Aboriginal Legal Service (NSW/ACT) Limited

22 December 2023

The Hon. Peter McClellan AM KC
Chairperson
NSW Sentencing Council
By email: sentencingcouncil@justice.nsw.gov.au

Dear Chairperson,

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited ('ALS'). Thank you for the opportunity to provide a submission to the NSW Sentencing Council's review of the law of sentencing for firearms, knives and other weapons offences.

The ALS is a proud Aboriginal community-controlled organisation and the peak legal services provider to Aboriginal and Torres Strait Islander adults and children in NSW and the ACT.

More than 280 ALS staff members based at 27 offices across NSW and the ACT support Aboriginal and Torres Strait Islander people through the provision of legal advice, information and assistance, as well as court representation in criminal law, children's care and protection law, and family law.

Increasingly, we represent Aboriginal and Torres Strait Islander families in the NSW Coroner's Court, provide a variety of discrete civil law services including tenant's advocacy, and undertake policy work and advocacy for reform of systems which disproportionately impact Aboriginal and Torres Strait Islander communities.

In preparing this submission we sought the feedback and experience of our solicitors who represent Aboriginal clients in criminal matters before courts of all levels in NSW.

Sincerely,

Nadine Miles
Principal Legal Officer
Aboriginal Legal Service (NSW/ACT) Limited

Aboriginal Legal Service (NSW/ACT) Limited

Submission to NSW Sentencing Council

Firearms, Knives and Other Weapons Offences

22 December 2023

About the ALS

The Aboriginal Legal Service (NSW/ACT) Limited (**ALS**) is a proud Aboriginal community-controlled organisation and the peak legal services provider to Aboriginal and Torres Strait Islander adults and children in NSW and the ACT.

More than 280 ALS staff members based at 27 offices across NSW and the ACT support Aboriginal and Torres Strait Islander people through the provision of legal advice, information and assistance, as well as court representation in criminal law, children's care and protection law, and family law.

Increasingly, we represent Aboriginal and Torres Strait Islander families in the NSW Coroner's Court, and provide a variety of discrete civil law services including tenant's advocacy, employment and discrimination, and assistance with fines and fine-related debt. We represent the interests of the communities we service through our policy work and advocacy for reform of systems which disproportionately impact Aboriginal and Torres Strait Islander people.

This submission is informed by the feedback and experience of our solicitors who represent Aboriginal adults and young people in criminal proceedings before courts of all levels in NSW.

This submission should be read in conjunction with our preliminary submission to the review, where additional information about client demographics and the experiences of ALS solicitors is presented.

Introduction

The ALS welcomes the opportunity to make a submission to the Sentencing Council's review of sentencing for firearms, knives and other weapons offences.

The ALS is supportive of evidence-based sentencing reforms, particularly reforms which foreground connection to culture, community and healing for Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander people in NSW are grossly overrepresented in custody, with figures released by the NSW Bureau of Crime Statistics and Research (BOCSAR) in March this year showing that the number of Aboriginal people in prison was the highest on record, despite a reduction in overall prison numbers.[1] This is a crisis for NSW, and for the communities we serve.

Conversely, statistics reveal a consistent downwards trend in weapons-related offending over the past 20 years for both young people and adults, with the incidence of assaults and robbery offences involving a knife in March 2023 being the lowest on record since April 2003.[2]

We acknowledge the harm that serious offences of violence cause to individuals and communities, as well as the justified community concern around highly publicised incidents involving fatal use of weapons like knives and firearms, however, for the reasons summarised here and detailed below, we strongly oppose any increase to maximum penalties for weapons-related offences, the addition of new offences to the Standard Non-Parole Period scheme, and the introduction of any additional powers for NSW Police.

Increased maximum penalties are often relied upon as a mechanism intended to deter criminal offending, however, evidence suggests that increasing maximum penalties is not effective in deterring crime. For example, the recent parliamentary *Inquiry into Victoria's Criminal Justice System* (2022) found that 'punishment or the threat of punishment does not shift criminal behaviour or reduce recidivism' and that '[r]ecidivism rates suggest that our current punitive approach to criminal

[1] Bureau of Crime Statistics and Research, *NSW Custody Statistics: Quarterly update March 2023* (Full Report, May 2023) 23. See also Aboriginal Legal Service (NSW/ACT) Limited, 'NSW prisons more unequal than ever with record level of Aboriginal people behind bars' (Media Release, 30 May 2022).
[2] Bureau of Crime Statistics and Research, 'Offences Involving Weapons' (Web Page), Table 'Assault and robbery offences involving a knife or firearm'.

behaviour is not reducing crime or improving community safety' (Finding 41).[3] Other evidence suggests that even short periods of incarceration may in fact be linked with subsequent contact with the criminal process.[4]

Sentencing courts have at their disposal a wide range of existing sentencing options to address the various purposes of sentencing under NSW law, including imposing terms of imprisonment up to statutory maximums which are some of the highest across all Australian jurisdictions.

Reactive and punitive law-making has historically led to disproportionate harmful impacts for the Aboriginal and Torres Strait Islander communities and entrenched marginalised people in cycles of criminalisation by compounding, rather than addressing, the factors underlying their contact with the legal system. Aboriginal and Torres Strait Islander people experiencing homelessness and young people are especially vulnerable to harm by the expansion of offences for weapons possession.

Any reforms to sentencing law and policy must be carefully considered, justified by a strong evidence base in support of the need for reform, and take into account any unintended consequences which would undermine the obligations of the NSW Government under the National Agreement on Closing the Gap to work to reduce the numbers of Aboriginal adults and young people in custody by 2031.

Summary of Recommendations

1. Reduce the maximum penalty for possessing a prohibited weapon contrary to s 7 of the *Weapons Prohibition Act 1998* (NSW).
2. Review Schedule 1 of the *Weapons Prohibition Act* to determine whether all weapons prescribed in the Schedule should continue to be criminalised for mere possession, as opposed to use.
3. Amend the legislation to provide for two categories of prohibited weapon for the purposes of sentencing for possession: military-style weapons and other weapons, with a maximum penalty of no more than 5 years' imprisonment for military-style weapons and 2 years' imprisonment for all other weapons. In the alternative, create a separate offence, with a lower maximum penalty of no more than 2 years' imprisonment, for weapons and articles incapable of causing serious injury.
4. Reduce the maximum penalty for possession of a prohibited weapon contrary to a Weapon Prohibition Order to 2 years' imprisonment or less.
5. Reduce the maximum penalty for possession of a firearm and retain the current maximum penalty for subsequent offences.
6. Do not introduce a separate sentencing scheme and penalties for 'prohibited persons'.
7. Do not introduce mandatory minimum sentences for any weapons offence.
8. Exclude gel blasters from the statutory definition of a 'firearm'.
9. Establish a separate summary offence for possession of an imitation firearm carrying a maximum penalty no greater than 2 years' imprisonment and/or a fine.
10. Do not expand the list of offences carrying a standard non-parole period.
11. Conduct a comprehensive review of the SNPP scheme in NSW prior to considering any expansion of the scheme.

[3] Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Report, March 2022) 636–41.
[4] Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report No 133, December 2017) 269 [7.157]–[7.158].

