

Consultation
Paper

Weapons-related offences: sentencing adult offenders

SEPTEMBER 2023

NSW
Sentencing
Council

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Contact details

NSW Sentencing Council

Email: sentencingcouncil@justice.nsw.gov.au

Website: www.sentencingcouncil.nsw.gov.au

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Terms of reference

The Sentencing Council is asked to conduct a review of sentencing for firearms, knives and other weapons offences (focusing on but not limited to offences involving the use or carrying of firearms, knives and other weapons), and make any recommendations for reform that it considers appropriate.

In undertaking this review, the Sentencing Council should:

1. provide sentencing statistics for convictions and penalty notices (where relevant) over a five-year period;
2. provide information on the characteristics of offenders, sentence type and length;
3. provide background information, including:
 - a. the key sentencing principles and reasoning employed by sentencing judges;
 - b. the mitigating subjective features of offenders; and
 - c. any other significant factors considered in sentencing decisions that explain how courts come to their final decision on sentence (which may be done using case-studies or collation of predominate themes across cases);
4. consider whether the standard non parole periods where identified remain appropriate;
5. consider whether offences for which penalty notices are available remain appropriate;
6. consider whether the maximum penalties for the offences are appropriate with reference to other jurisdictions;
7. consider whether any existing summary offences should be made indictable offences;
8. consider any other matter the Council considers relevant.

Participants

The Council

The Hon Peter McClellan AM, KC (Chairperson)

Professor John Anderson

Ms Christina Choi

Assistant Commissioner Scott Cook APM

Ms Thea Deakin-Greenwood

Ms Sally Dowling SC

Mr Mark Follett

Mr Craig Hughes-Cashmore

Mr Wayne Gleeson

Ms Felicity Graham

Acting Magistrate Timothy Keady

Ms Belinda Rigg SC

Mr Peter Severin

Ms Kerrie Thompson

Law Reform Commission and Sentencing Council Secretariat

Ms Carol Hoang, Policy Officer

Ms Laura Schultz, Senior Policy Officer

Ms Alexandra Sprouster, Policy Manager

Ms Madison Thompson, Policy Officer

Mr Joseph Verity, Intern

Mr Joseph Waugh PSM, Senior Policy Officer

Ms Anna Williams, Research Support Librarian

Ms Angela Xu, Intern

Acknowledgements

NSW Bureau of Crime Statistics and Research

Advocate for Children and Young People

1. Introduction

In brief

The Attorney General has asked the Sentencing Council to review sentencing for firearms, knives and other weapons offences, in particular offences involving the use or carrying of these weapons. A comprehensive review of sentencing for these offences has not been undertaken for some time. There have been some high-profile criminal incidents involving knives and firearms in recent years.

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Background to the review

Terms of reference

- 1.1 On 4 November 2022, the Attorney General asked the Sentencing Council to review sentencing for firearms, knives and other weapons offences. The terms of reference are as follows:

The Sentencing Council is asked to conduct a review of sentencing for firearms, knives and other weapons offences (focusing on but not limited to offences involving the use or carrying of firearms, knives and other weapons), and make any recommendations for reform that it considers appropriate.

In undertaking this review, the Sentencing Council should:

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 - (c) any other significant factors considered in sentencing decisions that explain how courts come to their final decision on sentence (which may be done using case-studies or collation of predominate themes across cases);

- (4) consider whether the standard non parole periods where identified remain appropriate;
- (5) consider whether offences for which penalty notices are available remain appropriate;
- (6) consider whether the maximum penalties for the offences are appropriate with reference to other jurisdictions;
- (7) consider whether any existing summary offences should be made indictable offences;
- (8) consider any other matter the Council considers relevant.

1.2 Our call for preliminary submissions on the terms of reference opened on 5 December 2022 for three months. We received 13 submissions (see appendix B), most of which are available on our website.

1.3 We conducted three preliminary consultations with key stakeholders, specifically on the issue of knife-related offences, and one consultation with young people with lived experience of weapon-related crime (see appendix C).

The need for the review

1.4 Recent media reporting, as well as recent legislative reforms passed by the NSW parliament, have suggested a need for review of firearms, knives and other weapons offences (in particular offences involving use or carrying).

1.5 In announcing the review, the former Attorney General, Mark Speakman SC MP, stated:¹

This is the first time that such a comprehensive weapons review will have been undertaken in NSW by the Sentencing Council. A limited review of firearms offences was last undertaken by the Council in 2004, and some knife offences have never been reviewed.

In requesting this review, I want to make sure that sentencing laws relating to possession and use of firearms, knives and other weapons remain in line with community expectations and that law enforcement agencies have access to the tools they need to keep our streets safe.

1.6 Prior to the issuing of the terms of reference, there had been some media reporting on high profile knife-related incidents in NSW. These included a school stabbing involving a religious knife, known as a kirpan, in 2021. The young offender was sentenced to a three-year community corrections order in December 2022. It also included a stabbing incident at the 2022 Sydney Royal Easter Show, resulting in the death of a young person. Criminal proceedings arising from this incident have not yet been finalised.

1. NSW, Department of Communities and Justice, "Review of Firearms, Knives and Weapons Offences" (Media Release, 7 November 2022) <<https://sentencingcouncil.nsw.gov.au/documents/our-work/firearms-knives-and-other-weapons/media-release-firearms-knives-other-weapons.pdf>> (retrieved 22 August 2023).

