of Criminal Appeal. It could similarly be argued that part of the role of the Office of the DPP is to exercise discretion in deciding whether a matter should properly be dealt with summarily or on indictment.¹⁹

Bearing in mind these considerations, the Sentencing Council, by majority, is of the opinion that it is not appropriate to have a procedure whereby serious indictable offences²⁰ with maximum penalties of 10 years or more are regularly disposed of in the Local Court with its jurisdictional limit of 2 years.²¹ The Sentencing Council accordingly recommends that firearms offences with maximum penalties of 10 years or more, should be heard strictly on indictment.

¹⁸ In the context of drug importation offences, Brennan J argued that “*The suffering of heroin addicts and the malignant avarice of those who feed upon that suffering make the illegal importing of large quantities of heroin a crime deserving of rigorous punishment.*” See *Kingswell v. R* [1985] HCA 72; (1985) 159 CLR 264 at 295; (1985) 62 ALR 161 at 183

¹⁹ Exercise of this discretion relies upon individual police prosecutors bringing appropriate matters to the attention of the Office of the DPP.

²⁰ A “serious indictable offence” is defined by section 4 of the *Crimes Act 1900* as meaning an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more

²¹ The Local Court may, however, accumulate penalties of imprisonment to a maximum of 5 years. See section 58 of the *Crimes (Sentencing Procedure) Act 1999*, amended by the *Crimes Legislation Further Amendment Act 2003*, which commenced on 14 February 2004.

6 Firearms offences

6.1 The meaning of “firearms offences”

In order to comment on whether further “*firearms offences*” should be included in the scheme, or whether there is a perception of inconsistency in sentencing for “*firearms offences*”, a definition of what is meant by the term “*firearms offence*” is needed.

There are a number of offences under the *Crimes Act 1900* and the *Firearms Act 1996*, which in some circumstances, may involve a firearm. For example section 29 of the *Crimes Act 1900*, “*certain other attempts to murder*” provides that whoever “*attempts to administer to, or cause to be taken by, any person any poison or other destructive thing, or shoots at, or in any manner attempts to discharge any kind of loaded arms at any person*” commits an offence.

The JIRS statistics for **some** of these offences are categorised more specifically than the legislative provision and it is clear from **some** of the JIRS statistics as to which sentences were imposed for an offence involving a firearm. For example, in relation to sentences imposed for offences against section 29 “*certain other attempts to murder*”, the relevant JIRS statistics are further categorised to “*shoot at with intent to murder*” and “*attempt to suffocate/strangle with intent to murder*”. For other offences, the JIRS statistics do not make clear which sentences were imposed for offences involving a firearm.

Some of the offences contained in the *Crimes Act 1900* which may or may not involve a firearm include:²²

- murder,
- manslaughter,
- use or possession of weapon to resist arrest,
- wounding etc with intent to do grievous bodily harm or resist arrest,
- malicious wounding or infliction of grievous bodily harm,
- robbery being armed or in company,
- robbery with arms, and
- wounding or being armed with intent to commit indictable offence.

As noted by the submission of the Office of the DPP, these are some of the most serious offences in the criminal calendar, and thus a standard non-parole period *will apply in any event* to the most serious of the offences involving a firearm. Indeed some of the offences under the *Crimes Act 1900* which may or may not involve a firearm, are already included in the standard non parole sentencing scheme. Such offences include;

- murder,
- conspiracy to murder,
- attempts to murder,
- wounding with intent to do bodily harm or resist arrest,
- robbery with arms and wounding,
- break and enter in circumstances of aggravation,
- break and enter in circumstances of special aggravation, and

²² The ODPP in its submission, has identified offences under the *Crimes Act 1900* which commonly, but not necessarily, involve firearms.

- car-jacking in circumstances of aggravation.

For the purposes of this Report, the Sentencing Council has restricted the term “*firearms offence*” to mean those offences which *necessarily* involve a firearm as part of the commission of the offence. The Hon. Gordon Samuels AC CVO QC has adopted a similar definition of a “*firearms offence*” in his Report on the merits of establishing a “gun court” in NSW.²³

The Sentencing Council has, however, where appropriate, considered other offences which may or may not involve the use of a firearm. For example, such offences have been considered in the context of sentencing principles to be applied when sentencing for an offence involving a firearm.

6.2 Offences under the *Crimes Act 1900* and *Firearms Act 1996*

Using the definition of a “*firearms offence*” outlined above, there are 5 “*firearms offences*” contained within the *Crimes Act 1900*, and over 60 “*firearms offences*” contained within the *Firearms Act 1996*. These offences are listed in *Schedule 4*. Other “*firearms offences*” are contained in other legislation; for example, the offence of “*unauthorised possession or use of prohibited weapon*” contained in section 7 the *Weapons Prohibition Act 1998*. The Sentencing Council has not been asked to consider firearms offences other than those contained in the *Crimes Act 1900* or the *Firearms Act 1996*.

Section 84 of the *Firearms Act 1996* provides that some of the above offences *may* be prosecuted on indictment, and others *must* be prosecuted on indictment.²⁴ Of the offences listed in section 84, all are “*serious indictable offences*”. As previously stated, a “*serious indictable offence*” is defined as an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more.²⁵

7 Trends and statistics

Statistical data from the Bureau of Crime Statistics and Research (“BOCSAR”) and the Australian Institute of Criminology (“AIC”) shows the number of firearms incidents and trends over recent years. The JIRS statistics deal with the subset of firearms incidents which result in the conviction for an offence, and the statistics show how regularly firearms offences are sentenced, and give an indication of the proportion of matters that are dealt with

²³ Report by the Hon Gordon Samuels AC CVO QC, *Review to Consider the Merits of Establishing a Specialist Gun Court in New South Wales*, March 2004, paragraph 4.2, p4.

²⁴ An offence under sections 7 or 7A, 36, 43, 44A, 50, 50AA, 50A (1), 51 (1) or (2), 51A, 51BA, 51D (1), 51E, 58 (2), 62, 63, 64, 66, 70, 71A, 72 (1) or 74 may be prosecuted on indictment. An offence under sections 50A (2), 51 (1A) or (2A), 51B, 51BB or 51D (2) are to be prosecuted on indictment only.

²⁵ A “serious indictable offence” is defined by section 4 of the *Crimes Act 1900*. By section 3 of the *Criminal Procedure Act 1986*, and “indictable offence” “means an offence (including a common law offence) that may be prosecuted on indictment.” Section 5 of the *Criminal Procedure Act 1986* stipulates when an offence is to be dealt with on indictment, and section 6 stipulates when an offence is to be dealt with summarily. Section 6 is to be read with section 260, which provides for certain offences to be dealt with summarily unless an election is made to proceed on indictment. Schedule 1 to the *Criminal Procedure Act 1986* is titled “*Indictable Offences Triable Summarily*” and contains “*Table 1: Indictable Offences that are to be dealt with summarily unless the Prosecutor or person charged elects otherwise*” and “*table 2: Indictable offences that are to be dealt with summarily unless the Prosecutor elects otherwise.*”

summarily to those dealt with on indictment. Care must be exercised in relying upon JIRS statistics. For example, JIRS statistics do not reveal any information regarding the circumstances of the offence, nor can conclusions be drawn such as, for example, the sentence that would be appropriate for an offence “*in the middle of the range of objective seriousness.*”

7.1 Firearms incidents

As mentioned previously, there are a number of offences which may or may not involve the use of a firearm, and as such are not included in the definition of a “*firearms offence*” for the purposes of this report. An example of such an offence is murder. BOCSAR published a paper in 2001 in response to a number of deaths in NSW involving firearms and the accompanying public speculation on whether firearms offences were increasing. The paper is titled “*Firearms and Violent Crime in NSW*”.²⁶ Many of the offences considered in the paper are not strictly “*firearms offences*”.

The paper reports:

- “*Murders involving firearms have declined over the last five years. [but murders specifically with hand guns has remained stable].*”
- *Robberies involving firearms have declined over the last three years.*
- *‘shoot with intent’ incidents have risen over the last 5 years.*
- *‘shoot with intent’ incidents involving handguns have risen over the last 5 years.*
- *About half of all ‘shoot with intent’ offences involving handguns and other firearms occur in a public place.*
- *The increase in firearm offences has been most pronounced in areas of Sydney where drug trafficking is a problem.*
- *Young males aged 18-19 are much more prone to involvement in shooting incidents than older males.*
- *The prevalence of firearm offences, in general, and handgun offences, in particular, remains low.”*

The paper comments on the sentencing trends for firearms incidents and comments that sanctions for breaches of some firearms offences are sentenced well below the maximum:

“In 1999, for example, the NSW Local Court convicted 284 people for whom possessing a firearm without a licence was their principal offence. Conviction in a Local Court for this offence carries a maximum penalty of two years imprisonment. Eleven of the 284 convicted (approximately 4%) received a prison sentence but the majority (approximately 56%) received a fine. 23% received a section 556A bond (i.e. no conviction recorded). The average fine imposed was \$439.

It is impossible to say on the basis of this data whether current sentencing practice acts as a sufficient deterrent to the illegal possession or use of firearms. Some breaches of firearm laws probably occur through negligence rather than through any carefully planned intention to breach the law. It remains important, nonetheless, to

²⁶ Fitzgerald, Briscoe and Weatherburn (2001) “*Contemporary Issues in Crime and Justice number 57: Firearms and Violent Crime in NSW*” Sydney: NSW Bureau of Crime Statistics and Research.

maximise compliance with the law if the flow of guns into the wrong hands is to be minimised.”

More recent data from BOCSAR has found that there has been a recent decrease in the number of assaults and “*shoot with intent*” incidents involving a handgun.²⁷

The AIC has also produced a number of papers on the topic of firearms offences in Australia.²⁸ The AIC is responsible for the National Firearms Monitoring Program, which was agreed upon at a meeting of the Australasian Police Ministers’ Council (“APMC”) in 1996. At that meeting of the APMC, the Prime Minister John Howard, tabled a proposal for a national gun control strategy in response to the deaths of 35 people at Port Arthur in Tasmania, involving semi-automatic weapons. The AIC notes²⁹ that the 10 point plan for the regulation of firearms became known as the Nationwide Agreement on Firearms. Amongst other things, the agreement banned self loading rifles and self loading/pump action shotguns; introduced a national registration of firearms, and introduced limitations on firearms ownership.

The AIC notes that Australia wide, there seems to be a declining trend over the past 20 years in the number of victims killed with a firearm, although the seems to be a changing pattern of firearms use, with an increase in the past few years in the number of handguns used in homicide.³⁰ The AIC comments that offenders tend to use hand guns as they are easily concealed and readily available on the black market. Importantly, the AIC reports that the majority of firearms used in homicides were not registered, and the offenders not licensed firearms owners.

7.2 Firearms offences sentenced in NSW Courts

The vast majority of firearms and weapons offences are disposed of in the Local Court.³¹ The maximum penalty available in the Local Court is imprisonment for 2 years, or a fine of 50 penalty units or both.³²

²⁷ Downward trend for 2001 to 2002, and continued into the first half of 2003. Cited by the Hon. John Watkins MP, Legislative Assembly, 29 October 2003, in the second reading speech to the *Firearms and Crimes Legislation Amendment (Public Safety) Bill 2003*.

²⁸ Mouzos J (2003) “Research and Public Policy Series no 46: Homicide in Australia: 2001-2002, National Homicide Monitoring Program” Australian Institute of Criminology: Canberra; Mouzos, J (2002) “Trends and Issues in Crime and Criminal Justice number 230: Firearms Theft in Australia” Australian Institute of Criminology: Canberra; Mouzos, J (2001) “Trends and Issues in Crime and Criminal Justice number 198: Firearm related morbidity in Australia, 1994-95 to 1998-99” Australian Institute of Criminology: Canberra; Mouzos, J (2000) “Trends and Issues in Crime and Criminal Justice number 161: Firearm-related deaths in Australia 1998” Australian Institute of Criminology: Canberra; Mouzos, J (2000) “Trends and Issues in Crime and Criminal Justice number 151: The Licensing and registration status of firearms used in homicide” Australian Institute of Criminology: Canberra; and Mouzos, J (1999) “Trends and Issues in Crime and Criminal Justice number 116: Firearm related violence: the impact of the Nationwide Agreement on Firearms” Australian Institute of Criminology: Canberra.

²⁹ Mouzos, J (1999) “Trends and Issues in Crime and Criminal Justice number 116: Firearm related violence: the impact of the Nationwide Agreement on Firearms” Australian Institute of Criminology: Canberra at 2.

³⁰ Mouzos, J (2000) “Trends and Issues in Crime and Criminal Justice number 151: The Licensing and registration status of firearms used in homicide” Australian Institute of Criminology: Canberra at 2, 4, and 5.

³¹ Such offences are contained in the *Firearms Act 1996*, the *Crimes Act 1900*, and the *Weapons Prohibition Act 1998*.