12. Do not prescribe a standard non-parole period for s 36(1), s 74(1) and s 62(1).
13. Abolish the standard non-parole period for s 7(1).
14. Conduct a comprehensive review of sentencing in NSW to consider whether s 21A of the Crimes (Sentencing Procedure) Act 1999 requires amendment, including specific consideration of recommendations to require consideration of the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.
15. Do not make the offences contrary to ss 11D and 11F *Summary Offences Act 1988* (NSW) indictable offences.
16. Exclude implements such as scissors, bottle openers and multi-tools from the definitions in s 93IA of the *Crimes Act 1900* (NSW).
17. Introduce an additional factor relevant to the consideration of 'reasonable excuse' for possession of a knife under s 92IB which relates to the experience of homelessness.
18. Allow the excuse of self-defence, or defence of another person, to be a reasonable excuse when mixed with other purposes.
19. Expand the list of offences eligible to be dealt with by way of a penalty notice to include custody of knife offences, including subsequent offences, as well as the 14 identified fine only offences in the *Weapons Prohibition Act* and three fine only offences in the *Weapons Prohibition Regulation*.
20. Expand the application of the Attorney-General's *Caution Guidelines Under the Fines Act 1996* to NSW Police officers.
21. Do not introduce additional police powers to address weapons related offending, including powers to search members of the general public using metal detectors.
22. Do not introduce additional schemes that place conditions on adults who have been convicted of weapon-related offences.
23. Review the FPO and WDO schemes to evaluate their impacts, including their impacts on Aboriginal and Torres Strait Islander communities, and their effectiveness in achieving their stated aims.
24. Do not adopt the approach to sentencing children in England and Wales following the decision in *R v Povey* [2008] EWCA Crim 1261.
25. Make Intensive Correction Orders available to courts sentencing children under 18 "according to law".
26. Prioritise community education directed at correcting public misconceptions about the nature and extent of crime in the community, and improving public understanding about the criminal law and sentencing.
27. Make regulations enabling *Young Offenders Act* warnings to be issued in relation to the Crimes *Act 1900* (NSW) s 93IB and s 93IC offences.
28. Do not implement Knife Crime Prevention Orders in NSW.
29. Expand the availability of Criminal Infringement Notices ('penalty notices' under the Criminal Procedure Act 1986 to people under 18 years of age repealing s 335 *Criminal Procedure Act 1986*.
30. Conduct comprehensive review of the penalty notice system which includes extensive consultation on the appropriate limits or caps on fine amounts for vulnerable people including children.

Maximum Penalties

We consider that the maximum penalties currently available for offences under the *Firearms Act 1996* and *Weapons Prohibition Act 1998* are adequate and provide appropriate sentencing scope to courts. We oppose the introduction of increased maximum penalties for any offence being considered by this review, and recommend a reduction in maximum penalty for some offences, as outlined below.

Possession of a prohibited weapon (Question 3.1)

The maximum penalty for possessing a prohibited weapon is more than adequate and we would oppose any increase to the available penalty for this offence.

The offence carries a maximum penalty of 14 years' imprisonment,[5] which is the highest available penalty for equivalent offences in Australia. Maximum penalties in other jurisdictions range from 2 to 5 years' imprisonment, and it is notable that the next highest available penalty (up to 5 years' imprisonment in the ACT)[6] is less than half of the NSW maximum penalty. The status of NSW as an outlier among Australian jurisdictions is a strong indicator than the current maximum penalty is not only more than adequate, is manifestly excessive or oppressive.

We acknowledge the sentencing patterns referred to at p 25 of the Consultation Paper which suggest that weapon possession matters are more often dealt with summarily and result in non-custodial sentences. We consider that this supports a conclusion that the maximum penalty is inappropriately high for the overwhelming majority of circumstances in which this offence is prosecuted, and would support a reduction in the maximum penalty for possessing a prohibited weapon.

Recommendation 1: Reduce the maximum penalty for possessing a prohibited weapon contrary to s 7 *Weapons Prohibition Act 1998*.

We support a review of Schedule 1 of the *Weapons Prohibition Act* to determine whether all weapons prescribed in the Schedule should continue to be criminalised for mere possession, as opposed to use.

Under the current regime, the maximum penalty for possession of a prohibited weapon is 14 years' imprisonment, whether the weapon is a bomb, a slingshot or a set of handcuffs. The Courts have recognised the difficulty in assessing objective seriousness on sentence, given the wide variety of prohibited weapons encompassed by the Act. In *Jacob v R*,[7] Hulme AJ (Ward JA agreeing) observed:

> [Military-style weapons are] vastly more dangerous, or at least with a much greater capacity to kill or injure, than the non-military prohibited weapons [in the Act] … The wide variety of weapons also makes difficult any determination of what is an offence answering the description of that charged that is in the middle range of objective seriousness.[8]

We agree in principle with the preliminary submission of the Officer of the Director of Public Prosecutions that the legislation be amended to differentiate, for the purposes of sentence, between categories of weapons included in Schedule 1.

We consider that such amendment should operate to distinguish between sentences available for 'military-style' weapons, as defined in cl 1A of the Schedule, and other prohibited weapons.

The military-style weapons listed in cl 1A, such as bombs and flamethrowers, are designed to, and are capable of, inflicting more serious injury than the other weapons and articles listed in the Schedule. Military-style weapons are designed to cause both injuries of a greater magnitude for individuals against whom the weapons are used, and potential injury to multiple individuals simultaneously or within a short period of time. Military-style weapons are distinct from the other weapons and articles

[5] *Weapons Prohibition Act 1998* (NSW) s 7.
[6] *Prohibited Weapons Act 1996* (ACT) s 5.
[7] [2014] NSWCCA 65.
[8] Ibid [180], [184].

listed in Schedule 1, which are likely to cause less serious harm, or no harm (e.g. handcuffs and body armour vests).

The available penalty for military-style weapons should be no greater than 5 years' imprisonment, with a maximum penalty of 2 years' imprisonment for possession of all other prohibited weapons. This would be consistent with the approach in other Australian jurisdictions.

If this recommendation is not taken up, in the alternative to the above, we would support the creation of a separate offence with a lower maximum penalty for weapons and articles which are less likely or incapable of causing serious injury, such as handcuffs, knuckle dusters and body armour. A maximum penalty of 2 years' imprisonment would be consistent with the approach in other Australian jurisdictions.

Recommendation 2: Review Schedule 1 of the *Weapons Prohibition Act* to determine whether all weapons prescribed in the Schedule should continue to be criminalised for mere possession, as opposed to use.

Recommendation 3: Amend the legislation to provide for two categories of prohibited weapon for the purposes of sentencing for possession: military-style weapons and other weapons, with a maximum penalty of no more than 5 years' imprisonment for military-style weapons and 2 years' imprisonment for all other weapons. In the alternative, create a separate offence, with a lower maximum penalty of no more than 2 years' imprisonment, for weapons and articles incapable of causing serious injury.

Possession Contrary to a Weapons Prohibition Order (Question 3.2)

We consider that the current maximum penalty of 10 years' imprisonment for possession of a prohibited weapon contrary to a Weapons Prohibition Order (WPO) is disproportionately high, and recommend that the maximum penalty be reduced to no more than 2 years' imprisonment.

As noted above, the maximum penalty for the s 7 offence of 14 years' imprisonment is exponentially higher than the penalties for equivalent offences in all other Australian jurisdictions. In the experience of our legal practice, the two offences are frequently charged together. Reducing the maximum penalty for the offence of possession contrary to a WPO, irrespective of whether our above recommendation to reduce the maximum penalty for the substantive possession offence is adopted, would be analogous to the way in which sentencing law applies to breaches of other court orders.

For example, the charge of contravening an Apprehended Domestic Violence Order (ADVO) carries a maximum penalty of 2 years' imprisonment,[9] and is often laid alongside charges that criminalise the behaviour that contravened the ADVO (such as common assault or intimidation), which frequently carry a much higher maximum penalty reflecting the increased level of criminality associated with the substantive conduct. Reducing the maximum penalty available for the possession contrary to a WPO offence would appropriately reflect the difference in the levels of criminality of the behaviour targeted by the separate offences: failure to comply with a WPO, as opposed to actual possession of a weapon.

Recommendation 4: Reduce the maximum penalty for possession of a prohibited weapon contrary to a weapon prohibition order to a term of 2 years' imprisonment or less.