- 1.7 The media has recently reported on a number of serious weapon-related offences, such as:
- a fatal stabbing incident in Campbelltown involving a paramedic victim in April 2023
 - a fatal shooting incident in Bondi Junction involving a single victim in June 2023
 - a shooting incident in Marrickville involving two victims in July 2023
 - a fatal shooting incident in Canterbury involving a single victim in July 2023
 - a fatal shooting incident in Greenacre involving a single victim in July 2023,
 - a shooting incident in Greenacre involving three victims in July 2023,
 - a shooting incident in Campsie involving a single victim in September 2023, and
 - a shooting incident in Blackett involving a single victim in September 2023.
- 1.8 On 10 November 2022, the then shadow Attorney General (now Attorney General) Michael Daley MP introduced the Crimes Amendment (Custody of Knives) Bill 2022. This Bill sought to repeal s 11C of the *Summary Offences Act 1988* (NSW) (*Summary Offences Act*), an offence that is within the scope of the review, and to replace it with an indictable offence in the *Crimes Act 1900* (NSW) (*Crimes Act*). The Bill lapsed on prorogation.
- 1.9 On 20 June 2023, the current Attorney General Michael Daley MP introduced the Criminal Legislation Amendment (Knife Crimes) Bill 2023. This Bill passed parliament on 29 June 2023 and was assented to on 13 July 2023. It will repeal s 11C and s 11E of the *Summary Offences Act* and will create new indictable offences in the *Crimes Act*. These reforms are discussed further in chapter 6.

Outline of this consultation paper

- 1.10 The purpose of this consultation paper is to seek your views on key issues that have been identified in our preliminary research and analysis, as well as concerns that have been raised in preliminary submissions and consultations.
- 1.11 We have focused on adult weapon-related offending in NSW. We intend to release a separate issues paper that will cover weapon-related offending by children and young people in due course.
- 1.12 We have not structured the consultation paper with separate chapters for each weapon type because the circumstances of offending and applicable sentencing issues are often interrelated.
- 1.13 Where we refer to data in this chapter, this has involved a preliminary analysis only. A more detailed analysis of data will be included in our final report, where relevant.

- 1.14 In **chapter 2 – the offences**, we provide an overview of the offences relevant to the review, and explain which offences we have chosen to focus on (the focus offences) and why. We seek your feedback on this approach. This chapter also provides statistics on prevalence and sentencing outcomes for the focus offences.
- 1.15 In **chapter 3 – maximum penalties**, we briefly explain the role of maximum penalties as a guidepost for sentencing. We then outline, and seek your feedback on, the specific issues raised in preliminary submissions and consultations about maximum penalties for some prohibited weapons and firearms offences.
- 1.16 In **chapter 4 – standard non-parole periods (SNPPs)**, we briefly explain the role of SNPPs as a guidepost for sentencing and outline our previous approach to SNPPs in 2013. We seek your feedback about the previous approach and its applicability to the review. We then outline, and seek your feedback on, specific issues raised in preliminary submissions and consultations about some prohibited weapons and firearms offences.
- 1.17 In **chapter 5 – sentencing principles and factors**, we outline the sentencing law and practice that is relevant to determining appropriate sentences for firearms, knives and other weapons offences. We seek your feedback on whether there are any other cases or issues we should consider, and we ask for specific feedback in relation to the issue of gel blasters.
- 1.18 In **chapter 6 – other issues**, we outline and seek your feedback on other issues relevant to the review:
- the summary offences relevant to the review, particularly in relation to knives, and whether any should be made indictable
 - the penalty notice offences relevant to the review, particularly in relation to knives and prohibited weapons, and whether these remain appropriate
 - alternative responses to crimes committed by adults involving firearms, knives and other weapons
 - the characteristics of offenders who are sentenced for relevant offences, and
 - the experiences of victims going through the sentencing process for relevant offences.
- 1.19 The **appendices** include:
- A – list of questions
 - B – list of preliminary submissions
 - C – list of preliminary consultations, and
 - D – glossary of penalties.

How to make a submission

- 1.20 We seek your responses to this consultation paper. To tell us your views you can send your submission to:

sentencingcouncil@justice.nsw.gov.au

or

Sentencing Council of NSW, Locked Bag 5000, Parramatta NSW 2124, Australia.

- 1.21 The closing date for submissions is **4 December 2023**.

Use of submissions and confidentiality

- 1.22 We generally publish submissions on our website and refer to them in our publications.
- 1.23 Please let us know if you do not want us to publish your submission, or if you want us to treat all or part of it as confidential.
- 1.24 We will do our best to keep your information confidential if you ask us to do so, but we cannot promise to do so. Sometimes the law or the public interest says we must disclose your information to someone else. In particular, we may be required to disclose your information under the *Government Information (Public Access) Act 2009* (NSW).

2. The offences

In brief

This chapter sets out the legislative frameworks for firearms, knives and other weapons offences in NSW, discusses the offences which will be the focus of the review, and outlines the most common penalties and sentencing outcomes for the offences we are focusing on.

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- 2.1 There are four main Acts in NSW which contain firearms, knives and other weapons offences. They are:
- the *Firearms Act 1996* (NSW) (*Firearms Act*), which regulates the possession and use of firearms
 - the *Weapons Prohibition Act 1998* (NSW) (*Weapons Prohibition Act*), which regulates prohibited weapons, including certain types of knives, military-style weapons, and miscellaneous articles such as body armour vests

- the *Crimes Act 1900* (NSW) (*Crimes Act*), which contains offences including possessing, carrying or using weapons, and more serious offences involving carrying or using a weapon in the course of other criminal conduct, and
- the *Summary Offences Act 1988* (NSW) (*Summary Offences Act*), which contains summary offences relating to carrying or using knives and offensive implements in a public place or school and selling knives to children under 16.

Firearms

Legislative framework

2.2 The *Firearms Act* was introduced in the aftermath of the Port Arthur massacre as part of a national approach to control firearms.¹ Section 3 of the *Firearms Act* sets out the principles and objects as follows:

- (1) The underlying principles of this Act are –
 - (a) to confirm firearm possession and use as being a privilege that is conditional on the overriding need to ensure public safety, and
 - (b) to improve public safety –
 - (i) by imposing strict controls on the possession and use of firearms, and
 - (ii) by promoting the safe and responsible storage and use of firearms, and
 - (c) to facilitate a national approach to the control of firearms.
- (2) The objects of this Act are as follows –
 - (a) to prohibit the possession and use of all automatic and self-loading rifles and shotguns except in special circumstances,
 - (b) to establish an integrated licensing and registration scheme for all firearms,
 - (c) to require each person who possesses or uses a firearm under the authority of a licence to prove a genuine reason for possessing or using the firearm,
 - (d) to provide strict requirements that must be satisfied in relation to licensing of firearms and the acquisition and supply of firearms,
 - (e) to ensure that firearms are stored and conveyed in a safe and secure manner,
 - (f) to provide for compensation in respect of, and an amnesty period to enable the surrender of, certain prohibited firearms.