³² Section 267 of the *Criminal Procedure Act 1986* deals with the maximum penalty that the Local Court may impose for a Table 1 offence dealt with summarily. Similarly, section 268 deals with the maximum penalty that the Local Court may impose for a Table 2 offence dealt with summarily. Previously, by section 58 of the *Crimes*

From the JIRS sentencing statistics, it can be seen that there are **well over 2,600 sentences imposed in the Local Court in the past 5 years** against the *Firearms Act 1996*. In stark contrast, **42 sentences were imposed in the higher courts over the same period** against the *Firearms Act 1996*.

Specifically in relation to section 7 offences, the vast majority of sentences were imposed in the Local Court, with the most common penalty being a fine.³³ Only 6% received a sentence of imprisonment. In the higher courts, 50% received a prison sentence, with the highest non-parole period being 18 months. This is *markedly lower* than the 3-year standard non-parole period specified in the table.³⁴

From the JIRS sentencing statistics, it can be seen that there are 163 firearms offences against the *Crimes Act 1900* sentenced in the Local Court in the past 5 years and only 64 such that were sentenced in the higher courts over the same period.

In total, 33 sentences have been imposed in the Children's Court for offences against the *Firearms Act 1996* and 14 sentences for firearms offences against the *Crimes Act 1900*.

7.3 Caution in interpretation of statistical material

There is ample High Court and Court of Criminal Appeal authority noting that the sentencing statistics maintained by the Judicial Commission can be of use to the sentencing judicial officer, but care must be taken in how they are used, and for what purpose.³⁵ Generally speaking, statistics provide an indication of general sentencing trends and standards, but they do not reveal anything about the circumstances of the individual offences committed.

Firstly, it should be understood that JIRS statistics are categorised according to the principle offence sentenced, and the sentence imposed may have been for multiple offences. It should also be understood that there is delay in correcting statistics where a sentenced is altered on appeal to the Court of Criminal Appeal, or where a matter is re-heard in the District Court. The JIRS database contains a preliminary explanation of the statistics in the following terms:

*“Sentencing statistics form one component of the JIRS database. They provide a general guide to the pattern of sentences handed down by the courts for particular offences. The Statistics together with the Principles and Practice, Case Summaries and Supreme Court, Court of Criminal Appeal and High Court judgments form a package of information intended to assist the courts in achieving consistency of approach. The statistics need to be approached with caution. For example, where there are multiple offences **JIRS only records the principal offence**. A database of Court of Criminal Appeal sentencing decisions is maintained by the Judicial Commission. This database is used to “correct” the Higher Court statistics whenever*

(Sentencing Procedure) Act 1999 prison sentences in the Local Court could be accumulated up to 2 years. Since 14 February, such sentences can now be accumulated up to 5 years. See the *Crimes Legislation Further Amendment Act 2003*.

³³ 795 offences compared to 22 dealt with in the higher courts, and 48% received a fine.

³⁴ It is, however, accepted that the standard non-parole period does not represent the same thing as the JIRS statistics midpoint for the reasons outlined in paragraph 7.3.

³⁵ See for example, *Wong v The Queen*; *Leung v The Queen* [2001] HCA 64, (2001) 207 CLR 584; (2001) 185 ALR 233 at [59], [66] per Gaudron, Gummow and Hayne JJ and [91] per Kirby J. See also *R v. Bloomfield* (1998) 44 NSWLR 734 at 738 – 739.

sentences are quashed or varied by the CCA. There is always some delay in correcting the statistics to take into account decisions of the CCA.” (Emphasis added.)

As noted below at paragraph 8, firearms offences, particularly offences against section 7 of the *Firearms Act 1996* and offences dealt with on indictment, are usually sentenced in combination with more serious offences, with those other offences being the principal offence.

Care also needs to be taken, for example, in using the statistics to draw conclusions regarding the appropriate sentence for an offence “*in the middle of the range of objective seriousness.*” This question is most relevant to this report bearing in mind that the Sentencing Council recommends that further firearms offences should be added to the standard non-parole sentencing scheme, and that 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.*”³⁶ It would be incorrect to equate the midpoint range of the statistics for an offence as representing the sentence for an offence “*in the middle of the range of objective seriousness*” for a number of reasons: the JIRS statistics represent the final sentence imposed, taking into account the subjective features of the offender; the JIRS statistics are categorised according to principal offence, but other offences may be reflected in the sentence; and there may also be a spate of serious or non-serious offences which may skew the statistics. None of these matters are revealed by the statistics.

8 Current sentencing principles and issues

Many of the sentencing principles relevant to firearms offences have been raised and discussed in the context of offences which are not strictly “*firearms offences*” as defined for the purposes of this report. The principles are nevertheless relevant.

There has been limited recent consideration by the Court of Criminal Appeal of specific firearms offences such as section 7 of the *Firearms Act 1996*, but in the vast majority of matters, the firearms offence was not the most serious offence. Many firearms offences arose in circumstances where the most serious offence was drug related. For example, a list of matters in which the Court of Criminal Appeal or the Supreme Court considered section 7 of the *Firearms Act 1996* is attached at *Schedule 6*. Almost all of these cases involved a more serious matter.

At least as far back as 1975, it has been recognised that there is an important need for general deterrence when dealing with firearms offences. In *R v. Rushby*³⁷ the respondent, who had no prior history of violence, pleaded guilty to maliciously wounding his wife with intent to do her grievous bodily harm. The respondent was released upon entering into a recognizance, and the Attorney General appealed. On appeal, the sentence below was quashed, and the respondent was sentenced to a term of 3 years with a non-parole period of 6 months. In explaining the sentence, Street CJ held, with Lee and Slattery JJ agreeing:

“We are disposed to agree with Mr Morris’s submission that, so far as this individual respondent is concerned, both the requirements of his own deterrence and of his

³⁶ Section 54A(2), *Crimes (Sentencing Procedure) Act 1999*

³⁷ [1977] 1 NSWLR 594 per Street CJ with Lee and Slattery JJ agreeing.

*reformation are admirably satisfied by the order made by the learned Judge. We do not, however, and this is a conclusion we reach with regret, bearing in mind the strong subjective circumstances surrounding this case, accept that the need to deter other members of the community from crimes of this nature is sufficiently satisfied by other than a term of imprisonment. We have not in the course of these reasons gone in detail to the powerful subjective factors here present. They substantiate the general proposition that this respondent was strained emotionally. He was taunted by his wife to a point where his self restraint, bearing in mind his consumption of alcohol, broke down. The objective facts, however, are that he had been threatening for hours before the actual shooting to shoot his wife; and he loaded the shotgun hours before. In this sense his action was premeditated, albeit that his wits were fogged with alcohol and jealousy. **It is necessary in the protection of society that the sentence include a sufficient deterrence of others from similar courses of conduct. A gaol term is, we regret to say, inescapable.***” (Emphasis added.)

In *R v. Readman*³⁸ the NSW Court of Criminal Appeal considered a Crown appeal against a sentence imposed for one count of robbery being armed.³⁹ The respondent used a shortened shot gun, which was loaded, to rob a hotel. The respondent did not fire any shots, but threatened to use the gun, if need be, on several occasions. The respondent had a lengthy criminal history for various offences, including several armed robbery offences. Maxwell J held, with Gleeson CJ and Samuels JA agreeing, that robberies involving firearms can be categorised in escalating seriousness in the following way:

“In the present case the gun the respondent used was loaded. As to this, this Court indicated in R v. Dicker, 3 July 1980 that robberies can be viewed in escalating seriousness of carrying a firearm, of a firearm being loaded, of the loaded firearm being discharged, and of discharge being deliberately aimed at a victim or important target. The respondent in the instant case made threats in the course of the robbery and attempted, and partly succeeded, in opening his bag when apprehended by the police.”

Maxwell J also emphasised the need for specific, and more importantly, *general deterrence* for these types of offences. The sentence below of a minimum of 3 years with an additional term of 1 year was quashed, and the respondent was re-sentenced to a minimum term of 5 years with an additional term of 1 year and 8 months.

The “hierarchy” of firearms offences in order of escalating seriousness, along with the *strong need for general deterrence*, was more recently noted in *Werner*.⁴⁰ The applicant, after completing a period of periodic detention, travelled into the City where he robbed an adult bookshop, and shot the store attendant three times. Handley JA refused the applicant leave to appeal his sentence of a minimum term of 10 years, with Lee CJ at CL and Sully J agreeing. Sully J noted:

“The Community will not tolerate and should not be expected to tolerate the use of firearms particularly when those firearms are loaded. When such firearms are actually used; that is, fired and when firing of them results, as in the present case, in

³⁸ NSW CCA, Unreported, 9 April 1990 per Gleeson CJ, Samuels JA and Maxwell J

³⁹ Section 97 of the *Crimes Act 1900*

⁴⁰ *Werner (John James)* NSW CCA 29 Sep 1992, cited in Potas (2001) “Sentencing Manual NSW” Sydney: Law Book Company and the Judicial Commission of NSW, under heading “Firearms and Prohibited Weapons”

the infliction of serious injury the courts would be failing in an obvious duty if not seeking to deter by the penalty imposed those who might perhaps be minded to act in some similar fashion.” (Emphasis added.)

A further category to be added to the escalating categories of firearms offences may involve the type of firearms in question, and the place in which they are being possessed. In *Phan*⁴¹ it was held that aggravating factors contributing to the seriousness of the possession offence included that it was a shortened firearm, with a live round in the breach, being carried in a busy street.

In contrast to the escalating categories of firearms offences noted above, Potas observes that in *Duggan*⁴² it was held that the fact that a firearm is not loaded may do little to diminish the seriousness of the offence. Potas notes that an unloaded weapon places the crime in a less serious category than where the weapon is loaded. This is not the same as suggesting that the fact that the weapon is unloaded is a mitigating factor.⁴³

Potas⁴⁴ observes that when sentencing for an offence of possessing a firearm, the purpose of the possession is relevant to the objective gravity of the offence. In *Thurgar*,⁴⁵ the appellant appealed both the conviction (on the basis that it was inconsistent with the acquittal on another charge) and the sentence. Although the appeal against conviction was dismissed, the appeal against sentence succeeded as the sentencing judge sentenced on the basis that the purpose of the possession of the pistol was for use in a hostile manner against the alleged object of the conspiracy to murder. This was held to be impermissible remembering the rule in *De Simoni*. The judgment of Gleeson CJ, with whom Meagher JA and Smart J agreed, suggests that an offence of “possession”, as it existed at the time of the matter, may incorporate a wide variety of offending behaviour:

“The offence under section 25(1) of the Firearms and Dangerous Weapons Act may take many forms of different degrees of gravity. At one end perhaps lies the case of a person who, having been licensed had failed to renew his licence but had not surrendered his weapon. Also at or towards the bottom of the range would be the offence committed by a person who acquired a pistol as a curio and kept it for no other purpose. More serious but short of the top of the range would be the case of a person who obtained a pistol for his own protection but was unable to obtain or did not seek to obtain a licence in respect of it. If such a person kept the weapon in safe circumstances in his own home for his own protection only, his guilt would be substantially less than that of a person who possessed the weapon with hostile intention as did the prisoner in the present case. The culpability is in my view substantially greater where the offender has the weapon for a hostile purpose and takes it away from his own home or has it in a public place for that purpose.”

⁴¹ Unreported, NSWCCA, 1 April 1998

⁴² Unreported, NSW CCA, 2 June 1995

⁴³ See *Readman* NSWCCA 9 April 1990, 47 A Crim R 181 at 184 and *Haworth*, Unreported, NSW CCA, 18 November 1996. Both cited in Potas (2001) “Sentencing Manual NSW” Sydney: Law Book Company and the Judicial Commission of NSW.

⁴⁴ Potas (2001) “Sentencing Manual NSW” Sydney: Law Book Company and the Judicial Commission of NSW

⁴⁵ (1990) 41 A Crim R 109

Potas observes that it is not, however, open to the court to infer that an offender had a weapon for a hostile purpose simply because it is a prohibited type of weapon,⁴⁶ although the purpose for which a shortened firearm is retained by the offender is relevant to sentencing.⁴⁷

Potas⁴⁸ cites several other matters pertaining to the objective seriousness of firearms offences including:

- “*The number of weapons in possession;*⁴⁹
- *The type of weapons in possession;*⁵⁰
- *Whether a firearm had been used by an offender;*⁵¹
- *Whether an offender is likely to use the firearm;*⁵²
- *The crowded nature of a street through which a firearm is carried;*⁵³
- *Whether a firearm contains live ammunition.*”⁵⁴

In *R v Henry*⁵⁵, the Supreme Court promulgated a guideline judgment in relation to the offence of “robbery being armed or in company.”⁵⁶ Spigelman CJ held, with Wood CJ at CL, Newman, and Simpson JJ agreeing, that a range, rather than a fixed starting point is appropriate given the variability of the features. In particular, the Chief Justice noted a number of factors particular to the offence of armed robbery which would be relevant to sentencing. The first of such factors noted was the “*nature of the weapon*”.