[9] *Crimes (Domestic and Personal Violence) Act 2007* s 14.

Firearm Possession (Question 3.3)

The ALS opposes raising the maximum penalty for possessing a firearm, prohibited firearm or pistol, contrary to s 7(1) and s 7A(1) of the *Firearms Act 1996*.

The available penalties for firearms offences in NSW are generally in line with other states and territories,[10] with the maximum penalty in NSW (14 years' imprisonment with a standard non-parole period of 4 years) sitting at the higher end across jurisdictions. The statistics presented in the Consultation Paper do not support a need to increase the available penalties.

We also oppose higher maximum penalties for subsequent firearms offences, noting that s 21A of the *Crimes (Sentencing Procedure) Act 1999* already requires a sentencing court to take into account person's record of previous convictions as an aggravating factor on sentence. As noted in the introduction to this submission, a growing body of evidence shows that the deterrent effect imprisonment limited,[11] with research showing that 'imprisonment has, at best, no effect on the rate of reoffending and often results in a greater rate of recidivism'.[12] We urge that any sentencing reforms take into account this body of evidence.

We recommend that a reduced maximum penalty for first offences be introduced, similar to the approach in other Australian jurisdictions.[13]

Recommendation 5: Reduce the maximum penalty for first offences of possessing a firearm and retain the current maximum penalty for possessing a firearm as a subsequent offence.

The ALS strongly opposes the introduction of a separate scheme and penalties for 'prohibited persons'.

In Victoria, 'prohibited person' status is automatically ascribed to an individual who meets the relevant statutory criteria, which capture persons who are serving a term of imprisonment for certain offences, or subject to a final domestic violence order, a community-based order, a mental health supervision order or an order under the *Criminal Organisations Control Act 2012* (Vic).

Section 11 of the NSW *Firearms Act* contains ample safeguards prohibiting possession of firearms by persons under 18 years of age and persons who have been subject to an AVO in the past 10 years, as well as broad discretionary powers to refuse licences to persons whom the Commissioner considers not to be 'fit and proper' or regarding whom there are any criminal intelligence reports that the person poses a risk to public safety. Firearm Prohibition Orders (FPOs) are also available in circumstances where the Commissioner considers that a person is not fit to possess a firearm.

Any broad, automatic application of a separate sentencing regime to persons falling within particular categories is antithetical to the imperative for NSW sentencing courts to retain a broad sentencing discretion, which "is essential to ensure that all of the wide variations of circumstances of the offence and the offender are taken into account".[14]

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[10] Maximum penalties in other jurisdictions range from 3 years' imprisonment in the NT to 21 years' imprisonment in Tasmania, however, all offences punishable under the *Criminal Code Act 1924* (Tas) carry the same maximum penalty of 21 years. The maximum penalty for prohibited firearm possession in the ACT is 10 years' imprisonment and in Queensland it is 7 years' imprisonment or 300 PU. In SA, the maximum penalty for possession of a prescribed firearm (equivalent offence of prohibited firearm possession) is $50,000 or 10 years' imprisonment. SA has an increased maximum penalty of 15 years' imprisonment for aggravated firearm possession (that is, if the firearm is loaded, located in the immediate vicinity of ammunition, concealed on the offender's person, or if the offence was in connection with drug offences).

[11] See, eg, Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Report, March 2022) 636–41; Charles E Loeffler and Daniel S Nagin, 'The Impact of Incarceration on Recidivism' (2022) 5 *Annual Review of Criminology* 133.

[12] Donald Ritchie, 'Does Imprisonment Deter? A Review of the Evidence' (Research Paper, Sentencing Advisory Council Victoria, 2011) 2.

[13] For example, in Western Australia, the maximum penalty for a first offence is 5 years' imprisonment, and for subsequent offences is 10 years: *Firearms Act 1973* (WA) ss 6(1), 6(3); *Firearms Regulations 1974* (WA) regs 23(2), 26(1).

[14] See, eg, *R v Whyte* (2002) 55 NSWLR 252 at [147] (Spiegelman J).

The introduction of such a scheme also creates a risk of over-criminalisation. The range of sentencing options in NSW includes community-based orders such as a Conditional Release Order imposed without conviction,[15] which may be imposed for fine-only offences. 'Prohibited person' criteria equivalent to the Victorian example would capture individuals subject to such orders, despite the fact that they are likely to have limited or no other criminal history.

Recommendation 6: Do not introduce a separate scheme and penalties for 'prohibited persons'.

Mandatory Minimum Sentences (Question 3.4)

The ALS strongly opposes the introduction of mandatory or minimum sentences for any offences because of their propensity to disproportionately impact Aboriginal and Torres Strait Islander people in contact with the criminal process and increase Aboriginal and Torres Strait Islander incarceration.

In 2017, the Australian Law Reform Commission *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* found that 'mandatory sentencing increases incarceration, is costly and is not effective as a crime deterrent',[16] and may disproportionately impact marginalised groups including Aboriginal and Torres Strait Islander people. The Inquiry found that '[p]resumptive minimum sentences can have a similar effect to mandatory minimum sentences'.[17]

Mandatory and presumptive sentencing provisions curtail judicial discretion, and limit the ability of sentencing courts to give effect to principles of individualised justice, proportionality, and use of imprisonment as a last resort. The Australian Law Reform Commission also found that, '[w]hile increasing incarceration, there is no evidence that mandatory sentencing acts as a deterrent and reduces crime'.[18]

Case Study – *R v Johnson* [2023] NSWDC 428

Mr Johnson was an ALS client who was convicted of possessing a firearm. The only issue at trial was whether the item before the court met the statutory definition of a 'firearm'.

The item is described at [10]:

"The item is comprised of a brass threaded section of pipe fixed to a timber frame by a hose clamp. The exhibit is fitted with a metal hammer which pivots about a screw on the frame. The hammer is connected to a small spring. A small rubber band was wrapped around the hammer and a screw on the frame. Tension from the rubber band pulled the hammer forward."

The evidence established that the item was incapable of propelling a projectile without "extreme measures" being taken (namely, placing it in a vice and striking it with a hammer, which were never part of the item).

The Court ultimately concluded the item was a firearm within the broad definition in the Act.

While it was held at law that Mr Johnson was in possession of a firearm, the item he possessed was incapable of being used as a firearm as commonly understood and did not have the appearance of a firearm such that the considerations relating to offences for possessing imitation firearms would arise. Binding a sentencing court to a mandatory or minimum sentence in circumstances where broad

[15] *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 9, 10(1)(b).
[16] Australian Law Reform Commission, Pathways To Justice–Inquiry Into The Incarceration Rate Of Aboriginal And Torres Strait Islander Peoples (ALRC Report No 133) [8.1].
[17] Ibid [8.5]. The Inquiry ultimately recommended 'that Commonwealth, state and territory governments should repeal sentencing provisions which impose mandatory or presumptive terms of imprisonment upon conviction of an offender, and that have a disproportionate impact on Aboriginal and Torres Strait Islander peoples': Recommendation 8–1.
[18] Ibid [8.13], citing Michael Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' (2009) 38 *Crime and Justice* 65.

statutory definitions bring cases such as this within the ambit of criminal punishment would restrict judicial discretion and prevent the shaping of appropriate sentences reflecting the objective and subjective features in individual cases.

Recommendation 7: Do not introduce mandatory or minimum sentences for any weapons offence.

Maximum Penalties for Gel Blasters and Imitation Weapons (Question 3.5)

The ALS considers that gel blasters should be excluded from the definition of a 'firearm', a position also echoed in the preliminary submissions of Legal Aid NSW, the ODPP, and the Law Society of NSW.