2.3 A firearm is defined as 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 fire

1. *R v Cromarty* [2004] NSWCCA 54 [15]; *Firearms Act 1996* (NSW) s 3(1)(c).

firearm, or an air gun, but does not include a paintball marker within the meaning of the *Paintball Act 2018* or anything declared by the regulations not to be a firearm”.²

- 2.4 An air gun is defined as a gun that can propel, or is designed to propel, a projectile by means of air, gas (other than gas generated by an explosive) or a spring and is operated or designed for operation by means of a trigger or similar device.³
- 2.5 Pistols and prohibited firearms are types of firearms. A pistol is defined as a firearm of a prescribed dimension that is “reasonably capable of being raised and fired by one hand”.⁴ Prohibited firearms are listed in schedule 1 of the *Firearms Act* and include items such as machine guns, self-loading or pump action shotguns, firearms with attachments capable of muffling, reducing or stopping the noise caused by firing, and firearms that disguise or conceal the fact that they are firearms.⁵ The *Firearms Act* distinguishes between these two types of firearms and other types of firearms in terms of penalty, with offences involving pistols and prohibited firearms having higher penalties.⁶
- 2.6 Imitation firearms are governed by the *Firearms Act* in the same way as firearms, except that licences may generally not be issued for imitation firearms and there is no requirement to register an imitation firearm.⁷ An imitation firearm is defined as an object that “substantially duplicates in appearance” a firearm but does not include any object produced and identified as a children’s toy.⁸
- 2.7 Some gun-like objects that have other, more recreational uses have been found to be firearms. One example is a gel blaster, which propels hydrated gel pellets through a mechanism involving compressed air. Gel blasters have been found to meet the definition of firearm in NSW (as a result of falling within the definitions of an air gun and a pistol)⁹ or an imitation firearm (where it looks like a firearm and is not produced or identified as a children’s toy).¹⁰ Gel blasters are discussed further in chapters 3 (maximum penalties) and 5 (sentencing principles and factors).
- 2.8 A person must have a licence to use or possess a firearm. There are five categories of licences which involve progressively more serious firearms and impose more limitations on obtaining a licence. There are also specific licences for firearms

2. *Firearms Act 1996* (NSW) s 4(1) definition of “firearm”.

3. *Firearms Act 1996* (NSW) s 4(1) definition of “air gun”.

4. *Firearms Act 1996* (NSW) s 4(1) definition of “pistol”.

5. *Firearms Act 1996* (NSW) sch 1.

6. See, eg, *Firearms Act 1996* (NSW) s 7, s 7A.

7. *Firearms Act 1996* (NSW) s 4D(1).

8. *Firearms Act 1996* (NSW) s 4D(3)–(4) definition of “imitation firearm”.

9. *R v Zerafa* [2021] NSWDC 547 [12].

10. *R v Smith* [2023] NSWDC 88 [20]–[21]; *Firearms Act 1996* (NSW) s 4D(3)–(4) definition of “imitation firearm”.

dealers and firearms collectors. A person must establish a “genuine reason” to have a licence which can include recreation, primary production, business or employment and animal welfare. Personal protection and protection of property are not genuine reasons.¹¹

- 2.9 Permits are more limited than licences and can be issued allowing a person to acquire a firearm, allowing possession or use of a firearm by minors, for film/theatrical productions, or for shortening or conversion of firearms.¹²
- 2.10 The *Firearms Act* includes the following categories of offences:
- unauthorised use or possession of firearms, either because the person is not licensed or permitted to use a firearm (including because they are subject to a firearms prohibition order) or the firearm itself is not registered (part 2, division 1 and part 7)
 - offences relating to firearms dealers (part 5)
 - licence, permit, registration and safekeeping offences (part 2 divisions 2 and 3, part 3 and part 4), and
 - manufacture, purchase and supply offences (part 6).

Focus offences

- 2.11 The review will focus on firearms offences that relate to use or possession of firearms, and firearms offences that have standard non-parole periods (SNPPs).
- 2.12 Possession and use offences are generally the most prevalent offences in the *Firearms Act*. Four of the six highest volume offences in the *Firearms Act* (measured by total number of proven charges from 2013 to 2022) relate to the possession or use of firearms.¹³ Those four offences, starting with the highest volume, are:
- possess ammunition without authority (s 65(3))
 - possess unauthorised prohibited firearm or pistol (s 7(1))
 - possess unauthorised firearm (s 7A(1)), and
 - possess unregistered firearm (s 36(1)).
- 2.13 There are only two offences in the *Firearms Act* that had 1000 or more proven charges from 2013 to 2022 that did not relate to the use or possession of firearms, being not keeping a firearm safely (s 39(1)(a)) and the holder of a category A or B licence not having approved storage (s 40(1)).¹⁴ Other than these two offences, no

11. *Firearms Act 1996* (NSW) s 7-12.

12. *Firearms Act 1996* (NSW) s 28.

13. NSW Bureau of Crime Statistics and Research, ab23-22460, table 1.

14. NSW Bureau of Crime Statistics and Research, ab23-22460, table 1.

licensing or permit offence in the *Firearms Act* had more than 144 proven charges from 2013 to 2022.¹⁵

- 2.14 No firearms dealer offence had more than 38 charges from 2013 to 2022. No manufacturing, purchase and supply of firearms offence had more than 132 proven charges from 2013 to 2022. We have not heard any concerns from stakeholders about these types of offences.
- 2.15 We will be considering all four *Firearms Act* offences which have SNPPs. These are:
- the use or possession of a pistol or prohibited firearm (s 7),
 - unauthorised sale of a prohibited firearm or pistol (s 51(1A) and s 51(2A))
 - unauthorised ongoing sale of firearms (s 51B),
 - and unauthorised possession of more than three firearms any one of which is a prohibited firearm or pistol (s 51D(2)).
- 2.16 We heard concerns from some stakeholders about use and possession of firearms offences in the context of maximum penalties (chapter 3) and SNPPs (chapter 4).