The need for general deterrence in the sentencing of firearms offences was emphasised in the recent matter of *R v. Cromarty*.⁵⁷ Mr Cromarty was found in possession of a large cache of prohibited and unregistered weapons, and was charged with a number of firearms offences. Although it was accepted that there was a strong subjective case and no evidence to suggest that Mr Cromarty intended selling his weapons on the black market, the Crown appeal was allowed, and the sentence increased. Kirby J in particular noted the need for a sentence that would unmistakably denounce the conduct in collecting such a huge cache of weapons, and would “*operate as a deterrent to likeminded offenders.*” (Emphasis added.) In the course of judgment it was noted that in introducing a number of new firearms offences, the Minister for Police noted that “*firearms related crime is a major concern for both police and the community*” and that the purpose of the introduced offences was to “*crack down on possession for the purposes of illegal trafficking...*” Despite the fact that Mr Cromarty did not intend selling his weapons on the black market, Kirby J accepted that it nevertheless posed an “*unquestionable risk to public safety*” as the weapons could have fallen into the hands of criminals.

⁴⁶ *Brown* [1999] NSWCCA 143 per Carruthers AJ at [11] cited in Potas (2001) “Sentencing Manual NSW” Sydney: Law Book Company and the Judicial Commission of NSW.

⁴⁷ *Murray* [2000] NSWCCA 159 per Carruthers AJ cited in Potas (2001) “Sentencing Manual NSW” Sydney: Law Book Company and the Judicial Commission of NSW.

⁴⁸ Potas (2001) “Sentencing Manual NSW” Sydney: Law Book Company and the Judicial Commission of NSW

⁴⁹ *Balic*, Unreported, NSWCCA, 29 Sep 1997

⁵⁰ *Balic*, Unreported, NSWCCA, 29 Sep 1997. As noted by the submission of the NSW Law Society, the nature of the weapon was considered to be an aggravating matter in *R v Mitchell* [2002] NSWCCA 270

⁵¹ *Dicandilo*, Unreported, NSWCCA, 13 December 1993

⁵² *Dicandilo*, Unreported, NSWCCA, 13 Dec 1993

⁵³ *Phan*, Unreported, NSWCCA, 1 April 1998

⁵⁴ As noted by the submission of the NSW Law Society, the fact that the pistol was loaded with 13 rounds was considered to be an aggravating matter in *R v Mitchell* [2002] NSWCCA 270

⁵⁵ *R v Henry* [1999] NSWCCA 111, (1998-1999) 46 NSWLR 346, 106 A Crim R 149

⁵⁶ Section 97 of the Crimes Act 1900

⁵⁷ [2004] NSWCCA 54 per Kirby J with Simpson and Bell JJ agreeing.

Most recently, in the context of homicide, the Judicial Commission has analysed the sentences for murder and manslaughter and observed that “*firearms use, whether in relation to a murder or manslaughter conviction, may lead to a slightly higher sentence than other types of killing.*”⁵⁸

9 Perception of inconsistency or leniency

As to inconsistency more generally, the Sentencing Council’s project on “*how best to promote consistency in sentencing in the Local Court*” is relevant.

9.1 Public perceptions of crime trends

As a precursor to discussing public perceptions of inconsistency in *sentencing* of firearms offences, it is useful to comment on community beliefs that *criminal activity itself* is on the increase. The NSW Bureau of Crime Statistics and Research recently published a paper titled *Public Perceptions of Crime Trends in New South Wales and Western Australia*.⁵⁹ The paper follows and confirms an argument that public perceptions of criminal activity in NSW and WA⁶⁰ are often mistaken. This is of serious concern as these perceptions play a critical role in shaping law and order policy and public spending. As stated in the paper;

*“The fact that many members of the Australian public hold false views about trends in crime ought to be a matter of serious concern to Australian governments. Recent research in Britain has shown that people who mistakenly think crime has risen generally have less confidence in the criminal justice system than those who do not hold this view, even after controls have been introduced for other factors that might influence public confidence in criminal justice.”*⁶¹

In other words, if at this fundamental level public perceptions of criminal activity are misguided, then this has ramifications for the later processes of the criminal justice system, including sentencing.

Of particular interest to the subject matter of this Report, the paper conducted research into the public perception of a number of offences, including robberies involving firearms and whether that category of crime had increased, decreased or remained stable over the last two years. The *actual* crime trend for this offence has been stable however the majority of all the respondents of the survey believed that this category of crime had risen over the last two years.⁶² An extensive investigation into the causes of this misapprehension was beyond the

⁵⁸ See Jason Keane (2004) “*Sentenced Homicides in NSW 1994-2001*” Sydney: Judicial Commission, at p 103

⁵⁹ Weatherburn D and Indermaur D, Crime and Justice Bulletin Number 80 (March 2004) “*Public Perceptions of Crime Trends in New South Wales and Western Australia*”, NSW Bureau of Crime Statistics and Research, Sydney.

⁶⁰ The research for this paper was confined to New South Wales and Western Australia however the authors note that the level of misapprehension about crime is unlikely to differ markedly in other Australian states and territories. Note 59 at 7.

⁶¹ Note 59 at 7

⁶² The pattern of response from the participants was varied for different demographic and social groups with women and elderly people more likely to overestimate the occurrence of robberies involving firearms. Note 59 at 4,5.

scope of the paper however they did mention that one possible cause was the “*tendency on the part of the media to give an exaggerated or distorted picture of the direction, character and prevalence of crime.*”⁶³

9.2 Differences in objective seriousness in firearms offences

There are vast variations in the objective seriousness of firearms offences, which could legitimately reflect differences in sentence. These differences can be seen in the discussion of sentencing principles relevant to firearms offences (above at paragraph 8) and involve factors such as the number and type of weapons in possession, whether the firearm has been used or is likely to be used, whether the firearm contains ammunition, and the nature of the place where the firearm is possessed or used.

To use an example which incorporates some of the above factors, the objective seriousness of an offence against section 7 of the *Firearms Act 1996* in circumstances where a farmer possesses a rifle that is stored safely, but lacks a license to do so, would be vastly less than where a person is found in possession of a loaded pistol in a populated public place.⁶⁴ Such a hypothetical is set out in further detail in *schedule 5*.

The submission of the NSW Chief Magistrate notes the differences in objective seriousness as an important factor in sentencing for firearms offences. The submission argues that because firearms offences vary in objective seriousness, the present procedures for disposition of firearms offences, which usually provide for disposition summarily with an election for the matter to be dealt with on indictment, is appropriate and should remain. The issue of elections is further discussed later.

9.3 Perceptions of inconsistency generally

The question of whether the perception of inconsistency is valid for firearms offences is central. On the one hand, BOCSAR suggests that the present sentencing for firearms offences may be lenient, thus not providing sufficient general deterrence:⁶⁵

“It is impossible to say on the basis of these data whether current sentencing practice acts as a sufficient deterrent to the illegal possession or use of firearms. Some breaches of firearm laws probably occur through negligence rather than through any carefully planned intention to breach the law. It remains important, nonetheless, to maximise compliance with the law if the flow of guns into the wrong hands is to be minimised.”

The submission of the Office of the DPP notes that this suggestion was made prior to the increase in penalty for section 7 offences.⁶⁶ Further, there have since been new firearms offences introduced with substantial penalties, and the deterrent impact of these sections is

⁶³ Note 59 at 7.

⁶⁴ See also “hypotheticals” from the NSW Young Lawyers Criminal Law Committee (March 2003) “*Minimum Sense: Sentencing Reforms and the NSW Election*” attached at *Schedule 5*.

⁶⁵ Fitzgerald, Briscoe and Weatherburn (2001) “*Contemporary Issues in Crime and Justice number 57: Firearms and Violent Crime in NSW*” Sydney: NSW Bureau of Crime Statistics and Research.

⁶⁶ See Schedule 1[6], *Firearms Amendment (Trafficking) Act 2001* no 24, clarified by Schedule 2[1], *Firearms Amendment (Public Safety) Act 2002* no 47

yet to be assessed. The most recent data from BOCSAR finds that there has been a recent decrease in the number of assaults and “shoot with intent” incidents involving a handgun.⁶⁷

Recently, the Honourable Gordon Samuels AC CVO QC reported that “*there is no evidence that the Courts are displaying undue leniency or inconsistency in the sentences imposed in gun related cases.*”⁶⁸

The NSW Chief Magistrate submits that he is presently unaware of any research which properly founds a perception of inconsistency for firearms offences in the Local Courts, and that perceptions of inconsistency may not consider the vast array of criminality presented by an offence such as possession of a firearm. Such vast array in criminality may justify the differences in penalties for the same offence. To this end, the Legal Aid Commission submits: “*There will of necessity be differences in penalties imposed for the same offence. When properly exercised, the discretion available to sentencing judges is a strength rather than a weakness of our system.*”

Similarly, the submission of the Law Society of NSW queries the “*perception of inconsistent sentences*”, and notes that there has been no judicial pronouncement from the Court of Criminal Appeal regarding a pattern of inadequate sentences being imposed for firearms offences.⁶⁹ The Sentencing Council does, however note that there have been a fair number of Crown appeals to the Court of Criminal Appeal for matters involving firearms.⁷⁰

In summary, due to the huge differences in objective seriousness of the offence and subjective circumstances of the offender when sentencing firearms offences, it is most difficult to assess whether the sentencing for firearms offences generally is inconsistent or inadequate. In order to properly assess whether the perception of leniency or inconsistency is valid, a “*detailed analysis by those qualified to interpret the statistics and a detailed examination of a sample of the material tendered in these cases and the submissions advanced by the parties would be needed in order to draw any conclusions as to current sentencing practice.*”⁷¹

The notion of leniency reported to the community needs to be noted. As Chief Justice Spigelman has commented:

⁶⁷ Downward trend for 2001 to 2002, and continued into the first half of 2003. Cited by the Hon. John Watkins MP, Legislative Assembly, 29 October 2003, in the second reading speech to the *Firearms and Crimes Legislation Amendment (Public Safety) Bill 2003*.

⁶⁸ The Hon. Gordon Samuels AC CVO QC *Review to Consider the Merits of Establishing a Specialist Gun Court in New South Wales*, March 2004, paragraph 12.1

⁶⁹ This is most relevant bearing in mind the comments by Spigelman CJ in refusing to promulgate a guideline judgment in *Attorney General's Application No 2 of 2002* [2002] NSWCCA 15 at [48], namely that the Court should be slow to come to a conclusion that there is any systematic pattern of leniency, in a context where the Crown has not exercised its right of appeal.

⁷⁰ Aside from the recent matter of *Cromarty* [2004] NSWCCA 54, most of the Crown appeals were in circumstances where the primary offence did not involve a firearm and was usually drug related (see for example, *R v Moore* [2000] NSWCCA 272; *R v Rossetto* Unreported, 6 April 1995; *R v Harris* (2001) 125 A Crim R 27; *R v Rajapaski* [2001] NSWCCA 126; *R v WM* [2004] NSWCCA 53; *R v Shankley* [2003] NSWCCA 253; *R v Hammoud* (2000) 118 A Crim R 66; *R v Capar* (2002) 136 A Crim R 564) or the primary offence involved a firearm, but does not fall within the definition of a firearms offence for the purpose of this report (for example, armed robbery: *R v Christian* [2002] NSWCCA 264; *R v Merritt* [2000] NSWCCA 365; break, enter and steal: *R v Guthrie* [2002] NSWCCA 77; malicious wounding with intent: *R v Baquayee* [2003] NSWCCA 401)

⁷¹ As noted in the submission of the Office of the DPP.

“...allegations of systematic leniency in sentencing decisions, which so frequently appear in the media, is often not well informed criticism...The occasional inadequate sentence receives much more significant public exposure through the media than the continuing, day in and day out, imposition of sentences that are generally regarded as correct and therefore pass without comment.”⁷²

9.4 Recent shootings in Western Sydney

The Attorney General, in his letter of reference to the Sentencing Council, cites a number of recent shootings in Western Sydney, and specifically the matter of Damian McEachern. The Attorney notes that a number of media reports suggests that the Courts are not treating firearms offences seriously.

Damian McEachern was apprehended with a large number of weapons including assault rifles and shotguns. At the time of the apprehension, Mr McEachern was on parole for armed robbery.⁷³ Mr McEachern was convicted of 6 offences and sentenced for each to a \$500 fine.

The offences for which Mr McEachern was sentenced were:

- Possess unauthorised firearm/prohibited firearms (4);
- Possess ammunition unless holder of licence/permit;
- Possess greater than 3 unregistered firearms including prohibited pistol;
- Possess firearm or barrel with altered defaced identification;
- Goods in personal custody suspected of being stolen; and
- Unauthorised possession/use of prohibited weapon/article.