Gel blasters are not prohibited from being imported into Australia, are lawful to possess in Queensland and are widely regarded in the community as 'toys'. Expert evidence in *R v Smith* [2023] NSWDC 88, referred to in the Consultation Paper, indicated that '*paint ball guns have an impact force 14 times greater than a gel blaster, and that the impact force of a nerf gun is only "one" lower than the gel blaster*'.[19]

The wide availability of gel blasters for online purchase means that many community members are unaware that their possession in NSW is criminalised. ALS solicitors representing clients in criminal proceedings relating to possession of gel blasters report that both adults and young people often mistakenly believe that gel blasters are a toy, or purchase them online from Queensland vendors not realising that they are not lawful to possess in NSW.

Significant harms may flow to people who are prosecuted for possession of gel blasters. In *R v Smith*, the defendant was sentenced for four counts contrary to s 51D(2) of the *Firearms Act 1996* relating solely to gel blasters. This offence carries a maximum penalty of 20 years' imprisonment with a standard non-parole period of 10 years. The Court found that, whilst "gel blasters did fall within the s 4(1) definition of the *Firearms Act* … the gel blasters in the possession of the offender were only ever intended for use as toys".[20]

Mr Smith was 35 years of age and had two children, aged 11 and 8 years, at time of sentence. Mr Smith had no criminal history and at the time of his arrest was employed by Corrective Services NSW. He spent 65 days on remand before being granted bail. He was suspended without pay until some months after his release from custody and there was evidence before the Court of the significant cost of defending these legal proceedings. Police also issued Mr Smith with a Firearm Prohibition Order (FPO) and, as such an order has no expiration date, it was noted that Mr Smith may continue to be subject to invasive police searches as a consequence of the order.

The Court noted that Mr Smith's culpability fell at 'the absolute bottom of the range for offences of their type' and remarked on the perceived need for legislative reform.[21]

Recommendation 8: Exclude gel blasters from the statutory definition of a 'firearm'.

It is acknowledged that imitation firearms have the potential to pose a risk to public safety through the harms that may be inflicted through their use in the commission of offences such as armed robbery or their wielding in a public place. We consider, however, that it is important for the law to reflect the fact that the lack of capacity for an imitation firearm to cause injury places it in a category that differs from 'actual' firearms, and warrants a distinction being made between the penalties available for mere possession versus actual use.

[19] At [16].
[20] Ibid [18].
[21] Ibid [19].

We would support the establishment of a separate summary offence for possession of an imitation firearm carrying a maximum penalty of no more than 2 years' imprisonment and/or a fine, in line with other jurisdictions including Victoria and the Northern Territory.

Recommendation 9: Introduce a separate summary offence for possession of an imitation firearm carrying a maximum penalty no greater than 2 years' imprisonment and/or a fine.

Standard Non-Parole Periods

SNPP Offences (Question 4.1)

The ALS strongly opposes the expansion of the standard non-parole period (SNPP) scheme to include more offences, and supports the abolition of the SNPP scheme in its entirety.

We consider that there is no basis for retaining the SNPP scheme, due to its effect in enforcing rigidity in sentencing and curtailing the sentencing discretion, leading to a risk of unjustified increased incarceration for Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander adults and young people are grossly overrepresented in custody, and this overrepresentation has been steadily worsening, with the proportion of Aboriginal adults in prison in February 2023 being the highest on record.[22] Any reforms to sentencing law and policy must be carefully considered, justified by a strong evidence base in support of the need for reform, and take into account the obligations of the NSW Government under the National Agreement on Closing the Gap to work to reduce the numbers of Aboriginal adults and young people in custody by 2031.

We maintain that sentencing in NSW is best served by preserving judicial discretion, with the instinctive synthesis to be applied by sentencing courts guided by the legislative guidepost of the maximum penalty and longstanding sentencing principles enabling courts to balance the various purposes of sentencing in determining appropriate outcomes in individual cases.

Recommendation 10: Do not expand the list of offences carrying a standard non-parole period.

Principles to be Applied in Determining SNPP Offences (Question 4.2)

If SNPPs are to be retained, they should be reserved for the most serious category of offences punishable by terms of imprisonment of 20 years or longer.

ALS supports the position of the Law Society of NSW in its preliminary submission that a "nuanced investigation" would be required before consideration is given to increasing any existing SNPPs.

If there is to be any consideration of expansion of the SNPP scheme in NSW, we support a comprehensive review of the scheme, considering the appropriateness of prescribed maximum penalties, the range of conduct captured by relevant offence provisions, and whether sentencing patterns indicate that an SNPP is necessary.

Recommendation 11: Conduct a comprehensive review of the SNPP scheme in NSW prior to considering any increases to existing SNPPs or expansion of the scheme.

Process for Setting SNPPs (Question 4.3)

In relation to the process for setting a SNPP period, we do not consider that there is a basis to increase the upper limit for the length of a SNPP from 37.5% of the maximum penalty available for an offence.

[22] Bureau of Crime Statistics and Research, *NSW Custody Statistics: Quarterly update March 2023* (Full Report, May 2023) 23. See also Aboriginal Legal Service (NSW/ACT) Limited, 'NSW prisons more unequal than ever with record level of Aboriginal people behind bars' (Media Release, 30 May 2022).

In many cases, it is appropriate for a SNPP to be far shorter to take into account the range of non-custodial sentencing outcomes imposed for the offence in question and accurately reflect the seriousness of an offence at the middle of the range of objective seriousness for a given offence.

Similar Offences Not Having a SNPP (Question 4.5)

The ALS opposes a SNPP being prescribed for the offences under s 36(1), s 74(1) and s 62(1).

We strongly oppose raising SNPPs for any offences without a strong evidence base supporting the need to do so. The fact that these offences carry the same maximum penalty as other offences which carry a SNPP does not justify prescribing a SNPP in circumstances where no SNPP is currently prescribed.

Recommendation 12: Do not introduce a standard non-parole period for ss 36(1), 74(1) and 62(1).

Difference in SNPP of Similar Offences (Question 4.7)

As discussed above, s 7(1) captures an extremely wide range of offending behaviour. We adopt the Sentencing Council's view that capturing a wide range of offending behaviour may be a factor justifying exclusion of an offence form the SNPP scheme (Consultation Paper at [4.59]).

We also note that offences charged under s 7(1) are overwhelmingly dealt with summarily, indicating that the types of conduct being captured by the offence are generally of a lower level of seriousness. We support the abolition of the SNPP for s 7(1).

Recommendation 13: Abolish the standard non-parole period for s 7(1).

Principles of Sentencing (Questions 5.4 – 5.7)

The ALS is supportive of evidence-based sentencing reforms, particularly reforms which foreground the importance of connection to culture and community for Aboriginal and Torres Strait Islander people in addressing the statutory purposes of sentencing.

We consider that any proposed amendments to s 21A of the *Crimes (Sentencing Procedure) Act 1999,* to add or remove aggravating and mitigating factors to be taken into account on sentence, should not be undertaken in the context of a review confined in scope to weapons offences.

We recommend that such proposals be considered as part of a separate, comprehensive review of the current sentencing regime in NSW which includes specific consideration of implementing Recommendation 6–1 of the Australian Law Reform Commission Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples that sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander offenders, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.[23]

Recommendation 14: Conduct a comprehensive review of sentencing in NSW to consider whether s 21A of the Crimes (Sentencing Procedure) Act 1999 requires amendment, including specific consideration of recommendations to require consideration of the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.

Summary Offences

Summary offences considered by the review (Question 6.1)

[23] Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report No 133, December 2017) 269 [7.157]–[7.158].

The ALS opposes any currently summary offences being made indictable.

Knife Offences (Question 6.2)

The ALS opposes making s 11D and s 11F of the *Summary Offences Act 1988* (NSW) indictable offences. As noted in the Consultation Paper at page 90, there have been no finalised charges for s 11D since 2013, and only one finalised charge for s 11F. Section 11D is currently a fine only offence. The available evidence discloses no basis upon which to elevate its seriousness or increase the applicable penalty.