Sentencing outcomes for focus offences

- 2.17 In 2022, custody was the most common penalty issued by the Local and higher courts to adults for possess a shortened firearm that is not a pistol (*Firearms Act*, s 62(1)(b)) and use of unauthorised pistol (s 7(1)), where this was the principal (most serious) offence (for adult defendants). Custody and community correction orders (whether supervised or unsupervised) were the equal most-common penalties for possess an unauthorised pistol (s 7(1)).¹⁶
- 2.18 In 2022, community correction orders (whether supervised or unsupervised) were the most common penalties for possess an unauthorised prohibited firearm (s 7(1)) or an unregistered pistol (s 36(1)) imposed by the Local and higher courts where those offences were the principal (most serious) offence (for adult defendants). Intensive correction orders were the most common penalty for possess more than three unregistered firearms, one of which is prohibited firearm or pistol (s 51D(2)) imposed by the Local and higher courts where that was the principal (most serious) offence (for adult defendants).¹⁷
- 2.19 In 2022, conditional release without conviction was the most common penalty for use unauthorised prohibited firearm (s 7(1)), possess or use unauthorised firearm (that is not a pistol or prohibited firearm) (s 7A(1)), possess an unregistered firearm

15. *Firearms Act 1996* (NSW) sections 25(1)(a), 25(1)(b), 36(1), 37(1)(a), 37(1)(b), 39(1)(a), 39(1)(b), 41(1), 42A(3), 82A(2)(b) and 51E; NSW Bureau of Crime Statistics and Research, ab23-22460, table 1.

16. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4.

17. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4.

(that is not a pistol or prohibited firearm) (s 36(1) and possess an unregistered prohibited firearm (s 36(1)), imposed by the Local and higher courts where those offences were the principal (most serious) offences (for adult defendants).¹⁸

- 2.20 For the focus offences relating to supply or sell firearms, custody was the result in every case but two out of twelve in 2022. An ICO was ordered for one supply pistol offence and a CCO with supervision was given for one unlawfully sell firearm parts on three or more occasions offence.¹⁹
- 2.21 For more explanation of these penalty types referred to above, see appendix D.

Prohibited weapons

Legislative framework

- 2.22 The *Weapons Prohibition Act* deals with weapons other than firearms. Section 3 of the *Weapons Prohibition Act* sets out the principles and objects as follows:

- (1) The underlying principles of this Act are –
 - (a) to confirm that the possession and use of prohibited weapons is a privilege that is conditional on the overriding need to ensure public safety, and
 - (b) to improve public safety by imposing strict controls on the possession and use of prohibited weapons.
- (2) The specific objects of this Act are as follows –
 - (a) to require each person who possesses or uses a prohibited weapon under the authority of a permit to have a genuine reason for possessing or using the weapon,
 - (b) to provide strict requirements that must be satisfied in relation to the possession and use of prohibited weapons,
 - (c) to provide an amnesty period to enable the surrender of prohibited weapons.

- 2.23 Prohibited weapons are identified in schedule 1 of the *Weapons Prohibition Act* and are categorised as follows:
- knives, including flick knives, ballistic knives and butterfly knives
 - military-style weapons, including any bomb, grenade, rocket, missile or mine, and flame throwers
 - miscellaneous weapons, including spear guns, crossbows, slingshots, darts, whips containing metal, taser guns, knuckle-dusters and anti-personnel spray
 - imitation weapons and concealed blades, and

18. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4.

19. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4.

- miscellaneous articles including body armour vests, handcuffs and silencers.
- 2.24 We discuss concerns raised about the wide range of prohibited weapons captured by the *Weapons Prohibition Act* in chapter 3.
- 2.25 The *Weapons Prohibition Act* has three categories of permits: general permits, weapons dealer permits, and theatrical weapons armourer permits. A general permit authorises a person to possess or use the prohibited weapon specified in the permit for the purpose established by the person as being the “genuine reason” for possessing or using the prohibited weapon.²⁰ These are similar to the genuine reasons for possessing a firearm under the *Firearms Act* but also include reasons relating to theatre, scientific purposes, heirlooms, public museum purposes, historical re-enactments and weapons collecting.²¹
- 2.26 The *Weapons Prohibition Act* offences can be categorised as follows:
- use or possession of prohibited firearms offences under part 2, division 1 and part 5 (unauthorised because the person does not have a permit to possess or use the prohibited weapon or because they are subject to a weapons prohibition order)
 - offences relating to weapons dealers (part 4)
 - permit and safekeeping offences (part 2 division 2 and part 4A), and
 - manufacture, purchase and supply offences (part 5).

Focus offences

- 2.27 The review will focus on offences that relate to the use or possession of prohibited weapons.
- 2.28 Use or possession of a prohibited weapon is one of the highest volume offences in the scope of the review, with 12,103 proven charges from 2013 to 2022 (28 of these related to possession or use of a military-style prohibited weapon).²² We also heard from stakeholders about this offence in the context of SNPPs (see chapter 4).
- 2.29 Offences relating to weapons dealing, manufacture, purchase, supply, and permits in the *Weapons Prohibition Act* have very low volumes of proven charges. No permit or safekeeping of prohibited weapons offence has exceeded 57 proven charges from 2013 to 2022.²³ There were a total of four proven charges for weapons dealer offences from 2013 to 2022,²⁴ and no manufacture, purchase or supply of

20. *Weapons Prohibition Act 1998* (NSW) s 8(1).

21. *Weapons Prohibition Act 1998* (NSW) s 11.

22. NSW Bureau of Crime Statistics and Research, ab23-22460, table 1.

23. *Weapons Prohibition Act 1998* (NSW) s 19(1)(a), s 32A(a).

24. *Weapons Prohibition Act 1998* (NSW) s 20(1), s 20A(3).

prohibited weapons offence has exceeded 35 proven charges in this time period.²⁵ We did not hear any concerns from stakeholders about these types of offences.