The NSW Attorney General’s Department reports that in response to suggestions that the sentences imposed were inappropriately lenient, the Commissioner of Police has committed to issuing an instruction that all serious firearms offences be dealt with on indictment and that any inappropriate sentences should be appealed. The Department further reports that the Office of the DPP has expressed an opinion that on the material available, a Crown appeal against the penalties would not succeed.⁷⁴

⁷² Spigelman CJ “Sentencing Guideline Judgments” a paper delivered to the National Conference of District and County Court Judges, 10 February 2004, p1. Cited by The Hon. Gordon Samuels AC CVO QC, *Review to Consider the Merits of Establishing a Specialist Gun Court in New South Wales*, March 2004, paragraph 6.2.1

⁷³ Mr McEachern was sentenced at the Parramatta District Court on the 14 December 2000 to 3 years imprisonment /non-parole period of 9 months for an armed robbery committed on 6 August 2000. He had no other convictions and was released on parole in September 2001.

⁷⁴ Advice from Attorney General’s Department, dated 10 October 2003. It is understood that shortcomings were identified by the prosecutor in the brief, namely that the initial stop and search of the vehicle was arguably unlawful, the admission by McEachern of ownership and possession of the bag containing the items was made without a caution having been given, the admission was not electronically recorded or adopted by McEachern, in spite of video recording equipment being available nearby and the weapons were in a bag in the tray of the vehicle occupied by McEachern and another man. The vehicle was not registered to McEachern and without an admission, it would be difficult to prove McEachern was in possession of the items found. The Attorney General’s Department reports that taking these issues into account, discussions between the prosecution and defence took place, and an agreement was reached that the matter would be disposed of summarily, with three charges withdrawn and pleas of guilty entered in respect of the remaining six charges.

In sentencing Mr McEachern, the sentencing magistrate took into account as an aggravating factor the fact that McEachern was on parole at the time of the offence, and also took into account the fact that McEachern had served a period of nine weeks imprisonment in relation to these offences with bail refused, and had good rehabilitative prospects.

9.5 Changing the law state-wide where perceived problem is localised

As noted in the Attorney General's letter to the Sentencing Council, the community concern regarding inconsistent or lenient sentencing (actual or perceived) is in relation to a specific geographic area in Western Sydney. The letter reads:

“As you may be aware, there have been a number of shootings in Western Sydney in recent times and a general media perception that firearm offences are not being treated as seriously as they deserve by the courts.”

The submission of the Legal Aid Commission has commented on the fact that the actual or perceived problem is in a particular part of the state, and notes that there may well be legitimate reasons for possession of firearms in some geographic areas:

“In rural areas of the state, the possession of firearms is associated with the work and livelihoods of many people. In the city, there is little perceived need for possession of a firearm.”⁷⁵

The submission of the Legal Aid Commission then questions the utility in changing the law state-wide in a situation where the perceived problem is in a distinct geographic area.

“In these circumstances, it could be asked whether it is appropriate to change the laws affecting all citizens in the State because of what is happening in one area of south western Sydney.”⁷⁶

To this end, the Sentencing Council notes that there is a principle which suggests that prevalence of an offence is relevant when imposing a sentence and one which justifies an increase in penalty. It is said to apply *“in relation to increased prevalence of a particular offence generally; of a particular offence committed by a particular group; or of a particular offence in a particular locality. The rationale for the increase in penalty due to prevalence being on the basis of general deterrence.”⁷⁷*

The Legal Aid Commission suggests that a more effective response may be to put more resources into stopping the flow of illegal guns to the area in question. The Legal Aid Commission also notes that the proliferation of firearms in the area in question seems to be related to other criminal activity such as the supply of drugs and car re-birthing. The Legal Aid Commission suggests:

“A multi-tiered approach involving concerted efforts to detect and stop the availability of guns on the black market, strong policing of those involved in illegal

⁷⁵ Submission of the Legal Aid Commission, 11 March 2004.

⁷⁶ Submission of the Legal Aid Commission, 11 March 2004.

⁷⁷ See NSW Law Reform Commission (1996) “Discussion Paper 33: Sentencing” at p158, paragraph 5.13. See also, for example, *R v Ragen* (1916) 33 WN (NSW) 106, where the prevalence of pilfering from wharves in Sydney was considered relevant to sentence.

activity associated with guns and prosecution of offenders in the appropriate jurisdiction would be a more focussed way of dealing with the problem of guns in the community.”

Examples of such a “*multi-tiered*” approach by government include the policing initiatives in areas of concern, and the protocol between the NSW Police and the Office of the DPP regarding elections in firearms matters. The Sentencing Council agrees that such a multi-tiered approach is essential.

9.6 Firearms offences and the Children’s Court

Where offenders are under the age of 18, firearms offences will generally be dealt with in the Children’s Court. Sentencing statistics for firearms offences including in the Children’s Court are outlined above at paragraph 7.2.

A young person is to be sentenced according to law for serious children’s indictable offences,⁷⁸ and in relation to other offences, a court has a discretion to deal with a young person either according to law or under the *Children (Criminal Proceedings) Act 1987*.⁷⁹ When sentencing a young person, punishment and general deterrence are considered subordinate to the rehabilitation of the offender.⁸⁰ The Legal Aid Commission submits “*inconsistencies will be apparent from this fact alone.*”

10 Recent NSW reforms

A number of recent legislative and other changes have been made to introduce new firearms offences, (particularly in relation to firearms parts), to improve detection, apprehension and prosecution of those who commit firearms offences and to promote consistency in the sentencing of firearms offences. These measures show a co-ordinated approach to the problem of illegal possession and use of firearms and their parts. The Sentencing Council views such a co-ordinated approach as absolutely essential. As noted by Professor Radzinowicz, the real deterrent to the commission of crime is fear of detection and certainty of punishment rather than ever increasing penalties. Indeed, Professor Radzinowicz suggests that:

*“Impunity is itself a cause of crime. It attracts new recruits to the ranks of regular criminals; it encourages first offenders to persevere in crime as a profitable course of activity; and it stimulates daring and initiative among the professional and persistent class.”*⁸¹

These comments are most relevant to many firearms offences where, similar to drug offences, significant profits can be made in the trafficking of firearms and their parts.

⁷⁸ Section 17 of the *Children (Criminal Proceedings) Act 1987*. A “serious children’s indictable offence is defined by section 3(1) and relevantly includes *an offence under the Firearms Act 1996 relating to the manufacture or sale of firearms that is punishable by imprisonment for 20 years.*

⁷⁹ *R v WKR* (1993) 32 NSWLR 447 discusses the factors to be considered in deciding whether a young person should be dealt with according to law.

⁸⁰ See for example, *GDP* (1991) 53 A Crim R 112

⁸¹ Radzinowicz, L (Editor), McClintock, and Gibson (1961) “*Robbery in London: An enquiry by the Cambridge Institute of Criminology*” London: Macmillan & Co. at p xi.

10.1 Legislative and other changes

A number of recent legislative and other changes have been made as part of the co-ordinated approach to the problem of illegal possession and use of firearms and their parts. These changes will now be discussed.

10.1.1 Police and DPP protocol for firearms prosecutions

The Office of the DPP and the NSW Police have recently entered into a protocol for the prosecution of those firearms offences for which an election must be made for them to be dealt with on indictment.

In summary, where a police prosecutor has carriage of a table 1 or table 2 firearms offence, unless the police prosecutor refers these matters to the Office of the DPP recommending that an election be made, and the Office of the DPP agrees with the recommendation, then the offence will be dealt with summarily. An exception is for table 1 matters, where the defence also has the option of electing that the matter is dealt with on indictment.

The protocol between the NSW Police and the Director of Public Prosecutions lists a number of pre-determined characteristics which pre-dispose a table 1 or table 2 matter being dealt with on indictment.

Internal Police protocols require that the decision of the police prosecutor to refer a matter to the DPP in order that the DPP can consider whether to prosecute the matter on indictment is based on whether the defendant's criminality can be addressed within the sentencing limits of the Local Court. Further, police prosecutors *must* consider whether the following factors apply to the matter, and if so, ensure that those factors are brought to the attention of the DPP:

1. Previous convictions for firearms/weapons offences;
2. Evidence of intent to use the firearm in the commission of a crime;
3. The circumstances of the possession (eg whether or not in a public place);
4. The number and type of firearms involved;
5. Whether the defendant was the subject of a restraining order at time of the offence;
6. Any previous convictions for violent offences; and
7. Any other relevant prior convictions.

Ultimately, it is *still a decision for the police prosecutor* to bring the matter in question to the attention of the Office of the DPP, in order for the Office of the DPP to consider whether the matter should be prosecuted on indictment. However, internal police protocols suggest that possession of hand guns and/or prohibited weapons in a public place *ought to be referred to the Office of the DPP as a matter of course*.

10.1.2 Crimes Legislation Further Amendment Act 2003

The *Crimes Legislation Further Amendment Act 2003* relevantly creates two separate offences for possession or use of an unauthorised firearm under Section 7 of the *Firearms Act 1996*. Former section 7 contained two distinct offences. Since the amendment a maximum penalty of 14 years applies in relation to a prohibited firearm or pistol, which remains as section 7 of the Act, and a maximum penalty of 5 years applies in relation to other firearms,

which is now section 7A of the Act. The amendment makes clear that the standard non-parole period of 3 years applies to offences against the “new” section 7 involving prohibited firearms. New subsection (3) provides:

“(3) if, on the trial for an offence under this section, the jury is not satisfied that the accused is guilty of the offence but is satisfied on the evidence that the person is guilty of an offence under section 7A, it may find the person not guilty of the offence but guilty of an offence under section 7A, and the accused is liable to punishment accordingly.”

Pursuant to section 4 of the *Firearms Act 1996*, a “firearm” means:

“firearm means a gun, or other weapon, that is (or at any time was) capable of propelling a projectile by means of an explosive, and includes a blank firearm, or an air gun, but does not include anything declared by the regulations not to be a firearm.”

A “prohibited firearm” is defined as a firearm as described under Schedule 1, and includes any machine gun, semi machine gun, several types of self loading rifle, any firearm to which there is a “silencer” attached, and a firearm that substantially duplicates in appearance some other article. The Bill received assent on 5 December 2003⁸², and commenced on 14 February 2004.

It is noted that since the amendment, care must be taken in considering the sentencing statistics for section 7 offences, as the former section encompassed a wider range of offending.

10.1.3 Firearms and Crimes Legislation Amendment (Public Safety) Act 2003

The *Firearms and Crimes Legislation Amendment (Public Safety) Act 2003* received assent on 10 December 2003, and commenced on 15 December 2003. It introduces a number of new offences into the *Crimes Act 1900* and the *Firearms Act 1996*. An extract of the second reading speech succinctly describes the major legislative changes:

“A recent court decision found that a firearm which is inside a private vehicle which is in a public place is not necessarily itself within that public place. That is clearly nonsense, and the new section 93F in schedule 1 to the Bill amends the Crimes Act to clarify this. New section 93GA creates a more specific offence in the Crimes Act of firing at a dwelling house or building with disregard for the safety of persons. The maximum penalty for this offence will be 14 years. This will allow police to more accurately target persons who commit so-called drive-by shootings. It also represents an increase on the current 10-year penalty for the less specific offences of causing danger with a firearm or spear gun, and trespassing with, or dangerous use of, a firearm or spear gun currently in sections 93G and 93H of the Crimes Act.

The Bill also amends the Crimes Act. New section 93I in schedule 1 introduces a new offence where an unlicensed person carrying an unregistered firearm in a public place is liable to a maximum penalty of 10 years imprisonment, as well as a new

⁸² Act no 85 for 2003

aggravated carriage offence carrying a maximum penalty of 14 years. New section 154D introduces a new offence of stealing a firearm, with a maximum penalty of 14 years imprisonment. Amendments to the firearm legislation in schedule 2 to the Bill include new sections 50AA and 51BA, which make it an offence to illegally purchase or sell a firearm part, attracting a maximum penalty of 5 years for non-prohibited firearm parts and 10 years for a pistol or prohibited firearm part.

New section 51B increases the time period for establishing the current ongoing trafficking offence from three illegal firearm sales in 30 days to three illegal sales in 12 months. This recognises that the modus operandi in regard to illegal firearm sales is very different from that in regard to prohibited drugs, on which the three sales in 30 days time frame was originally modelled. New section 51BB introduces a new offence of ongoing supply for major parts of a firearm. This clause is modelled directly on the current offence of ongoing illegal sale of a whole firearm, with the addition of the extension of the offence period to three sales in 12 months.

Schedule 2 to the Bill also amends the firearms legislation to clarify the offence regime for forging licences and using a forged licence. New section 71A introduces a new offence of using a forged firearm licence or permit in an effort to illegally obtain a firearm. This will attract a maximum penalty of 10 years imprisonment. The Bill also increases the penalty for forging a firearm licence or permit from \$5,500 to a maximum of 10 years imprisonment by deleting the current offence in section 71 (b) of the Firearms Act and making it clear, via the insertion of a note, that the existing offence in section 300 (1) of the Crimes Act applies to forgery of a firearm licence. The penalty for such a forgery is a maximum of 10 years imprisonment.