Recommendation 15: Do not make any currently summary offences, including the offences in s 11D and s 11F of the *Summary Offences Act 1988* (NSW), indictable offences.

We consider that certain types of bladed implements should be excluded from the definition of a knife, including scissors, screwdrivers, multi-tools, and bottle openers with a folding design known as a 'waiter's friend'. These are common household items which are readily purchased, and generally include small or blunt blades which are incapable of inflicting serious physical injury with ease.

As discussed in our preliminary submission, contrary to the doubt expressed by some members of Parliament in recent debate regarding the insertion of s 93IA into the *Crimes Act 1900* (NSW),[24] ALS clients experiencing homelessness are often charged for being in possession of such implements for innocuous reasons such as food preparation, making shelter or signs, or for personal grooming.[25] People with disability and young people are overrepresented in the cohort of clients we represent in relation to prosecutions for custody of a knife.

Recommendation 16: Exclude implements such as scissors, bottle openers and multi-tools from the definitions in s 93IA of the *Crimes Act 1900* (NSW).

The ALS supports the addition of a factor to the list of reasonable excuses for custody of a knife that relates to the experience of homelessness directly, including, *but not limited to*, having a knife for the purposes of preparing shelter, for food preparation or personal grooming. This reasonable excuse should be introduced in conjunction with the introduction of a specific class of 'knife', including scissors or multi-tools, which are predominantly used for such purposes.

While various 'reasonable excuse' exclusions are already a feature of the legislation, police rarely accept these explanations and proceed to charge. Many clients choose not to defend these charges at court in response to the various pressures on accused persons in NSW to plead guilty, including the prospect of lengthy delays awaiting finalisation, often subject to onerous bail conditions or time in custody on remand. As discussed in our preliminary submission, clients may prefer to plead guilty rather than give evidence, generally out of a concern that their account will not be accepted. Even where charges are successfully defended on the basis of a reasonable excuse, the criminal process inflicts harm on accused persons by virtue of having been stopped, searched and arrested, often in public, then subjected to the uncertainty, stress and further public shame and stigmatisation wrought by the court process.

The inclusion of unambiguous wording directly relating to the experience of homelessness may encourage police to exercise their discretion not to charge and prevent the unnecessary entry of vulnerable people into the criminal legal process, where their disadvantage is compounded.

We observe that possession of a knife in a car is sufficient to constitute possession of a knife in a public place in NSW. People experiencing homelessness, including victim-survivors of domestic and family

[24] New South Wales, *Parliamentary Debates,* Legislative Council, 29 June 2023, 51 (The Hon. Tanya Mihailuk, Member of the Legislative Council) accessed via <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-92499>.
[25] Aboriginal Legal Service (NSW/ACT) Limited, Preliminary Submission

violence, are often are forced to live in their cars, and these circumstances should be taken into account when a knife is found in a vehicle.

Recommendation 17: Introduce an additional factor relevant to the consideration of reasonable excuse for possession of a knife under s 92IB which relates to the experience of homelessness.

The ALS supports the reinstatement of the word "solely" to s 93IB(4) to leave open the possibility of a statutory defence where having custody of a knife for self-protection (or protection of another) is acknowledged in combination with another reasonable excuse, such as for preparing shelter or food.

ALS clients charged with custody of a knife offences frequently experience multiple, intersecting forms of marginalisation and disadvantage, such as young people, people with disability or victim-survivors of domestic and family violence experiencing homelessness. Vulnerable persons accused of knife offences should not be deprived of a statutory defence in circumstances where they acknowledge that one of the purposes for custody of the relevant implement was for self-defence or defence of another.

Recommendation 18: Allow the excuse of self-defence, or defence of another person, to be a reasonable excuse when mixed with other purposes.

Penalty Notice Offences (Questions 6.3–6.5)

As observed above, in our experience, even where a person suspected of committing a knife offence raises a legitimate purpose for having custody of a knife directly related to their homelessness status, police rarely exercise discretion not to charge.

The ALS cautiously supports the expanded availability of penalty notices for custody of knife offences, including subsequent offences, so that police are provided with an alternative to commencement of criminal proceedings in circumstances where they are unwilling to exercise their discretion to take no action. We also support expansion of the availability of penalty notices to the 14 fine-only offences under the *Weapons Prohibition Act* and three fine-only offences in the *Weapons Prohibition Regulations*.

Our qualified support for the expansion of penalty notices to include these offences is predicated on the desirability of promoting avenues for 'diversion' from the criminal court process in recognition of the urgent need to address the over-incarceration for Aboriginal and Torres Strait Islander adults and young people. In circumstances where police overwhelmingly exercise their discretion to charge our clients, it is desirable that police are provided with, and adequately trained and supported to make appropriate use of, alternatives to direct criminalisation.

In supporting this reform, we acknowledge that penalty notices are not truly a 'diversionary' option for vulnerable people experiencing socio-economic disadvantage due to their well-known effects in compounding disadvantage and entrenching poverty, as well as the risk of secondary criminalisation through punitive sanctions for non-payment of fines (for example, the risk of being fined or charged for driver licensing offences due to licence suspension related to fine default).[26]

We also observe that police are less likely to exercise discretionary powers to 'divert' Aboriginal and Torres Strait Islander people from criminal charges than non-Aboriginal people, even where alternatives are available. For example, a recent NSW Bureau of Crime Statistics and Research study in relation to the NSW Cannabis Cautioning scheme found that 12% of Aboriginal adults with a small

[26] See, eg, Sophie Clarke, Suzie Forell and Emily McCarron, 'Fine but Not Fair: Fines and Disadvantage' (Law and Justice Foundation of NSW Justice Issues Paper No 3, November 2008) 6; Julia Quilter and Russell Hogg, 'The Hidden Punitiveness of Fines' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 9, 15–16; Luke McNamara et al, 'Homelessness and contact with the criminal justice system: Insights from specialist lawyers and allied professionals in Australia' (2021) 10 *International Journal for Crime, Justice and Social Democracy* 111, 121.

amount of cannabis were cautioned by NSW Police, compared to 44% of non-Aboriginal adults.[27] NSW Police are also less likely to utilise *Young Offenders Act* diversionary options for Aboriginal young people than non-Aboriginal young people.[28]

Expansion of penalty notices to include the above offences should be accompanied by improved training and education for NSW Police about the unintended punitive impacts of both penalty notices and charges for vulnerable people and improved cultural competency training in relation to interacting with Aboriginal and Torres Strait Islander communities. Expansion of penalty notices to include these offences should be accompanied by action by NSW Police and the NSW Government to implement all 12 recommendations of the Law Enforcement Conduct Commission (LECC) in its NSW Police Force Aboriginal Strategic Direction 2018-2023 monitoring report,[29] in particular, the recommendation for NSW Police to publish a Closing the Gap delivery plan which states how it will implement the priority reform areas and what it will take to help NSW achieve targets 10 and 11 to reduce over-representation.

We also support reforms to the *Fines Act 1996* to expand the application of the Attorney-General's Caution Guidelines under the Fines Act to police officers so that there is an express requirement for police to take into account matters such as a person's homelessness status, mental illness or intellectual disability, age for children under 18, and various factors related to the level of risk and seriousness of the suspected offending, prior to issuing a penalty notice.

Recommendation 19: Expand the list of offences eligible to be dealt with by way of a penalty notice to include custody of knife offences, including subsequent offences, as well as the 14 identified fine only offences in the *Weapons Prohibition Act* and three fine only offences in the *Weapons Prohibition Regulation*.

Recommendation 20: Expand the application of the Attorney-General's *Caution Guidelines Under the Fines Act 1996* to NSW Police officers.