Sentencing outcomes

- 2.30 Fines were the most common penalty for possession or use of a prohibited weapon (other than a military-style weapon) in 2022, making up 42% (292) of occasions that the Local and higher courts sentenced adults where this was the principal (most serious) offence.²⁶ From 2013 to 2022, fines made up between 32% and 42% of all penalties for this offence per year, where it was the principal (most serious) offence (for adult defendants).²⁷
- 2.31 The next most common penalties for this offence in 2022 where it was the principal (most serious) offence (for adult defendants) was a community correction order (28% or 192). Only 8% (54) of penalties resulted in a custodial penalty in 2022.²⁸

Weapons offences under the *Crimes Act*

Legislative framework

- 2.32 The *Crimes Act* contains generally more serious offences covering many types of weapons, including firearms, knives, prohibited weapons and other items which may be used as weapons.
- 2.33 The *Crimes Act* has an overarching definition of “offensive weapon or instrument”, which captures:
- anything made or adapted for offensive purposes
 - anything that, in the circumstances, is used, intended to be used or threatened to be used for offensive purposes, whether or not it is ordinarily used for offensive purposes or is capable of causing harm; and
 - a “dangerous weapon”, defined as a firearm or imitation firearm under the *Firearms Act*, a prohibited weapon under the *Weapons Prohibition Act*, or a spear gun.²⁹

25. *Weapons Prohibition Act 1998* (NSW) s 23(1), s 23(3)(a), s 23A(1), s 23A(2), s 23B(1), s 24(1), s 24(3), s 25(a), s 25(b), s 25A(1)-(2), s 25B(1), s 26(a), s 28(1), s 31, s 32B(1), s 32C(1), s 32D(1); NSW Bureau of Crime Statistics and Research, ab23-22460, table 1.

26. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4.

27. NSW Bureau of Crime Statistics and Research, ab23-22643, table 3.

28. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4.

29. *Crimes Act 1900* (NSW) s 4(1) definition of “dangerous weapon” and “offensive weapon or instrument”.

- 2.34 The *Crimes Act* contains a number of offences that have a weapon either as an essential element of the offence or as an optional element. Offences with weapons as an optional element do not require a weapon to be involved in the commission of the offence for the offence to be proven. Where a weapon is involved in the commission of an offence, many of the offences provide for a higher penalty.
- 2.35 The *Crimes Act* weapons offences are under part 3 (offences against the person),³⁰ part 3A (offences relating to public disorder),³¹ part 4 (stealing and other similar offences),³² part 4AE (offences relating to aircraft, vessels et cetera)³³ and part 14A (miscellaneous offences).³⁴
- 2.36 The part 3 and part 4 offences are mostly offences where a weapon is an optional element; that is, the essential element of the offence is other criminal conduct (for example, attempted murder, resisting arrest, sexual assault or robbery) and there are optional elements which may apply where a weapon was involved.
- 2.37 The public order offences under part 3A, the part 4AE offences and the part 14A offences are those where a weapon is an essential element. These relate to possessing, discharging or carrying weapons,³⁵ placing or carrying weapons on board an aircraft or vessel,³⁶ being in an unlawful assembly while armed, or being apprehended carrying a razor.³⁷

Focus offences

- 2.38 The review will focus on the *Crimes Act* weapons offences which have SNPPs, as well as *Crimes Act* weapons offences which have high volumes of proven charges.
- 2.39 Five *Crimes Act* weapons offences had more than 1000 proven charges from 2013 to 2022: 7239 for armed with intent to commit an indictable offence (s 114(1)(a)), 2672 for robbery armed with an offensive weapon (s 97(1)), 1731 for use, threaten to use or possess an offensive weapon with intent to commit an indictable offence (s 33B(1)(a)), 1258 for carrying a cutting weapon upon apprehension (s 547D) and 1056 for use, threaten to use or possess an offensive weapon to prevent lawful detention (s 33B(1)(a)).³⁸

30. *Crimes Act 1900* (NSW) s 29, s 33A(1)-(2), s 33B(1)-(2), s 66C(2) and (4), s 66DE(1), s 61J(1), s 61JA(1), s 61K(b), s 80A(2A), s 91G(3).

31. *Crimes Act 1900* (NSW) s 93FB(1), s 93G(1), s 93GA, s 93H, s 93I(1)-(2).

32. *Crimes Act 1900* (NSW) s 97(1)-(2), s 98, s 109(2)-(3), s 111(2)-(3), s 112(2)-(3), s 113(2)-(3), s 114(1)(a) and s 154C(2).

33. *Crimes Act 1900* (NSW) s 207(2)(a)-(c) and s 208(3)(a).

34. *Crimes Act 1900* (NSW) s 545C(2) and s 547D.

35. *Crimes Act 1900* (NSW) s 93FB, s 93G, s 93GA, s 93H, s 93I.

36. *Crimes Act 1900* (NSW) s 207, s 208(3).

37. *Crimes Act 1900* (NSW) s 545C(2), s 547D.

38. NSW Bureau of Crime Statistics and Research, ab23-22460, table 1.

- 2.40 Six weapons offences in the *Crimes Act* have SNPPs and are considered further in chapter 4.
- 2.41 The public order offences under part 3A, which relate to possessing, discharging or carrying weapons, had much lower volumes of proven charges from 2013 to 2022. The highest volume of these offences is fire a firearm in or near a public place (s 93G(1)(b)), which had 241 proven charges over this period.