Schedule 3.2 [1] inserts a new clause 14 I in the Firearms (General) Regulation 1997 that requires licence holders to notify police of both the storage address of their firearm and any change of address where firearms are stored within seven days of the movement. The amendments in clause 87 in schedule 2 and clause 107 in schedule 3 will enable the Commissioner of Police to more generally delegate the power to sign a certificate of evidence to an authorised registry officer, rather than the current requirement that requires the regulation to be amended each time the commissioner wants to exercise a delegation.”

The Second Reading speech to the Bill also outlines a number of other moves, and proposed moves by the Government to address gun crime in NSW:

“This Bill is part of the package of measures to improve the comprehensive, co-ordinated approach taken by NSW Police to illegal gun availability, detection, apprehension and prosecution. However, it does not constitute the entire package.

Other parts of the package include a new 47-member mobile team of Operation Vikings police, which has begun high-visibility, high-impact raids since the first week of October, targeting criminals and funds carrying concealed handguns in hot spots. An additional 20 firearm detector dogs will be deployed from the 2004-05 financial year to support searches, high-profile street policing, crime scene investigations and screening of public places and vehicles. The Government is seeking stronger sentences for handgun crimes and, to address consistency in sentencing, is asking the

newly formed Sentencing Council to examine sentencing trends for serious firearms offences with a view to implementing standard minimum sentences.

The Government is also considering making more serious firearm crimes strictly indictable in order for such crimes to be tried in the District Court or the Supreme Court and, therefore, attract higher sentences. It is also examining measures to ensure that more cases are dealt with on indictment, and ensuring that the Commissioner for Police instructs prosecutors to instigate immediate appeals if firearms criminals receive sentences that the community views as inappropriate. In addition, a review of the use of firearms in the security industry is approaching finalisation. This review includes an examination of increased safe storage requirements, limiting the calibre and magazine capacity of firearms being purchased by the industry, limiting access to firearms to certain types of security work and examining whether certain sectors of the industry need to be armed, the ratio of guns held by companies relative to the number of employees, and better enforcement of annual training requirements. (Emphasis added).

The Operation Vulcan illegal firearms phone-in campaign has been reactivated, with callers eligible for increased rewards of up to \$5,000 for information leading to a conviction.”

The issue of whether more serious firearms offences should be dealt with strictly on indictment is further considered below at part 11.

10.1.4 Firearms Amendment (Prohibited Pistols) Act 2003

The *Firearms Amendment (Prohibited Pistols) Act 2003* was assented to on 22 July 2003, and commenced on 1 October 2003. The Act defines a category of “prohibited pistols” as agreed at the Council of Australian Governments (“COAG”) on 2 December 2002. This definition is contained in section 4C of the *Firearms Act 1996*. The amending Act also amends section 8 of the *Firearms Act 1996* to contain the new class of “prohibited pistols” in the definitions of licence categories and authorities conferred by the different categories. The Act also introduced administrative procedures for the buyback of prohibited pistols which is presently being run by the NSW Police. The NSW Police are presently providing compensation for surrendered prohibited pistols through mobile buyback vans, and is concurrently running a firearms amnesty through all police stations. The two schemes are concurrently running from 1 Oct 2003 to 31 March 2004.

The Sentencing Council is further informed that the NSW Police are presently visiting firearms holders throughout NSW to consider the need for the firearm to be retained, and also to give holders the opportunity to ask any questions they may have, to lessen the probabilities of inadvertent offences. The Sentencing Council considers that this is a worthwhile initiative, although notes that it will not address the situation where people have committed offences in overlooking registration of firearms in the first place.

10.1.5 Bail Amendment (Firearms and Property Offences) Act 2003

The *Bail Amendment (Firearms and Property Offences) Act 2003* is yet to commence. It will insert a new section 8B into the *Bail Act 1978*. Section 8B will create a presumption *against* bail for serious firearms and weapons offences. Section 8B will apply to offences under sections 93G, 93GA, 93H (2), 93I (2) or 154D of the *Crimes Act 1900*, and offences under

sections 7, 36, 50, 50A (2), 51 (1A), 51 (2A), 51A or 51D (2) of the *Firearms Act 1996*, being an offence that relates to a prohibited firearm or pistol, and offences under section 51B or 51BB of the *Firearms Act 1996*. The *Bail Amendment (Firearms and Property Offences) Act 2003* was assented to on 5 December 2003, and is yet to commence.

The Legal Aid Commission submits that these amendments to the *Bail Act 1978* may provide a short-term solution without addressing underlying problems. The Legal Aid Commission also submits that targeted policing of areas and individuals notorious for the possession and use of handguns have accompanied the legislative changes outlined above. It is suggested that this is an appropriate multi-tiered response to the problem of concealed firearms and the potential and actual threat they pose to the community. The Sentencing Council agrees that a multi-tiered response, including initiatives to improve the detection and apprehension of firearms offenders is necessary.

10.2 Standard non-parole scheme and section 7 offences

The standard non-parole sentencing scheme is contained in Part 4 Division 1A of the *Crimes (Sentencing Procedure) Act 1999*. It was introduced on 22 November 2002, and commenced on 1 February 2003. A standard non-parole period is defined by the Act to represent “*the non-parole period for an offence in the middle range of objective seriousness*”.⁸³ All of the 24 offences originally listed in the table of standard non-parole periods (to which no new offences have been added) fall within the definition of a “serious indictable offence.”⁸⁴ The non-parole sentencing scheme currently contains a standard non-parole period of 3 years for an offence against section 7 of the *Firearms Act 1996*.

10.2.1 Rationale for inclusion of section 7 offences in the scheme

It is unclear why section 7 of the *Firearms Act 1996* was included in the standard non-parole sentencing scheme while other firearms offences were not.

Section 7 of the *Firearms Act 1996* is a Table 1 offence, meaning that it is an indictable offence dealt with summarily unless the prosecution or the defence elect for it to be dealt with on indictment.⁸⁵ The maximum penalty available for an offence against section 7 is 14 years imprisonment.⁸⁶ There are other firearms offences listed in Table 1 with a maximum penalty of 14 years or more which were not included in the standard non-parole sentencing scheme.

The submission of the Office of the DPP notes the overlap of section 7 offences with other *Crimes Act* offences, but notes a possible rationale for such overlap:

⁸³ Section 54A *Crimes (Sentencing Procedure) Act 1999*

⁸⁴ In the second reading speech to the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill*, the Attorney General stated that: “*The Government’s Bill establishes a new sentencing scheme in new Division 1A Part 4, of the Crimes (Sentencing Procedure) Act 1999 – The Principal Act – by setting standard non-parole periods for a number of specified serious offences set out in a table in the bill*” (Emphasis added.)

⁸⁵ Schedule 1 to the *Criminal procedure Act 1986* is titled “*Indictable offences triable summarily*” and contains “*table 1: Indictable offences that are to be dealt with summarily unless prosecutor or person charged elects otherwise*”

⁸⁶ Prior to the introduction of section 7A, the maximum penalty for an offence against section 7 was 14 years where a prohibited weapon was concerned, and 5 years in all other cases.

“One rationale for these seemingly overlapping offences is that section 7 on proper construction is more appropriately applied in the context of regulation and control of firearms and breach of licence, rather than conduct which endangers life.”

This rationale is supported by the JIRS statistics for section 7 which show that the overwhelming majority of section 7 offences are sentenced in the Local Court.⁸⁷ This suggests that the section is most often used for *“less serious regulatory transgressions rather than conduct that endangers life.”*⁸⁸

There are many other offences in the *Firearms Act 1996* which contain maximum penalties of 14 years or more which have *not* been included in the standard non-parole sentencing scheme. There are also such offences in the *Crimes Act 1900* and the *Weapons Prohibition Act 1998*.⁸⁹

10.2.2 Effect of inclusion of section 7 in the scheme

Bearing in mind that the vast majority of prosecutions for offences against section 7 of the *Firearms Act 1996* presently occur in the Local Court (as do most other firearms offences), it may be argued that the standard non-parole sentencing scheme may have little effect on the sentencing of such offences. On the other hand, the standard non-parole sentencing scheme, which has been described as *“a new concept in sentencing”*⁹⁰ may result in the emergence of new sentencing patterns⁹¹ including changes in the proportion of matters that are dealt with summarily to those dealt with on indictment.⁹²

To date, there have been few section 7 prosecutions dealt with under the standard non-parole sentencing scheme and it is not possible to draw conclusions about the effect that the scheme may have on sentencing patterns for that offence.⁹³ However, the Legal Aid Commission states:

“In general terms, it could be said that the standard non-parole period regime which came into effect on 1 February 2003 has had no effect on gun related crime in south west Sydney. This suggests that targeting causes rather than imposing heavier penalties after the event, may be more effective in controlling gun-related crime.”

The Office of the DPP reports that to date, there have been very few matters sentenced under the standard non-parole sentencing scheme generally, and as such there is very little

⁸⁷ 865 matters, compared to 20 matters in the District Court.

⁸⁸ Submission of the Office of the DPP

⁸⁹ The Office of the DPP acknowledges this fact in its submission.

⁹⁰ See *Attorney General’s Application no 2 of 2002* [2002] NSWCCA 515 at [16]

⁹¹ For example, in the context of murder, see Keane J and Poletti P, (2004) *“Monograph Series 23: Sentenced Homicides in NSW, 1994 – 2001”* Sydney: Judicial Commission of NSW. At pp142-143

⁹² See for example, the Director of Public Prosecutions (2003) *“Prosecution Guidelines”* at Chapter 8. The *Guidelines* consider the approach to be taken when considering a standard non-parole period offence, and states: *“if the view is taken that no penalty other than imprisonment is appropriate and that the offence falls within the middle of the range of objective seriousness or higher for that particular table offence, then election should be made for the offence to be dealt with on indictment.”*

⁹³ The Law Society of NSW submits that there has been insufficient time for any changes in the pattern of sentencing for standard non-parole matters, including section 7 of the *Firearms Act 1996* to become apparent.

information upon which the scheme can be evaluated. Of the matters which have been sentenced to date, Crown appeals have been lodged in four.⁹⁴

Specifically in regard to sentencing section 7 offences under the standard non-parole scheme, only two such matters have been identified.

Adam Mouloudi was sentenced in the Campbelltown District Court on 26 September 2003. In summary, the offender entered pleas of guilty to two counts of unauthorised possession of a firearm, and a number of related firearms matters were taken into account on a form 1. At the time of committing the offences, the offender was due to commence periodic detention for a previous offence of malicious wounding and possession of an unauthorised firearm. The malicious wounding “involved the discharge of a firearm under the control of the prisoner, which discharge resulted in the wounding the prisoner’s own nephew.” The sentencing judge took into account the young age of the offender along with the real prospects of rehabilitation and continued:

“There are in my view special circumstances that justify the displacement of the usual ratio between head sentence and non-parole period and I think that those same circumstances justify, in this case, the imposition of a non parole period shorter than the standard. I am mindful of the provisions of s 3A and of s 21(A) (sic) as amended of the Criminal (Sentencing Procedure) Act (sic) and have taken them into account.”

The sentencing judge then sentenced the offender to a minimum term of 2 ½ years, with an additional term of 2 years imprisonment. This matter is the subject of a Crown appeal. The Sentencing Council is of the view that this Report should not be deferred for that Judgment.

John Michael McGuinness was sentenced to an 18 month suspended sentence for two counts against section 7 and one count against section 93G. The sentencing judge commented on the objective seriousness of firearms offences:

“The problem with section 93G offences is that the section covers such a wide spectrum of dealings with firearms, all the way from inadvertent behaviour, such as that to be seen in Hardman’s case, to drive by shootings. To have a loaded rifle in a public street with no more intent to take it home after a day’s shooting, to possess a loaded gun on a shooting expedition and to behave with it in a careless fashion, incurs the same maximum penalty as a gangster caught with a loaded weapon whilst bound on some unexplained errand. In short it covers that wide spectrum of behaviour that lies between otherwise innocent inadvertence and highly criminal adventurism.”⁹⁵

These comments by the sentencing judge are most relevant to the Sentencing Council’s consideration of whether certain firearms offences should be dealt with strictly on indictment (see below at part 11).

It is clear that both the section 7 matters sentenced under the standard non-parole sentencing scheme have substantially departed downwards from the standard, although one of the

⁹⁴ The Court of Criminal Appeal has delivered judgments in relation to five standard non-parole matters, three of which were Crown appeals against sentence: *R v. Way* [2004] NSWCCA 131; *R v. Shi* [2004] NSWCCA 135; *R v. Hopkins* [2004] NSWCCA 105; *R v. Tuncbilek* [2004] NSWCCA 105; *R v. Johnson* [2004] NSWCCA 140.