Alternative Approaches to Weapons Offences (Question 6.6)

The ALS supports evidence-based, holistic approaches to addressing the behaviour sought to be regulated by criminalisation, prioritising education and culturally safe, community-led responses developed in partnership with Aboriginal and Torres Strait Islander communities in line with the obligations of the NSW Government under the National Agreement on Closing the Gap.

The ALS strongly opposes the introduction of any additional police powers as a means of addressing weapons related offending, including powers to search the general public for weapons using metal detectors or 'wands'.

There is an overwhelming body of evidence demonstrating that Aboriginal and Torres Strait Islander people are more likely to be subjected to 'proactive' policing practices than non-Aboriginal people, and any expansion of police powers is likely to disproportionately impact the communities serviced by the ALS. Our experience as a legal services provider is supported by data which shows that Aboriginal people are disproportionately subject to powers of stop and search, issued with move-on directions, and charged with criminal offences, including for conduct such as offensive language or resist arrest, arising out of police-initiated interactions.[30] The LECC recently found that the use of

[27] Adam Teperski and Sara Rahman, 'Why are Aboriginal adults less likely to receive cannabis cautions?' (Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 258, June 2023).
[28] See our response to Questions 2.1 and 2.2 from the Issues Paper, below.
[29] Law Enforcement Conduct Commission, *NSW Police Force Aboriginal Strategic Direction 2018-2023 monitoring report* (23 October 2023).
[30] See, eg, Tamsin Rose, 'NSW police strip-searches of Indigenous people rose 35% in past 12 months and included 11 children, data reveals' (*The Guardian*, 17 October 2023); Nigel Gladstone, 'Children searched more than 100,000 times by NSW police' (*Sydney Morning Herald*, 13 February 2023); Michael McGowan, 'NSW police disproportionately target Indigenous people in strip searches' (*The Guardian*, 16 June 2020).

proactive policing strategies in the form of the Suspect Target Management Plan by NSW police "was unreasonable, unjust, oppressive and may have been improperly discriminatory in its effect" and that there was "a systemic pattern of disproportionately high representation of young Aboriginal people selected for STMP targeting".[31] In a separate review of consorting in NSW, the LECC also found that Aboriginal people were disproportionately represented as subjects of the consorting law.[32]

Policing practices are a key driver of over-incarceration of Aboriginal and Torres Strait Islander people. Recent BOCSAR data presented to the ALS and other justice stakeholders shows that the exponential increase in the number of Aboriginal and Torres Strait Islander people on remand is linked to an increase in the number of court actions by police which is driving bail refusal numbers, while recent research confirmed that policing is a "major contributor" to imprisonment rates across jurisdictions.[33] The LECC also recently considered statistics in relation to the exercise of police powers and concluded that NSW Police officers "may be using their discretion in a way that causes more Aboriginal people to come into the criminal justice system", finding that this is "at odds" with priorities of the NSW Police Force under its own previous Aboriginal Strategic Direction, and the objectives of the National Agreement on Closing the Gap.[34]

We strongly urge against the introduction of additional powers for police outside of the safeguards established by the *Law Enforcement (Powers and Responsibilities) Act 2002* ('LEPRA'). While the Consultation Paper posits that the ability for police to conduct searches of the general public in the absence of a warrant or forming reasonable suspicion is 'more restricted' than in other jurisdictions, we consider that the existing statutory safeguards and preconditions for the exercise of invasive police powers under LEPRA are a fundamental protection for the rights of members of the public to occupy public spaces without justified interference with their privacy and bodily autonomy, and that these interests must be balanced against a desire to pre-emptively detect crime. They are also an important measure contributing to the protection of individual rights recognised in international law,[35] which NSW Parliament has explicitly included as a factor weighing against the admission of evidence obtained improperly or in contravention of Australian law (such as LEPRA) in court proceedings.[36]

We also note the observations in the Consultation Paper that there has been "no evidence to suggest any deterrent effect" in other jurisdictions where 'wanding' has been introduced.[37]

Recommendation 21: Do not introduce additional police powers to address weapons related offending, including powers to search members of the general public using metal detectors.

Post-conviction schemes

The ALS strongly opposes the introduction of any additional post-conviction schemes which confer powers on police to exercise powers against individuals in the absence of reasonable suspicion or a warrant, including Serious Violence Reduction Orders (SVROs).

[31] Law Enforcement Conduct Commission, *Operation Tepito: An investigation into the use of the NSW Police Force Suspect Targeting Management Plan on children and young people* (Final Report, October 2023) 13.
[32] Law Enforcement Conduct Commission, *Review of the operation of the amendments to the consorting law under Part 3A Division 7 of the Crimes Act 1900* February 2023, 39.
[33] See, eg, Don Weatherburn 'Interjurisdictional differences in Australian imprisonment rates: Sentencing or arrest rates?' (2022) 55 *Journal of Criminology* 621, 623.
[34] Law Enforcement Conduct Commission, *NSW Police Force Aboriginal Strategic Direction 2018-2023 monitoring report* (Final Report, October 2023) 36–7.
[35] See, eg, International Covenant on Civil and Political Rights, art 17; Convention on the Rights of the Child, art 16; Convention on the Rights of Persons with Disabilities, art 22.
[36] See, eg, *Evidence Act 1995* (NSW) s 138(3)(f).
[37] Janet Ransley et al, *Review of the Queensland Police Service Wanding Trial* (Griffith Criminology Institute, August 2022) iv.

SVROs were introduced for a two-year trial in the United Kingdom in April 2023. We submit that any consideration of the implementation of a similar scheme in NSW would be inappropriate in the absence of a comprehensive evaluation of the UK scheme.

We also consider that there should be no introduction of additional post-conviction schemes which place conditions on people who have been convicted of weapon-related offences without first reviewing the existing Firearm Prevention Order (FPO) and Weapon Prevention Order (WPO) schemes. The FPO scheme has not been reviewed since 2016.[38] In our experience, FPOs:

- are disproportionately imposed against Aboriginal children;
- lead to frequent searches of individuals and their property in circumstances where there is no basis to suspect they are in possession of a firearm;
- lead to charges being laid for non-weapon related offences, such as low-level drug possession for personal use; and
- are often imposed against individuals with no history of convictions for weapons offences.

Data provided by NSW Police in Budget Estimates confirms that in 2022/23, 45% children against whom FPOs were imposed identified as Aboriginal or Torres Strait Islander.[39]

Recommendation 22: Do not introduce additional schemes that place conditions on adults who have been convicted of weapon-related offences.

Recommendation 23: Review the FPO and WDO schemes to evaluate their impacts, including their impacts on Aboriginal and Torres Strait Islander communities, and their effectiveness in achieving their stated aims.

Characteristics of weapons offenders (Question 6.7)

As discussed in our preliminary submission, marginalised individuals are regularly charged with custody of knife offences. In our experience representing Aboriginal and Torres Strait Islander people in contact with the criminal process, the following groups are overrepresented:

- Clients experiencing homelessness;
- Women who are experiencing domestic violence;
- People with cognitive impairment or intellectual disability;
- People with mental health challenges; and
- Young people.

We consider that policing practices influence the composition of this cohort of clients. Young people, people experiencing homelessness, people with disability including mental illness and cognitive impairments, and people from cultures which prioritise communal space over private space, including Aboriginal and Torres Strait Islander peoples, by virtue of their visibility in public spaces, are at higher risk of being proactively approached by police and subjected to powers of stop and search.

In the 2022/23 financial year, the ALS represented 511 clients charged with custody of a knife (both first and subsequent offences):

- 431 clients identified as male (84%)
- 78 clients identified as female (15%)
- 1 client identified as transgender
- 1 client's gender was unknown

[38] New South Wales Ombudsman, *Review of police use of the firearms prohibition order search powers: Section 74A of the Firearms Act 1996* (August 2016).
[39] Parliament of NSW, Portfolio Committee No 5, Responses to Questions Taken on Notice in Budget Estimates Hearing 7 November 2023, Tab A, Table 2.