Sentencing outcomes

- 2.42 Weapons offences under the *Crimes Act* generally result in more serious penalties than offences under the *Firearms Act* and *Weapons Prohibition Act*.
- 2.43 In 2022, the Local and higher courts sentenced to custody in 30% (174) of occasions where armed with intent to commit an indictable offence (s 114(1)(a)), and 35% (58) of occasions where use, possess or threaten to use an offensive weapon with intent to commit an indictable offence (s 33B(1)(a)), where these offences were the principal (most serious) offence (for adult offenders).³⁹
- 2.44 In 2022, the Local and higher courts sentenced the offence of robbery armed with an offensive weapon to custody 77% (68) of occasions, with ICOs comprising the other 23% (20).⁴⁰

Summary knife offences

Legislative framework

- 2.45 The *Summary Offences Act* contains several summary offences relating to knives. Most of these offences (custody or use of knife in a public place or school) will be moved to part 3A of the *Crimes Act* as a result of the *Criminal Legislation Amendment (Knife Crimes) Act 2023* (NSW) (*Knife Crimes Act*). The offence of selling a knife to a child aged under 16 will remain in the *Summary Offences Act*. We discuss these offences in further detail in chapter 6.
- 2.46 There are some other relevant offences in the *Summary Offences Act* relating to custody or use in a public place or school of an offensive implement, defined as anything made or adapted for causing injury to a person or anything intended, by the person having custody of the thing, to be used to injure or menace a person or damage property.⁴¹

39. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4.

40. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4.

41. *Summary Offences Act 1988* (NSW) s 11B(3) definition of “offensive implement”.

Focus offences

- 2.47 Custody of knife in a public place or school (s 11C) is the highest volume offence out of all offences in the scope of the review. For custody of knife in a public place, there were 18,172 proven charges for a first offence and 7212 for a subsequent offence from 2013 to 2022. These numbers steadily increased between 2017 and 2020 up from 1771 to 2360.⁴²
- 2.48 Custody of knife in a school is far less common, with 83 proven charges for a first offence and seven for a subsequent offence from 2013 to 2022.⁴³ We focus on the aspect of the offence relating to a public place below, when considering sentencing outcomes.
- 2.49 We heard concerns from stakeholders about these offences in the context of maximum penalties, which will be increased by the *Knife Crimes Act* (see chapter 6).
- 2.50 Custody of offensive implement had a much lower volume but is still among the most prevalent offences in the scope of the review, with 2835 proven charges from 2013 to 2022.⁴⁴ The *Knife Crimes Act* will not apply to these offences.

Sentencing outcomes

- 2.51 Fines are by far the most common penalty for custody of knife in a public place, where the offence is the principal (most serious) offence (for adult defendants). In 2022, fines made up 63% (611) of penalties issued by Local and higher courts to adults for a first-time offence and 59% (280) for a subsequent offence.⁴⁵ Two percent (19) proven court appearances for a first offence in 2022 resulted in a custodial penalty. For a subsequent offence, this rose to 10% (47).⁴⁶
- 2.52 Over the period 2013 to 2022, fines were the single most common penalty received for custody of knife in a public place first and subsequent offence, making up between 59% and 65% of penalties each year (first offence) and 43% to 59% (subsequent offence).⁴⁷

42. NSW Bureau of Crime Statistics and Research, ab23-22460, table 1.

43. NSW Bureau of Crime Statistics and Research, ab23-22460, table 1.

44. NSW Bureau of Crime Statistics and Research, ab23-22460, table 1.

45. NSW Bureau of Crime Statistics and Research, ab23-22463, table 4.

46. NSW Bureau of Crime Statistics and Research, ab23-22463, table 4.

47. NSW Bureau of Crime Statistics and Research, ab23-22643, table 3.

- 2.54 Similarly, custody of offensive implement resulted in a fine on 48 occasions (53%) in 2022 where it was the principal (most serious) offence (for adult defendants).⁴⁸
- 2.55 Wielding a knife or carrying a knife visibly in a public place,⁴⁹ a less common offence than having custody of a knife in a public place, attracted more severe penalties. On the 23 occasions that the Local and higher courts sentenced this offence in 2022 where it was the principal (most serious) offence, four occasions resulted in custody, two in an ICO, seven in a CCO, three in a CRO, six in a fine and one in a conditional release without conviction.⁵⁰

Question 2.1: Legislative framework and focus offences

- (1) Are there any broad issues of consistency (not addressed in the chapters that follow) across the legislative framework that you think should be addressed?
- (2) Are there any Acts or provisions that you think should be included in the focus offences?

Offences excluded from scope

- 2.56 The terms of reference of the review focus on offences involving the use or carrying of firearms, knives and weapons, without limiting the scope of the review.
- 2.57 Preliminary submissions and consultations mostly raised issues around offences involving use or possession of a firearm, knife or weapon. As noted in the section above, these offences tend to be more prevalent than other types of weapons offences (for example, licence and permit offences).
- 2.58 Accordingly, the review will focus on use and possession of weapons offences as well as weapons offences which have SNPPs.
- 2.59 We propose not to consider the following categories of offences:
- offences in the *Firearms Act*, *Weapons Prohibition Act* and the *Security Industry Act 1997* (NSW) relating to licences, permits, registration, manufacture, sale, supply or dealing (except for those offences which have an SNPP)
 - explosives offences under the *Crimes Act* and the *Explosives Act 2003* (NSW), and
 - fishing and hunting offences contained under various Acts and regulations.

48. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4.

49. *Summary Offences Act 1988* (NSW) s 11E(1)(a)-(b).

50. NSW Bureau of Crime Statistics and Research, ab23-22463, table 4.

2.61 Penalty notice offences are discussed separately in chapter 6.

Question 2.2: Offences excluded from scope

Are there any offences we propose to exclude from scope that you think should be included, and why?

3. Maximum penalties

In brief

This chapter explains statutory maximum penalties and some considerations for reviewing them. It then outlines the issues raised in preliminary submissions and consultations that relate to maximum penalties of certain prohibited weapons and firearms offences.

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- 3.1 In this chapter we explain the purpose of maximum penalties and outline some considerations for reviewing them. We have limited the discussion in this chapter to maximum penalties for particular offences that fall within the scope of the terms of reference and that were raised with us in preliminary submissions and consultations. We do not propose to review the maximum penalties of all offences captured by the terms of reference (see chapter 2).

- 3.2 The main issues raised across the *Weapons Prohibition Act 1998* (NSW) (*Weapons Prohibition Act*) and the *Firearms Act 1996* (NSW) (*Firearms Act*) were related to the variety of weapons captured by the legislative definitions of “prohibited weapon” and “firearm”.¹ A common concern was that the different types of weapons captured by a single maximum penalty is too broad.