⁹⁵ Judge Shadbolt, District Court of NSW, 5 December 2003

matters is subject of a Crown appeal. Appellate guidance may clarify the operation of the standard non-parole scheme.⁹⁶

10.2.3 Inclusion of further offences in the standard non-parole scheme

All but one of the submissions received by the Sentencing Council were against inclusion of further firearms offences in the standard non-parole sentencing scheme.⁹⁷

The submission of the NSW Police and the Ministry for Policy (“*the joint Police submission*”) recommended that the standard non-parole scheme should be extended to other firearms offences. The joint Police submission notes that there are many other serious firearms offences which may facilitate the commission of a section 7 offence, but for which a section 7 charge is not possible. The joint Police submission also suggests that the recently created offences of purchase of sale of firearms parts and restriction of sale of firearms parts should be included in the standard non-parole sentencing scheme, particularly considering that these offences are inevitably linked to the possession and use of unauthorised firearms, but in a situation where a charge under section 7 is not available.⁹⁸

The vast majority of submissions received by the Sentencing Council were against further offences being included in the standard non-parole sentencing scheme. The reasons put forward in those submissions can be summarised as being, firstly that there is no evidence as to the effect of the standard non-parole sentencing scheme on section 7 offences to date, and secondly, there is no empirical basis for any perception of inconsistency or leniency with respect to firearms offences, and that therefore there is no need to add further firearms offences to the standard non-parole sentencing scheme. In their submission the Legal Aid Commission noted concerns about the standard non-parole period sentencing scheme and its impact upon the cost of defending criminal matters. In particular there is a concern that it may remove the incentive to enter pleas of guilty in appropriate cases. The Bar Association has expressed a concern that the standard non-parole periods will fetter the discretion of the sentencing judge. The Association submits:

“The Association considers that there is a real danger that the ‘standard non-parole period’ will be treated as a statutory presumption which significantly fetters the sentencing court’s discretion.”

In relation to the current inclusion of section 7 in the scheme, the Association notes that the circumstances for section 7 offences are likely to vary enormously with different levels of culpability, and as such, the 3 year non-parole period may not be appropriate. The Bar Association does not support the inclusion of any other firearms offences in the standard non-parole sentencing scheme.

⁹⁶ *Adam Mouloudi*, argument heard in the Court of Criminal Appeal on 10 March 2004, judgment reserved. In relation to the standard non-parole sentencing scheme more generally, see *R v. Way* [2004] NSWCCA 131; *R v. Shi* [2004] NSWCCA 135; *R v. Hopkins* [2004] NSWCCA 105; *R v. Tuncbilek* [2004] NSWCCA 105; *R v. Johnson* [2004] NSWCCA 140.

⁹⁷ The submission of the NSW Police and the Ministry for Policy recommended that the standard non-parole scheme should be extended to other firearms offences.

⁹⁸ The new offences are contained in sections 51BA and 51BB of the *Firearms Act 1996* respectively, and were introduced by the *Firearms and Crimes Legislation Amendment (Public Safety) Act 2003*.

The Sentencing Council has considered the views expressed in all of the submissions, and the majority of the Sentencing Council favours the approach taken in the joint Police submission. Bearing in mind that there are other firearms offences which may facilitate the commission of a section 7 offence, it seems illogical to separate out section 7 offences from these other firearms offences (often involving firearms parts). The joint Police submission further suggests that these further offences are serious in their own right.⁹⁹

The Sentencing Council by majority recommends that the following offences should be added to the standard non-parole sentencing scheme:

- **50A(2): Unauthorised manufacture of prohibited firearms (20 years maximum).**
- **51(1A): Restrictions on sale of firearms (prohibited firearms or pistols) (20 years maximum).**
- **51(2A): Restrictions on sale of firearms (prohibited firearms or pistols) (20 years maximum).**
- **51B: Selling firearms on an ongoing basis (20 years maximum).**
- **51BA(2): Restrictions on sale of firearm parts (prohibited firearms or pistols) (10 years maximum).**
- **51BB: Selling firearms parts on an ongoing basis (20 years maximum).**
- **51D(2): Unauthorised possession of firearms in aggravated circumstances (prohibited firearm or pistol) (20 years maximum).**

The Sentencing Council considers that these offences are most relevant to stemming the flow of guns into the community, and are offences where there is a strong need for consistency in sentencing¹⁰⁰ and general deterrence.¹⁰¹ Save for section 51D(2), these offences involve the manufacture and sale of firearms or their parts. To manufacture or sell is to take criminality to a very high level. It also leads to other crimes of ever escalating gravity including firearms usage and ultimately crimes of violence including armed robbery and even murder.

It can be seen that these offences involving the manufacture or sale of firearms, could be considered as offences which would facilitate the commission of a section 7 offence. The Sentencing Council notes that two of these offences are newly created, and as such, no JIRS sentencing statistics exist in relation to them.¹⁰² This is relevant to the extent that the standard non-parole periods already in the table were set taking into account the JIRS statistics for

⁹⁹ The minority of the Council argues that an appropriate sentence may be imposed for an objectively serious firearms offence via the process of electing for the matter to be dealt with on indictment. Further, the minority argues that there is no evidence to suggest that this process of election has not been working, or that there is any evidence of inconsistent or inadequate sentencing when such matters are dealt with on indictment.

¹⁰⁰ In *R v. Way* [2004] NSWCCA 131, the Court of Criminal Appeal discussed the standard non-parole sentencing scheme generally, and noted that when interpreted in a purposive way, it is intended to provide *guidance and structure* to judicial discretion, and to promote *consistency and transparency* in sentencing. The Court of Criminal Appeal did however also note that the scheme may result in sentences increasing for some offences: “...it may be that for some offences the sentencing pattern will move upwards, while for others it will not.” The Hon. Gordon Samuels AC CVO QC has also considered consistency in relation to firearms offences, and noted that there is no evidence leniency or inconsistency in the sentencing of firearms offences. See *Review to Consider the Merits of Establishing a Specialist Gun Court in New South Wales*, March 2004, paragraph 12.1

¹⁰¹ See for example, the recent matter of *R v. MA* [2004] NSWCCA 92 at [24] and [25].

¹⁰² Indeed, there is limited sentencing statistics available for these section 7 offences generally. The JIRS database maintained by the Judicial Commission of NSW shows that over the past 5 years, there have been 4 matters sentenced in the higher courts for an offence against section 51B, and 2 matters sentenced in the higher courts for an offence against 51D(2).

those offences.¹⁰³ The majority of the Sentencing Council believes that the absence of JIRS statistics should not preclude the Sentencing Council from making a recommendation that the offences be added to the standard non-parole sentencing scheme. The Sentencing Council considers that it should take a proactive approach in responding to the concerns of the community in relation to firearms offences, and indeed considers that *community expectation* may be regarded as well reflected in the membership of the Sentencing Council.

It could be argued that offences against sections 93G (causing danger with firearm or spear gun) and 93H (trespassing with, or dangerous use of firearm or spear gun) of the *Crimes Act 1900* should be added to the standard non-parole sentencing scheme. It would be inconsistent to include section 7 of the *Firearms Act 1996* in the scheme, without including other “table 2” firearms offences. The Sentencing Council deals with these two offences below, and discusses whether these offences should be dealt with strictly on indictment.

The Sentencing Council acknowledges that the setting of a standard non-parole period, which is to represent an offence in the middle of the range of objective seriousness, is not an easy task.¹⁰⁴ For this reason, the Sentencing Council considers that it would not be appropriate to suggest standard non-parole periods for these offences without proper consideration. The Sentencing Council would, however, be happy to consider this issue if requested.

11 Inconsistency in disposition of firearms offences and elections

The manner of disposition of firearms offences, and the current method of “elections” related to the recently updated ODPP/NSW Police protocol for firearms prosecutions, discussed above at paragraph 10.1.1.

11.1 Inconsistency in disposition of firearms offences

A number of firearms offences contained in the *Firearms Act 1996*, the *Weapons Prohibition Act 1998* and the *Crimes Act 1900* carry the same maximum penalty of 14 years, yet have a different specified manner of disposition in each Act. These inconsistencies make it most difficult to assess any actual or perceived inconsistency in the sentence passed.¹⁰⁵ One example involves offences involving the discharge of a firearm, and the Office of the DPP submits as follows:

“...examples include the offence under section 33A of the Crimes Act (discharge firearm with intent to inflict GBH or with intent to prevent apprehension), which carries a maximum penalty of 14 years and is indictable, while the offence of steal firearm pursuant to section 154D (same maximum penalty) is Table 1.

Even though the following offences under the Firearms Act carry the same maximum penalty of 14 years, each of them is specified as Table 2:

- *Section 7(1) - possess or use unauthorised firearm, being a prohibited firearm;*
- *Section 51A – purchase prohibited firearm from unauthorised person; and*
- *Section 51E – possess or use pistol with magazine of more than 10 round capacity.*

¹⁰³ The Hon Bob Debus MP Attorney General, *Hansard*, Legislative Assembly, 23 October 2002, p5813

¹⁰⁴ Section 54A of the *Crimes (Sentencing Procedure) Act 1999*. In particular, the Council notes that there is difficulty in ascertaining the characteristics for an offence in the “middle of the range of objective seriousness” as well as difficulty in ascertaining what the appropriate standard non-parole period should be for such an offence.

¹⁰⁵ As noted in the submission of the Office of the DPP.

In addition, section 7 of the Weapons Prohibition Act which creates the offence of unauthorised possession or use of a prohibited weapon and also carries a maximum penalty of 14 years is specified at a Table 2 offence.

In contrast to the treatment of offences in the Crimes Act, three offences under the Firearms Act which carry a higher maximum penalty of 20 years imprisonment are Table 2 offences; ie offences under sections 50A...51..., and 51D....”

It could be argued that this inconsistent manner of disposition of firearms offences may encourage inconsistency in sentencing, particularly bearing in mind the jurisdictional limit of the Local Court compared to the maximum penalties in question. Despite this, the Office of the DPP suggests that JIRS statistics indicate that the more serious matters are being dealt with appropriately.

The submission of the NSW Chief Magistrate also observes the differences in manner of disposition of firearms offences namely that some offences are strictly indictable whereas others are either Table 1 or Table 2 offences. However, the Chief Magistrate suggests that such differences in manner of disposition allows for variations in objective seriousness of the offending behaviour, and is appropriate. The Chief Magistrate submits that, “*the Prosecutorial discretion to make an election for trial in appropriate cases should remain.*” It is suggested that any question of inconsistency of sentencing for firearms offences may be dealt with through the appeal process¹⁰⁶ or a guideline judgment may be sought, however, “*inconsistency in sentencing for such offences should be demonstrated before seeking a guideline judgment.*”¹⁰⁷

The ability of the appeal process to address consistency in sentencing has been addressed as part of another Sentencing Council project on “how best to promote consistency in sentencing in the Local Court”. The Sentencing Council is presently of the view that the efficacy of the appeal process between the Local and District Courts is currently seriously restricted.

11.2 Summary proceedings as against indictment for firearms offences

At present, a number of serious firearms offences are strictly indictable.¹⁰⁸ Consideration may be had to making further firearms offences strictly indictable. It could be argued that all offences with a maximum penalty of 10 years or more be made strictly indictable. This argument could be made on the basis that it could be considered illogical to charge a person with an offence carrying a maximum penalty of 10, 14 or 20 years, to only then have the matter heard in the Local Court with its limited jurisdiction as to sentence.¹⁰⁹ On the other

¹⁰⁶ Similarly, the Legal Aid Commission submits that “*if the sentencing judge strays from the appropriate range, there is always the appellate process open to both sides.*”

¹⁰⁷ A similar point was made by the Court of Criminal Appeal in *Attorney General’s Application No 2 of 2002* [2002] NSWCCA 515

¹⁰⁸ See *schedule 4*. Such firearms offences include section 33A of the *Crimes Act 1900*, new section 93GA of the *Crimes Act 1900*, and ss 50A (2), 51 (1A) or (2A), 51B, 51BB or 51D (2) of the *Firearms Act 1996*. Note: section 93I was added to Table 2 by schedule 3.1 of the *Firearms and Crimes Legislation Amendment (Public Safety) Act 2003*, which commenced on 15 December 2003.

¹⁰⁹ Section 267 of the *Criminal Procedure Act 1986* deals with the maximum penalty that the Local Court may impose for a Table 1 offence dealt with summarily. Similarly, section 268 deals with the maximum penalty that the Local Court may impose for a Table 2 offence dealt with summarily.

hand, it could be argued that the maximum penalty should not be the sole factor in deciding which firearms offences should be considered “serious”. The question of “seriousness” in relation to firearms offences is further considered below.

11.2.1 Meaning of a “serious” firearms offence

In the absence of a statutory definition as to what constitutes the most serious firearms offences, the maximum penalty is an important factor.¹¹⁰ Other factors to consider include whether the offence involves potential harm to person or property. Further, a particular offence may encompass a wide spectrum of offending behaviour. It may be that the maximum penalty allows for condign punishment in appropriate circumstances, but a far lesser penalty may be appropriate in certain other circumstances.¹¹¹ In considering which additional firearms offences could be made strictly indictable, the seriousness of the offence should be borne in mind, along with the particular concerns of the government in relation to prohibited weapons and pistols offences. The Sentencing Council recommends that if additional firearms offences are to be made strictly indictable, this should be limited to the more serious firearms offences.