- 90 clients were children, including three children under 12 years of age (18%)
- 316 clients had a disability (62%)[40]
- 26 clients reported being homeless.[41]

Children and Young People

Pre-Court Diversion (Question 2.1)

The ALS is in favour of increased pre-court diversion for Aboriginal and Torres Strait Islander young people. As noted above, police are less likely to exercise their discretion to divert Aboriginal young people under the *Young Offenders Act 1997* (YOA). BOCSAR NSW Recorded Crime Statistics data for 2022 show:

- non-Aboriginal young people received YOA warnings (2889) in far greater numbers than Aboriginal young people (889);
- non-Aboriginal young people (5043) received more cautions than Aboriginal children (2436);
- despite being smaller in number relative to the size of the general population, Aboriginal young people received more Youth Justice conferences (466) – the most onerous sanction under the YOA – than non-Aboriginal young people (364).[42]

Children's Court penalties (Question 3.1)

The ALS considers that the range of penalties and sentencing options available to the Children's Court under the *Children (Criminal Proceedings) Act 1987* and *Young Offenders Act 1997* is appropriate. The sentencing regime available in the Children's Court jurisdiction provides a robust apparatus for dealing with offences ranging from the lowest level up to very serious offences, with a strong emphasis on diversion and rehabilitation taking into account the principles embodied in the jurisdiction.

Youth Koori Court (Question 3.2)

The ALS considers that the Youth Koori Court sentencing process is an important component of the Children's Court sentencing apparatus for Aboriginal and Torres Strait Islander young people facing potentially serious sentencing outcomes.

The ALS appears for Aboriginal and Torres Strait Islander children in the Youth Koori Court at all three venues where the Court sits (Surry Hills, Parramatta and Dubbo). A recent evaluation of the Youth Koori Court found that it generally achieves better outcomes for Aboriginal young people by addressing identified needs and underlying factors driving contact with the criminal process, and adopting a culturally safe approach which empowers participants and the Aboriginal community.[43] Recent research suggests an association between participation in the YKC and reduced risk of imprisonment, without any adverse impact on re-offending rates.[44]

Sentencing Principles (Question 3.3)

The ALS considers that the sentencing principles which apply to young people being sentenced for weapons offences in NSW are appropriate. We recommend against the introduction the approach taken in England and Wales following the decision in *R v Povey* [2008] EWCA Crim 1261.

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[40] The disability status of 90 clients (18%) was unknown.
[41] This is likely to be significantly underreported as the availability of demographic data is reliant on clients being willing to disclose this information to their solicitor at the time of receiving a service from the ALS.
[42] NSW Bureau of Crime Statistics and Research (BOCSAR), 'NSW Recorded Crime Statistics January to December 2022: Number of proceedings under the Young Offenders Act initiated by NSW Police by postcode of incident, Aboriginality of person of interest, type of YOA proceeding, and proportion that were a warning (excl. transport regulatory)' (2023; reference: ac23-22377).
[43] Inside Policy, *An Evaluation of the Youth Koori Court Process* (Final Report, 6 June 2022).
[44] Evarn J Ooi and Sara Rahman, "The impact of the NSW Youth Koori Court on sentencing and re-offending outcomes" (BOCSAR, *Crime and Justice Bulletin* No CJB248, April 2022).

The UK Sentencing Guideline is incompatible with long-standing principles governing sentencing for children in NSW, including the principles espoused in s 6 of the *Children (Criminal Proceedings) Act 1987* and the statutory precondition for the imposition of a custodial sentence on a child that the court finds that it would be "wholly inappropriate" to impose any other available penalty.[45]

Recommendation 24: Do not adopt the approach to sentencing children in England and Wales following the decision in *R v Povey* [2008] EWCA Crim 1261.

Indictable offences (Question 3.4) and serious children's indictable offences (Question 3.5)

Children who are dealt with "according to law" in the District or Supreme courts for serious children's indictable offences (SCIOs), or other indictable offences committed from the Children's Court, may be sentenced to one of the options available under the *Crimes (Sentencing Procedure) Act 1999*, with the exception of an Intensive Correction Order (ICO), which is unavailable if the person being sentenced is under the age of 18 years.[46]

This exclusion means that a court that has sentenced a person under 18 years of age to imprisonment in respect of one or more offences is unable to make an ICO directing that the sentence be served by way of intensive correction in the community. This appears to be a lacuna in the range of options available to sentencing courts in respect of children under 18 years of age, with no options available other than a community-based order or full-time imprisonment despite the availability of an ICO as an alternative to full-time imprisonment for adults.

There does not appear to be a practical bar to the imposition of an ICO on a person under 18 years of age, with Youth Justice able to provide supervision to children sentenced to community corrections orders.

Courts sentencing children "according to law" take into account the special principles applicable to children under s 6 of the *Children (Criminal Proceedings) Act 1987*,[47] including the principles that:

- It is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption: s 6(c);
- It is desirable, wherever possible, to allow a child to reside in his or her own home: s 6(d);
- The penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind: s 6(e); and
- It is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties: s 6(f).

Making ICOs available for children would provide courts with an additional sentencing option for giving effect to these principles in appropriate cases.

Recommendation 25: Make Intensive Correction Orders available to courts sentencing children under 18 "according to law".

Prevalence (Question 4.1) and Sentencing Patterns for Focus Offences (Question 5.1)

The ALS notes the acknowledgement in the Issues Paper that there has been a general downward trend in weapons offences among 10–17 year olds.

[45] *Children (Criminal Proceedings) Act 1987* (NSW) s 33(2).
[46] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7(3).
[47] *R v SDM* (2001) 51 NSWLR 530.

We also note the statistics presented in the Issues Paper about sentencing trends for the focus offences, and consider that sentencing courts in NSW are using the robust sentencing apparatus available to them to appropriately respond to weapons offences committed by children.

We reiterate our support for evidence-based law and policy reform, and do not consider there is any factual basis for increasing penalties for children and young people in relation to weapons offences.

Understandable community concern around high-profile, isolated incidents which receive significant media attention is best addressed through community education directed at correcting public misconceptions about the nature and extent of criminal activity in the community, and improved public understanding of criminal law and sentencing.

Recommendation 26: Prioritise community education directed at correcting public misconceptions about the nature and extent of crime in the community, and improving public understanding about the criminal law and sentencing.

Increased penalties and mandatory sentences (Questions 6.3 and 6.4)

The ALS opposes the introduction of increased penalties and mandatory/minimum sentences for young people for the reasons set out above in relation to adults.

As stated above, we do not consider there is an evidence base justifying the conversion of any currently summary offences to indictable offences.

We note that, in 2022, approximately 20% of all those dealt with by police for prohibited weapons and regulatory offences received a formal warning,[48] and that the conversion of the former s 11C and s 11E offences under the *Summary Offences Act 1988* has rendered young persons accused of these offences ineligible for warnings under the *Young Offenders Act 1997.*

Recommendation 27: Make regulations enabling *Young Offenders Act* warnings to be issued in relation to the Crimes *Act 1900* (NSW) s 93IB and s 93IC offences.

Sentencing options under the Children (Criminal Proceedings) Act 1987 (NSW) (Question 6.5)

As noted above, the ALS considers that the range of penalties and sentencing options available under the *Children (Criminal Proceedings) Act 1987* is appropriate and well utilised by sentencing courts. The available sentencing options allow for the shaping of appropriate conditions, including good behaviour, supervision by Youth Justice, community service work and conditions to participate in nominated programs or engage with identified supports or services.