1. *Weapons Prohibition Act 1998* (NSW) s 4(1) definition of “prohibited weapon”, sch 1; *Firearms Act 1996* (NSW) s 4(1) definition of “firearm”.

- 3.3 A separate issue was raised regarding the appropriateness of the current maximum penalty for possession of a prohibited weapon contrary to a weapons prohibition order, when compared to the maximum penalty for possession of a prohibited weapon generally.
- 3.4 Maximum penalties for knife offences were only raised in the context of summary offences, which are dealt with in chapter 6.

What is a maximum penalty

- 3.5 A statutory maximum penalty reflects the public’s view of the seriousness of an offence, as expressed through the legislature.² The maximum penalty is reserved for the “worst category” of cases.³ Together with any applicable standard non-parole period (SNPP) and other reference points, the maximum penalty acts as a “guidepost” for determining the appropriate sentence.⁴ SNPPs are discussed in chapter 4.
- 3.6 An increase in the maximum penalty for an offence is an indication that the legislature intends for the offence to attract heavier sentences. The courts are expected to reflect and recognise this intention.⁵ However, an increase in the maximum penalty is only one matter a court considers in sentencing an offender, and it does not have a determinative or conclusive effect on the sentence imposed.⁶
- 3.7 The Local Court has a jurisdictional limit on the maximum period of imprisonment it can impose. For a single offence, the limit is two years’ imprisonment, and for multiple offences, the limit is five years’ imprisonment.⁷
- 3.8 In sentencing an offender, the Local Court is to have regard to the maximum penalty in assessing the objective seriousness of the offence, rather than the jurisdictional maximum.⁸ The Local Court stated:

The Local Court’s jurisdictional limit of 2 years’ imprisonment for a single offence, or 5 years’ imprisonment for multiple offences, means that the only practical use to which the maximum statutory penalties may be put is the backdrop against which objective seriousness is assessed, in accordance with the decisions of *R v Doan* (2000) 50 NSWLR 115 and *Park v The Queen* [2021] HCA 37.⁹

2. *R v H* (1980) 3 A Crim R 53, 65; *R v Moon* [2000] NSWCCA 534 [67].

3. *Ibbs v R* (1987) 163 CLR 447, 451–452.

4. *R v Way* [2004] NSWCCA 131, 60 NSWLR 168 [122].

5. *R v Way* [2004] NSWCCA 131, 60 NSWLR 186 [52].

6. *R v Crump* (unreported, NSWCCA, 30 May 1994) 14.

7. *Criminal Procedure Act 1986* (NSW) s 267(2), s 268(1A); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53B.

8. *Park v R* [2021] HCA 37, 273 CLR 303 [23]; *R v Doan* [2000] NSWCCA 317, 50 NSWLR 115 [35].

9. Local Court of NSW, *Preliminary Submission PWE09*, 3–4.

Approach for reviewing maximum penalties

- 3.9 The terms of reference ask that we review whether the maximum penalties for these offences are appropriate with reference to other jurisdictions.
- 3.10 Some other considerations for assessing whether a maximum penalty is appropriate include whether:
- the maximum penalties reflect the seriousness of the offence, including the various conduct captured by the offence
 - the differences in maximum penalties reflect the difference in seriousness of comparable offences, and
 - there is any evidence as to the inadequacy of current maximum penalties.
- 3.11 These considerations are discussed where relevant throughout this chapter.

Prohibited weapons possession or use offences

- 3.12 The *Weapons Prohibition Act* contains a list of weapons that are considered “prohibited weapons” under the Act. They are divided into the following categories:
- knives
 - military-style weapons
 - miscellaneous weapons
 - imitations, concealed blades etc, and
 - miscellaneous articles.¹⁰
- 3.13 The offence of possession or use of a prohibited weapon is a single offence that covers all categories of prohibited weapons listed above. There is a single applicable maximum penalty of 14 years’ imprisonment.¹¹
- 3.14 Some cases have commented on the broad variety of weapons captured under the definition of “prohibited weapon”. For example, one case stated that it is difficult to identify a common feature amongst the non-military weapons and that it was difficult to determine what kind of prohibited weapon would fall in the middle range of objective seriousness.¹²

10. *Weapons Prohibition Act 1998* (NSW) s 4(1) definition of “prohibited weapon”, sch 1.

11. *Weapons Prohibition Act 1998* (NSW) s 7.

12. *Jacob v R* [2014] NSWCCA 65 [181], [184]. See also *R v Williams* [2005] NSWCCA 355 [37].

- 3.15 Two submissions raised concerns about the variety of weapons captured, including the potential for inconsistent outcomes and the appropriateness of a single maximum penalty for a broad range of conduct.¹³
- 3.16 The Office of the Director of Public Prosecutions (ODPP) suggested that, given the difficulties that arise in assessing objective seriousness of individual offences within such a broad range of weapons, it may be appropriate to consider differentiating between the weapons that are capable of inflicting serious injury and those of a more miscellaneous nature.¹⁴ The objective seriousness of prohibited weapons offences is discussed further in chapter 5.
- 3.17 There have been some legislative changes in the past as to the kinds of weapons that fall within the definition of “prohibited weapons”. Prior to 2010, replica firearms were considered both a prohibited weapon and firearm. However, replica firearms were removed from the *Weapons Prohibition Act* so that only the *Firearms Act* regulated them.¹⁵ Replica or imitation firearms, and in particular gel blasters, are discussed further from [3.711], and in chapters 2 and 5.
- 3.18 The same amending Act introduced the category of “military-style weapons” (such as bombs, rocket launchers and flamethrowers) and new offences restricting the sale and manufacture of prohibited weapons generally and military-style weapons.¹⁶
- 3.19 The maximum penalty of 20 years’ imprisonment for the sale and manufacture of military-style weapons is higher than the maximum penalty of 14 years for the sale and manufacture of prohibited weapons generally. The second reading speech indicated that the new offences for the military-style weapons were “appropriate considering the potential risk to public safety represented by these items”.¹⁷
- 3.20 These tiered maximum penalties for sale and manufacture offences contrast with the single maximum penalty applicable to the possession or use of prohibited weapons.
- 3.21 Increasing the maximum penalty or prescribing a high maximum penalty for an offence can allow the court discretion to sentence an offender for a range of criminal conduct. However, one submission noted that where an offence captures a

13. Law Society of NSW, *Preliminary Submission PWE05*, 2, Legal Aid NSW, *Preliminary Submission PWE12*, 4.

14. NSW Office of Director of Public Prosecutions, *Preliminary Submission PWE08*, 4.

15. *Weapons and Firearms Legislation Amendment Act 2010* (NSW) sch 1 [37], amending *Weapons Prohibition Act 1998* (NSW) sch 1 cl 3(1)–(2); NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 18 March 2010, 21706.