In NSW, a “serious indictable offence” generally is defined as meaning an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more.¹¹²

In a federal context, Deane J considered the meaning of a “serious” offence in *Kingswell v R*.¹¹³ Deane J discussed the meaning of a “serious offence”, in the context of s 80 of the Constitution and noted that it is not one which could appropriately be dealt with summarily, in that conviction will expose the accused to grave punishment. In the course of his dissenting judgment, Deane J discussed the appropriateness of jurisdiction:¹¹⁴

“Obviously, there are elements of subjective judgment and discretion involved in determining whether a particular alleged offence falls into the less serious category which is capable of being appropriately dealt with by justices exercising summary jurisdiction. Those elements of subjective judgment and discretion did not and do not, however, preclude that question from being susceptible of judicial determination.”

¹¹⁰ See for example *H* (1980) 3 A Crim R 53 at 65, cited with approval by Howie J in *Zamagias* [2002] NSWCCA 17 at [11]: “...The sentencing Court must be reminded that the maximum penalty is a reflection of the seriousness with which the public through the legislature considers the type of criminal conduct with which it is concerned...”

¹¹¹ See for example, *R v Farroukh*, Unreported, 29 March 1996. It thus may be appropriate to consider the proportion of matters dealt with on indictment compared to those dealt with summarily where the offence in question is listed on either table 1 or table 2. For example, prior to the introduction of section 7A of the *Firearms Act 1996* on 16 January 2004, the great majority of offences against section 7 of the *Firearms Act 1996* were dealt with in the Local Court, with sentences ranging from section 10 dismissals to imprisonment. The Director of Public Prosecutions submits that this demonstrates that section 7 covers a huge range of criminality, and the option of summary disposal is necessary. It is not possible to comment on the sentencing pattern since the introduction of section 7A.

¹¹² Section 4 of the *Crimes Act 1900*

¹¹³ [1985] HCA 72; (1985) 159 CLR 264; (1985) 62 ALR 161 By section 80 of the *Australian Constitution*, the trial on indictment of any offence against any law of the Commonwealth shall be by jury. The Court considered the manner in which an offence is to be defined. Although the majority held (at 200-201) that it is “the law of the Commonwealth alone” which defines the elements of the offence,

¹¹⁴ (1985) 159 CLR 264 at 310; (1985) 62 ALR 161 at 194. Although Deane J was in dissent as to the outcome of the appeal, His Honour’s remarks are still relevant to the distinction between summary and indictable offences.

...
In the light of the foregoing, it appears to me that the correct criterion of what constitutes a serious offence is that it not be one which can appropriately be dealt with summarily by justices or magistrates. Within the limits of those offences which are capable of being appropriately so dealt with, the question whether a particular offence should, as a matter of legislative policy, actually be dealt with summarily by justices or magistrates is a matter for the Parliament."¹¹⁵

These comments show that the borderline between offences that should be dealt with on indictment compared to those that should be dealt with summarily is not always easily drawn. These comments are also relevant to considering the jurisdictional limit of the Local Court in deciding which offences are capable of being appropriately dealt with summarily.

11.2.2 History of summary proceedings for indictable offences in NSW

Part 14 Division 2 of the *Crimes Act 1900* was in the Act as commenced, and provides for the summary disposal of some indictable offences, with the consent of the accused, and at the discretion of the Magistrate.

In 1995, the system of summary disposal of indictable offences was expanded and overhauled with the introduction of "Table 1" and "Table 2" offences:¹¹⁶ "Table 1" offences being those indictable offences that are to be dealt with summarily unless prosecutor or person charged elects otherwise; "Table 2" offences being those indictable offences that are to be dealt with summarily unless prosecutor elects otherwise. The new scheme sought to remove the discretion of the magistrate in deciding upon jurisdiction. The offences within section 476 of the *Crimes Act 1900* were among those listed in Table 1, although section 476 was not repealed.

In introducing the legislation, the Hon Jeff Shaw, then Attorney General commented on the procedure under Part 14 Division 2 of the *Crimes Act 1900*, and noted that generally, considerable benefits result where indictable offences are dealt with summarily in appropriate cases. In particular, there are savings in the administration of justice, matters are resolved at the earliest opportunity, and resources of the District Court are freed to deal with the more serious matters. The new legislative scheme removed the discretion of the magistrate in the choice of jurisdiction, noting that the prosecution and the defence are in a better position to determine appropriate jurisdiction, and also in recognition of the fact that for the Magistrate to exercise discretion may cause undue prejudice.¹¹⁷ In the Second Reading Speech to the Bill, the Attorney General outlined the purposes of the scheme:

"A decision to commit the defendant for trial or sentence to the District Court has far-reaching consequences in terms of resources. For that reason alone, it is important to ensure that the resources of the District Court are being used effectively. In April 1992 a Bureau of Crime Statistics and Research study titled "Aspects of Demand for District Court Time" found that 78 per cent of all penalties imposed in 1991 in the District Court were less than two years' imprisonment. This finding suggests that significant savings in District Court time would be achieved by increased use of

¹¹⁵ 62 ALR 161 at 200-201

¹¹⁶ *Criminal Procedure Amendment (Indictable Offences) Act 1995* no 22.

¹¹⁷ The Hon. J. Shaw, Attorney General, *Hansard*, Legislative Council, 24 May 1995, p 118

*summary jurisdiction for those offences which would not attract penalties of more than two years, regardless of the jurisdiction in which they are tried.*¹¹⁸

The Bill received wide support from outside the Government as providing a means for disposing of a wider range of appropriate offences in the Local Court, thereby using District Court resources more efficiently. The Leader of the Opposition commented that the Bill received his “*wholehearted support*”.¹¹⁹

The Sentencing Council recognises the purposes behind the introduction of “Table 1” and “Table 2” offences into the *Criminal Procedure Act 1986*, and notes that this present reference does not require the Sentencing Council to consider the procedure of elections generally. Rather, the Sentencing Council is specifically considering elections as they relate to the discrete category of firearms offences. The Sentencing Council is of the opinion that any recommendation that it may make relating to firearms offences which should properly be heard on indictment, would not necessarily undermine the scheme of “elections” established by the *Criminal Procedure Act 1986*.

11.2.3 Should more "firearms offences" be strictly indictable

Bearing in mind the above considerations, the Sentencing Council, by majority, recommends that those firearms offences with a statutory maximum penalty of 10 years or more should be dealt with strictly on indictment. Such provides at least a yardstick or an indication of parliament’s attempt to provide condign punishment for persons committing such offences. These offences are listed below in Table A.

The Sentencing Council is of the opinion that the offences listed in Table A below clearly involve potential harm to persons or property, and should be properly dealt with on indictment. The majority of the Sentencing Council believes that it is incongruous to have a procedure whereby serious indictable offences with maximum penalties of 10 years or more are regularly disposed of in the Local Court with its jurisdictional limit of 2 years.¹²⁰ In making this recommendation, the Sentencing Council is aware of implications in making further firearms offences strictly indictable. Such implications include increased costs to the Office of the DPP, the Legal Aid Commission, the Public Defenders Office and the Courts, decreased incentives to pleas of guilty, and possible delays in the disposal of matters in the District Court. The Sentencing Council has also taken into account that some of these offences involve a wide spectrum of culpability.¹²¹ The majority of the Sentencing Council nevertheless recommends that offences against these sections should properly be dealt with on indictment bearing in mind the maximum penalty as compared to the jurisdictional limit of the Local Court, the need for general deterrence, and the clear potential harm to persons or property of the offence. Further, although there is a jurisdictional ceiling on the sentence which may be imposed by the Local Court, there is no lower limit on the sentence which may

¹¹⁸ The Hon. J. Shaw, Attorney General, *Hansard*, Legislative Council, 24 May 1995, p 119

¹¹⁹ The Hon. J. P. Hannaford, Leader of the Opposition, *Hansard*, Legislative Council, 31 May 1995. The leader of the opposition noted that the reforms would “*go some way to easing the pressure on victims*” with witnesses having to appear in only one court.

¹²⁰ The Local Court may, however, accumulate penalties of imprisonment to a maximum of 5 years. See section 58 of the *Crimes (Sentencing Procedure) Act 1999*, amended by the *Crimes Legislation Further Amendment Act 2003*, which commenced on 14 February 2004.

¹²¹ For example, see the recent comments of Judge Shadbolt in *McGuinness* noting that offences against section 93G cover a wide spectrum of culpability.

be imposed by the District Court, and the District Court may properly impose a non-custodial sanction in appropriate circumstances.

Table A: Firearms offences with a maximum penalty of 10 years or more, which are not presently strictly indictable

Offence	Maximum penalty	Present status
Section 93G <i>Crimes Act 1900</i> : Causing danger with firearm or spear gun	Maximum penalty: 10 years imprisonment	Table 2
Section 93H (2) <i>Crimes Act 1900</i> : Trespassing with or dangerous use of firearm or spear gun	Maximum penalty: 10 years imprisonment for use	Table 2
Section 93I <i>Crimes Act 1900</i> : Possession of unregistered firearm in public place	Maximum penalty: Imprisonment for 10 years, or 14 years if committed in circumstances of aggravation.	Table 2
Section 154D <i>Crimes Act 1900</i> : Steal firearm	Maximum penalty: Imprisonment for 14 years	Table 1
Section 7 <i>Firearms Act 1996</i> : Possess unauthorised firearm (prohibited firearm or pistol)	Maximum penalty: 14 years imprisonment	Table 2
Section 36 <i>Firearms Act 1996</i> : Sell, purchase, possess or use unregistered firearm	Maximum penalty: Imprisonment for 10 years if the firearm concerned is a prohibited firearm or pistol, or imprisonment for 5 years in any other case	Table 2
Section 44A(1) <i>Firearms Act 1996</i> : Prescribed persons not to be involved in firearms dealing business	Maximum penalty: Imprisonment for 14 years	Table 2
Section 50 <i>Firearms Act 1996</i> : Purchase of firearms	Maximum penalty: Imprisonment for 10 years if the firearm concerned is a prohibited firearm or pistol, or imprisonment for 5 years in any other case	Table 2
Section 50AA(2) <i>Firearms Act 1996</i> : Purchase of firearms parts (prohibited firearms or pistols)	Maximum penalty: Imprisonment for 10 years	Table 2
Section 50A(1) <i>Firearms Act 1996</i> : Unauthorised manufacture of firearms	Maximum penalty: Imprisonment for 10 years	Table 2
Section 51A <i>Firearms Act 1996</i> : Restrictions on purchase of firearms	Maximum penalty: Imprisonment for 14 years if the firearm concerned is a prohibited firearm or pistol, or imprisonment for 5 years in any other case	Table 2
Section 51BA(2) <i>Firearms Act 1996</i> : Restrictions on sale of firearm parts (prohibited firearms or pistols)	Maximum penalty: imprisonment for 10 years	Table 2
Section 51D(1) <i>Firearms Act 1996</i> : Unauthorised possession of firearms in aggravated circumstances	Maximum penalty: imprisonment for 10 years	Table 2
Section 51E <i>Firearms Act 1996</i> : Possession or use of pistols fitted with magazines of more than 10 round capacity	Maximum penalty: imprisonment for 14 years	Table 2
Section 62 <i>Firearms Act 1996</i> : Shortening of firearms	Maximum penalty: imprisonment for 10 years	Table 2
Section 63 <i>Firearms Act 1996</i> : Converting firearms	Maximum penalty: imprisonment for 10 years	Table 2
Section 70 <i>Firearms Act 1996</i> : False or misleading applications	Maximum penalty: imprisonment for 10 years if the application relates to a prohibited firearm or pistol, or	Table 2

	imprisonment for 5 years in any other case	
Section 71A <i>Firearms Act 1996</i> : Using forged or fraudulently altered licence or permit to obtain firearm	Maximum penalty: Imprisonment for 10 years	Table 2
Section 72(1) <i>Firearms Act 1996</i> : Falsifying or altering records (firearms dealer)	Maximum penalty: imprisonment for 14 years if the record relates to a prohibited firearm or pistol (or part of a prohibited firearm or pistol), or imprisonment for 5 years in any other case	Table 2
Section 74(1) <i>Firearms Act 1996</i> : Effect of firearms prohibition order	Maximum penalty: imprisonment for 10 years if the firearm concerned is a prohibited firearm or pistol, or imprisonment for 5 years in any other case	Table 2
Section 74(3) <i>Firearms Act 1996</i> : Effect of firearms prohibition order	Maximum penalty: imprisonment for 10 years if the firearm concerned is a prohibited firearm or pistol.	Table 2

12 Conclusion

The Sentencing Council, by majority, recommends that the following firearms offences should be included in the standard non-parole sentencing scheme:

- **50A(2): Unauthorised manufacture of prohibited firearms (20 years maximum).**
- **51(1A): Restrictions on sale of firearms (prohibited firearms or pistols) (20 years maximum).**
- **51(2A): Restrictions on sale of firearms (prohibited firearms or pistols) (20 years maximum).**
- **51B: Selling firearms on an ongoing basis (20 years maximum).**
- **51BA(2): Restrictions on sale of firearm parts (prohibited firearms or pistols) (10 years maximum).**
- **51BB: Selling firearms parts on an ongoing basis (20 years maximum).**
- **51D(2): Unauthorised possession of firearms in aggravated circumstances (prohibited firearm or pistol) (20 years maximum).**

The Sentencing Council, by majority, recommends that all serious firearms offences with a maximum penalty of 10 years or more, contained within the *Crimes Act 1900* and the *Firearms Act 1996* should be dealt with strictly on indictment.