The ALS strongly opposes the introduction of electronic monitoring for children, noting the paucity of evidence establishing that electronic monitoring reduces reoffending,[49] and research indicating that strict monitoring may in fact have a criminogenic effect by undermining the rehabilitation of a young person by preventing them from engaging in pro-social activities.[50]

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[48] Issues Paper 65.

[49] A systematic review of 33 international studies on the effectiveness of electronic monitoring found that that electronic monitoring produced no significant positive effect compared to non-monitoring for "high risk" offenders of all ages: see Jyoti Belur et Al, 'A Systematic Review of the Effectiveness of the Electronic Monitoring of Offenders' (What Works Crime Reduction Systematic Review Series No 13, June 2017) 5. See also Queensland Police Service, Briefing Paper the Youth Justice Reform Select Committee - Youth Justice Reform in Queensland Inquiry (13 November 2022), which reports that one-third of young people subject to court ordered electronic monitoring in the current trial for 16-17 year olds have breached their bail undertaking while subject to an electronic monitoring device: 19.

[50] Elizabeth Colliver, 'Digital shackles or rehabilitative technology? Electronic monitoring in the Northern Territory's youth justice system' (Presentation to Australian & New Zealand Society of Evidence Based Policing Conference, March 18 2019). See also Ross Deuchar, 'The impact of curfews and electronic monitoring on the social strains, support and capital experienced by youth gang members and offenders in the west of Scotland' (2011) 12 *Criminology & Criminal Justice* 113.

Knife Crime Prevention Orders (Question 6.6)

The ALS opposes the introduction of Knife Crime Prevention Orders (KCPOs).

Existing non-custodial sentencing options available in NSW already provide for the imposition of the kinds of conditions available under KCPOs in the UK, including Youth Justice Conferencing and good behaviour bond conditions requiring participation in targeted programs or support including counselling and treatment.

See our responses to Questions 6.5 and 6.6 above, presenting evidence of the disproportionate impact of proactive policing on Aboriginal and Torres Strait Islander people which is linked to over-incarceration. Data provided by NSW Police in Budget Estimates confirms that in 2022/23, 45% of children against whom FPOs were imposed identified as Aboriginal or Torres Strait Islander,[51] a significant overrepresentation.

We reiterate our recommendation that no new post-conviction schemes should be introduced without first conducting a comprehensive review of the FPO and WDO schemes to evaluate their impacts, including their impacts on Aboriginal and Torres Strait Islander communities, and their effectiveness in achieving their stated aims.

Recommendation 28: Do not implement Knife Crime Prevention Orders in NSW.

Penalty Notice Offences (Question 6.7)

The Issues Paper notes that the effect of moving custody of knife offences into the *Crimes Act 1900* has rendered penalty notices unavailable to police as an alternative to a charge for young people suspected of committing these offences.

While the new, indictable offences are 'penalty notices' as defined by ch 7 pt 3 of the *Criminal Procedure Act 1986* and sch 4 of the *Criminal Procedure Regulation 2017*, they now fall within the ambit of the Criminal Infringement Notice (CIN) scheme. CINs are not available for persons under 18.[52]

Repealing s 335 of the *Criminal Procedure Act 1986*, which currently prevents CINs from being issued to children, would have the effect of making CINs available to children for all offences currently designated as 'penalty notice offences' under sch 4 of the *Criminal Procedure Regulation 2017*.

The ALS provides legal assistance and representation to Aboriginal and Torres Strait Islander children with frequently complex and intersecting needs through both its state-wide criminal law service and its state-wide fines service. The ALS holds considerable concerns about the harmful impacts of fines and fine debts for children due to their general inability to pay. Fines are especially punitive when issued to vulnerable children, including children in out-of-home care and children with disability.

Despite these concerns, for the qualified reasons set out above in response to Questions 6.3–6.5 of the Consultation Paper, we support expansion of the availability of CINs to persons under 18 years of age, to the extent that it would reinstate the availability of penalty notices for custody of knife offences for young people and mitigate against an increase in the 'direct' criminalisation of children suspected of these offences by providing police with an alternative to charge.

In doing so, we adopt the reflection paraphrased at [6.37] of the Issues Paper that, while penalty notices are a practical way of 'getting people out of court', they are not a perfect solution.

We reiterate our recommendation that expansion of penalty notices be accompanied by improved training and education for NSW Police about the punitive impacts of both penalty notices and charges for vulnerable people, and improved cultural competency training in relation to interacting with

[51] Parliament of NSW, Portfolio Committee No 5, Responses to Questions Taken on Notice in Budget Estimates Hearing 7 November 2023, Tab A, Table 2.
[52] *Criminal Procedure Act 1986* s 335.

Aboriginal and Torres Strait Islander communities. Expansion of penalty notices should be undertaken in tandem with action by NSW Police and the NSW Government to implement all 12 recommendations of the Law Enforcement Conduct Commission (LECC) in its NSW Police Force Aboriginal Strategic Direction 2018-2023 monitoring report,[53] in particular, the recommendation for NSW Police to publish a Closing the Gap delivery plan which states how it will implement the priority reform areas and what it will take to help NSW achieve targets 10 and 11 to reduce over-representation.

We also reiterate our recommendation that the application of the Attorney-General's Caution Guidelines under the Fines Act be expanded to include police officers so that there is an express requirement for police to take into account matters such as a person's homelessness status, mental illness or intellectual disability, age for children under 18, and various factors related to the level of risk and seriousness of the suspected offending, prior to issuing a penalty notice.

The ALS supports reduced fine amounts for young people, however considers that there should be a dedicated review of the NSW penalty notice system and its impacts on vulnerable people, including children, in order to determine appropriate penalty notice amounts or scaling to take into account a person's ability to pay. For the same reason, we also decline to express a view about whether the requirement under cl 14 *Young Offenders Act 1997* to consider all alternative diversionary options prior to issuing a penalty notice should be extended to additional offences.

Recommendation 29: Expand the availability of Criminal Infringement Notices ('penalty notices' under the Criminal Procedure Act 1986 to people under 18 of age by repealing s 335 *Criminal Procedure Act 1986*.

Recommendation 30: Conduct comprehensive review of the penalty notice system which includes extensive consultation on the appropriate limits or caps on fine amounts for vulnerable people including children.

Police Powers to Conduct Random Searches (Question 6.10)

Refer to our response and recommendations to Question 6.6 of the Consultation Paper, above.

Targeted rehabilitation, restorative justice, integrated approaches (Questions 6.8, 6.9, 6.11)

The ALS supports reduced reliance on criminalisation and punitive, carceral approaches to crime. We support increased investment in holistic, trauma- and disability- informed approaches to addressing factors underlying contact with the criminal legal system for Aboriginal and Torres Strait Islander young people. Wherever possible, relevant programs, services and supports should be delivered by local Aboriginal community-controlled organisations.

Wholesale systemic reform to keep both communities and individual young people safe and strong in their culture requires governments to work in partnership and through shared decision-making with Aboriginal communities towards achieving all 13 socio-economic outcomes and 4 priority reforms under the National Agreement on Closing the Gap. Progress towards implementing Priority Reform 2 (Building the Community-Controlled Sector)[54] and Priority Reform 3 (Improving Mainstream Institutions),[55] in particular, will be critical to increasing the availability of approaches which are place-based, community-led and culturally safe and, therefore, effective.

[53] Law Enforcement Conduct Commission, *NSW Police Force Aboriginal Strategic Direction 2018-2023 monitoring report* (23 October 2023).
[54] Outcome: There is a strong and sustainable Aboriginal and Torres Strait Islander community-controlled sector delivering high quality services to meet the needs of Aboriginal and Torres Strait Islander people across the country.
[55] Outcome: Governments, their organisations and their institutions are accountable for Closing the Gap and are culturally safe and responsive to the needs of Aboriginal and Torres Strait Islander people, including through the services they fund.