Although outside the Sentencing Council's terms of reference, consideration could be given to making all serious firearms offences with a maximum penalty of 10 years or more, including those contained in legislation other than the *Crimes Act 1990* or *Firearms Act 1996*,¹²² strictly indictable for the same or similar reasons put forth in this report.

¹²² For example, the *Weapons Prohibition Act 1998*

Schedule 1

Australian Shooting Association
Commissioner for Children and Young People
Crime Commission of New South Wales
Department of Juvenile Justice
District Court of New South Wales
Law Society of NSW
Legal Aid Commission of New South Wales
Ministry for Police
NSW Bar Association
NSW Local Courts
NSW Police
NSW Shooting Association
Office of the Director of Public Prosecutions
Police Association
Public Defenders Office
Supreme Court of New South Wales

Schedule 2

28 January 2004

«Title»«First»«Last»
«Company_Title»
«Company»
«Address»

Dear «Salutation»

Re: NSW Sentencing Council Consideration of Firearms offences and the Standard Non-Parole Sentencing Scheme

The NSW Attorney General has asked the NSW Sentencing Council to prepare a report on the subject of firearms offences and the standard non-parole sentencing scheme (Part 4 Division 1A of the *Crimes (Sentencing Procedure) Act 1999*).

The non-parole sentencing scheme currently contains a standard non-parole period of 3 years for offences against section 7 of the *Firearms Act 1996*. In preparing its report to the Attorney General, the Sentencing Council will be considering whether any other firearms offences (whether contained in the *Crimes Act 1900* or the *Firearms Act 1996*) should be included in the standard non-parole sentencing scheme.

The Council will also be considering, where appropriate:

1. The effect of standard non-parole sentences on section 7 offences to date;
2. Recent changes to the relevant legislation; and
3. Whether the perception of inconsistent sentences is valid for firearms offences.

In order to assist the Council in its task, I invite «Company» to make a written submission addressing one or more of the issues set out above.

Submissions should be sent to:

The Executive Officer
NSW Sentencing Council,
GPO Box 6,
Sydney NSW 2001

The closing date for submissions is February 2004.

I look forward to receiving a submission from «Company».

Yours faithfully

The Hon A. R. Abadee RFD QC
Chairperson

Schedule 3

Commissioner for Children and Young People
Department of Juvenile Justice
Law Society of NSW
Legal Aid Commission of New South Wales
Ministry for Police
NSW Bar Association
NSW Local Courts
NSW Police
Office of the Director of Public Prosecutions
Public Defenders Office
Supreme Court of New South Wales

Schedule 4

Note:

- Light grey = Table1/Table 2 offences
- Dark grey = strictly indictable matters

Table1: Firearms offences

Section	Description of offence	Maximum Penalty
<i>Crimes Act 1900</i>		
33A	Discharging loaded arms with intent	14 years, or 20 years in company
93G	Causing danger with firearm or spear gun	10 years imprisonment
93GA	Firing at dwelling-houses or buildings	14 years imprisonment
93H	Trespassing with or dangerous use of firearm or spear gun	5 years imprisonment for possession, 10 years imprisonment for use
93I	Possession of unregistered firearm in public place	Imprisonment for 10 years, or 14 years if committed in circumstances of aggravation.
154D	Steal firearm	Imprisonment for 14 years
<i>Firearms Act 1996</i>		
7	Possess unauthorised firearm (prohibited firearm or pistol)	14 years imprisonment
7A	Possess unauthorised firearm (generally)	5 years imprisonment
25 (1)	Surrender and seizure of firearms when licence suspended/revoked	50 penalty units or imprisonment for 2 years, or both
30(6)	Fail to surrender revoked/suspended permit/firearm to police	50 penalty units or imprisonment for 2 years, or both
36	Sell, purchase, possess or use unregistered firearm	Imprisonment for 10 years if the firearm concerned is a prohibited firearm or pistol, or imprisonment for 5 years in any other case
37	Requirements relating to registered firearms	50 penalty units
38	Alteration of notice of registration	50 penalty units or imprisonment for 2 years, or both
39	Fail to take safety precautions with firearm	50 penalty units or imprisonment for 2 years, or both, if it is established beyond reasonable doubt that the firearm concerned was a prohibited firearm or a pistol, or 20 penalty units or imprisonment for 12 months, or both, in any other case
40	Category A or B licence requirements	20 penalty units or imprisonment for 12 months, or both
41	Category C, D or H licence requirements	50 penalty units or imprisonment for 2 years, or both
42A(3)	Inspections of storage of firearms held by security guard employers	50 penalty units
43	Firearms dealer must be licensed	Imprisonment for 7 years
44	Information about close associates of firearms dealers	50 penalty units
44A(1)	Prescribed persons not to be involved in firearms dealing business	Imprisonment for 14 years
45	Recording of transactions	20 penalty units
46	Quarterly returns	50 penalty units

47	Additional requirements for dealers	50 penalty units
48	Security of displayed firearms	50 penalty units
50	Purchase of firearms	Imprisonment for 10 years if the firearm concerned is a prohibited firearm or pistol, or imprisonment for 5 years in any other case
50AA(1)	Purchase of firearms parts	Imprisonment for 5 years
50AA(2)	Purchase of firearms parts (prohibited firearms or pistols)	Imprisonment for 10 years
50A(1)	Unauthorised manufacture of firearms	Imprisonment for 10 years
50A(2)	Unauthorised manufacture of firearms (prohibited firearms or pistol)	Imprisonment for 20 years
51(1)	Restrictions on sale of firearms	Imprisonment for 5 years
51(1A)	Restrictions on sale of firearms (prohibited firearms or pistols)	Imprisonment for 20 years
51(2)	Restrictions on sale of firearms	Imprisonment for 5 years
51(2A)	Restrictions on sale of firearms (prohibited firearms or pistols)	Imprisonment for 20 years
51A	Restrictions on purchase of firearms	Imprisonment for 14 years if the firearm concerned is a prohibited firearm or pistol, or imprisonment for 5 years in any other case
51B	Selling firearms on an ongoing basis	Imprisonment for 20 years
51BA(1)	Restrictions on sale of firearm parts	Imprisonment for 5 years
51BA(2)	Restrictions on sale of firearm parts (prohibited firearms or pistols)	Imprisonment for 10 years
51BB	Selling firearms parts on an ongoing basis	Imprisonment for 20 years
51C	Conspiring to commit and aiding etc commission of offence outside New South Wales	The same punishment, pecuniary penalty and forfeiture that the person would be subject to if the offence concerned had been committed in New South Wales.
51D(1)	Unauthorised possession of firearms in aggravated circumstances	Imprisonment for 10 years
51D(2)	Unauthorised possession of firearms in aggravated circumstances (prohibited firearm or pistol)	Imprisonment for 20 years
51E	Possession or use of pistols fitted with magazines of more than 10 round capacity	Imprisonment for 14 years
52	Use of mail for sending firearms or barrels	50 penalty units
53	Use of mail for sending firearms outside this State	50 penalty units
54	Advertising sale of firearms	50 penalty units
55	Means of delivering possession of firearms	50 penalty units
56	Commercial transportation of firearms	50 penalty units
57	Non-commercial transportation of firearms	50 penalty units
58(1)	Possession of spare barrels for firearms	50 penalty units
58(2)	Possession of spare barrels for firearms (prohibited firearm or pistol)	Imprisonment for 5 years
59	“on the spot” inspection of firearms by police	20 penalty units or imprisonment for 12 months, or both
60	Disposal of firearms by unauthorised persons	50 penalty units or imprisonment for 12 months, or both
61	Unsafe firearms	50 penalty units or imprisonment for 2 years, or both
62	Shortening of firearms	Imprisonment for 10 years
63	Converting firearms	Imprisonment for 10 years
64	Restrictions where alcohol or other drugs concerned	Imprisonment for 5 years
65	Sale, purchase and possession of ammunition	50 penalty units
66	Defacing or altering identification marks	Imprisonment for 5 years
67	Pawning of firearms prohibited	50 penalty units or imprisonment for 2

		years, or both
68	License or permit must be produced on demand	50 penalty units
69	Requirement to notify change of address	50 penalty units
70	False or misleading applications	imprisonment for 10 years if the application relates to a prohibited firearm or pistol, or imprisonment for 5 years in any other case
71	Misuse of licenses and permits	50 penalty units or imprisonment for 2 years, or both
71A	Using forged or fraudulently altered licence or permit to obtain firearm	Imprisonment for 10 years
72(1)	Falsifying or altering records (firearms dealer)	imprisonment for 14 years if the record relates to a prohibited firearm or pistol (or part of a prohibited firearm or pistol), or imprisonment for 5 years in any other case
72(2)	Falsifying or altering records (general)	50 penalty units or imprisonment for 2 years
74(1)	Effect of firearms prohibition order	imprisonment for 10 years if the firearm concerned is a prohibited firearm or pistol, or imprisonment for 5 years in any other case
74(3)	Effect of firearms prohibition order	Maximum penalty: imprisonment for 10 years if the firearm concerned is a prohibited firearm or pistol, or imprisonment for 5 years in any other case
82A	Deceased estates	50 penalty units

Table 2: Other offences under the Crimes Act 1900 which commonly involve a firearm

29	Certain other attempts to murder	25 years
33	Wounding etc with intent to do bodily harm or resist arrest	25 years
97(2)	Robbery etc or stopping a mail, being armed or in company	25 years

Schedule 5

Firearms “hypotheticals” – NSW Young Lawyers Criminal Law Committee, Sentencing Forum, 4 March 2003.

Possession of a Prohibited Weapon

1. Joe is a farmer who has a rifle that he is not licensed to possess.

This matter came to the attention of the police when neighbours reported hearing it discharged and voices arguing.

When the police attended, there was no report of any offence. They asked to see the firearm and Joe showed police where it was stored safely.

Joe is 47 years old. He has always worked on the family farm. He is married with three children who are all at school. His wife would not be able to manage the farm on her own. Times are tough in drought stricken NSW and it is likely that the farm would have to be sold if Joe went to gaol.

Joe has no criminal record. Some years ago, he was a councillor on the Local Council and has excellent character references.

Joe’s brother works as a prison officer at Junee Correctional Centre and they have a very similar appearance.

2. Bill is 27 years old and is charged with Unauthorised Possession of a Firearm.

Bill was in a car with three other male friends when the car was pulled over by police in Kings Cross and the vehicle was lawfully searched. Bill was searched and the firearm was found on him. The firearm is a pistol, which was loaded.

Bill cooperated with police, telling them that the firearm and the ammunition were his. He told police that he carried the firearm was for his protection, as there are former associates who are "out to get him".

Bill left school after finishing year 12. He successfully completed an apprenticeship at age 25 and now works as a mechanic. He lives with his mother who is divorced, and has step-brothers. He helps his mother with her financial commitments and helps look after his younger siblings.

Bill has a criminal record covering the period when he was 16 - 21 years old. He has entries on his record for custody of knife in a public place (for which he got a fine), assault (he got a bond for 12 months, which he did not break) and drive in a manner dangerous (6 months imprisonment). He was on a two year bond for assault occasioning actual bodily harm at the time he was apprehended by the police.

Issues –

If these offences were committed after 1 February 2003, and the matter is dealt with on indictment then a standard non-parole period of three years applies.

The statistics show that the majority of matters of this type are finalised in the Local Court. The majority of those matters are dealt with by way of non-conviction. A small number of matters have been dealt with in the District Court. No one has received a non-parole period of 3 years.

- * Should the DPP elect to have either matter dealt with in the District Court? We might think that Bill’s possession of the gun is far more serious but does he deserve a minimum term of three years.

- * How would a judge impose a sentence of less than three years in Bill's matter when he has no mitigating factors?
- * How does the Local Court approach its sentencing task if no election is made?
- * Is it appropriate that the DPP make a decision that will directly effect the length of the sentence?
- * The fact that Joe's brother is a prison officer means that he is at risk in gaol. Why isn't this a mitigating factor?

Schedule 6

Supreme Court and Court of Criminal Appeal consideration of section 7 of the Firearms Act 1996

R v Cromarty - [2004] NSWCCA 54; BC200401212 - NSWCCA - 22/03/2004
R v Middlebrook - [2004] NSWCCA 49; BC200401012 - NSWCCA - 05/02/2004
R v RK - [2003] NSWCCA 389; BC200308071 - NSWCCA - 08/12/2003
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