16. *Weapons Prohibition Act 1998* (NSW) (NSW) sch 1 cl 1A, s 23A, s 25A.

17. *Weapons Prohibition Act 1998* (NSW) s 23A, s 25A; NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 2 June 2010, 23522.

broad range of behaviour, there is a risk that lower-level offenders can face disproportionately higher maximum penalties.¹⁸

- 3.22 In 2022, the Local Court sentenced the offence of possession or use of a prohibited weapon where it was the principal (most serious) offence (adult offenders only) on 697 occasions. All occasions, except one, involved weapons other than military-style weapons. The following penalties were imposed:
- 17 had no conviction recorded (2%)
 - 70 were conditionally released without conviction (10%)
 - 17 received a conviction with no other penalty (2%)
 - 292 received a fine (42%)
 - 31 received a conditional release order (CRO) (4%)
 - 192 received a community correction order (CCO) (28%)
 - 25 received an intensive correction order (ICO) (4%), and
 - 53 received a custodial sentence (8%).¹⁹
- 3.23 The average non-parole period was five months. No head sentence for any custodial penalty imposed was greater than 22 months.²⁰ Appendix D provides information about penalties.
- 3.24 In 2022, the District Court sentenced the offence of possession or use of a prohibited weapon where it was the principal (most serious) offence (adult offenders only) on only one occasion. It received a custodial sentence with a non-parole period of 24 months.²¹ No relevant matters were sentenced in the Supreme Court in 2022.
- 3.25 The low average non-parole period of five months for an offence with a maximum penalty of 14 years may indicate that the lower-level offenders are being dealt with appropriately in the Local Court, without the need to differentiate maximum penalties by prohibited weapon type. However, the average non-parole period should be treated with caution, given it may have been impacted by the facts and circumstances of the case, the nature of the other offences being sentenced at the same time, the offender's criminal record, and other sentencing considerations such as discounts.

18. Law Society of NSW, *Preliminary Submission PWE05*, 2.

19. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4.

20. NSW Bureau of Crime Statistics and Research, ab23-22643, table 5, 6.

21. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4, 5.

Other jurisdictions

- 3.26 For prohibited weapon possession or use offences, all other Australian jurisdictions have significantly lower maximum penalties compared with NSW. The maximum penalties in other jurisdictions range from 2 years to 5 years' imprisonment. However, there are diverse approaches to the categorisation of prohibited weapons across the states and territories.
- 3.27 South Australia (SA), Queensland and Victoria are similar to NSW with respect to their single category of prohibited weapons.²² The weapons identified in each of these other jurisdictions have significant overlap with NSW's prescribed list of prohibited weapons.
- 3.28 In SA, possession of a prohibited weapon is a summary offence with a maximum penalty of 2 years' imprisonment or \$20,000.²³ In Victoria and Queensland, the maximum penalty is also 2 years' imprisonment (or a maximum fine of 240 penalty units (PU) and 100 PU, respectively).²⁴
- 3.29 In the remaining jurisdictions of the Australian Capital Territory (ACT), Northern Territory (NT) and Western Australia (WA), there are additional categories of weapons: prohibited articles and controlled weapons. Possession of these items has a lower maximum penalty than prohibited weapons possession in each jurisdiction.²⁵ These jurisdictions are discussed further below.
- 3.30 After NSW, the ACT has the highest maximum penalty for prohibited weapons possession, with 5 years' imprisonment and/or 500 PU.²⁶ The ACT category of prohibited articles is like "miscellaneous articles" under the *Weapons Prohibition Act*.²⁷ In the ACT, possession of prohibited articles carries a maximum penalty of 200 PU and/or 2 years' imprisonment.²⁸
- 3.31 The NT categorises weapons similarly. There is an offence of possessing prohibited weapons, which carries a maximum penalty of 400 PU or 2 years' imprisonment.²⁹ The NT category of controlled weapons, which includes knives and weapons like NSW's miscellaneous weapons, has a possession offence which carries a maximum

22. *Summary Offences Regulations 2016* (SA) reg 6; *Weapons Categories Regulation 1997* (Qld) cl 7A; *Control of Weapons Regulations 2021* (Vic) sch 2.

23. *Summary Offences Act 1953* (SA) s 21F(1).

24. *Control of Weapons Act 1990* (Vic) s 5AA; *Weapons Act 1990* (Qld) s 50(1)(c)(iii).

25. *Prohibited Weapons Act 1996* (ACT) s 5–6; *Weapons Control Act 2001* (NT) s 6(e), s 7(1); *Weapons Act 1999* (WA) s 6(1), s 7(1).

26. *Prohibited Weapons Act 1996* (ACT) s 5.

27. *Prohibited Weapons Act 1996* (ACT) sch 2; *Weapons Prohibition Act 1998* (NSW) sch 1 s 4.

28. *Prohibited Weapons Act 1996* (ACT) s 6.

29. *Weapons Control Act 2001* (NT) s 6(e).

penalty of 200 PU or 12 months' imprisonment.³⁰ The maximum penalty is doubled if the offence is committed at night-time.³¹

- 3.32 WA has 15 prescribed prohibited weapons (which is much less than NSW).³² The maximum penalty for possessing a prohibited weapon is 3 years' imprisonment and \$36,000.³³ Like the NT, WA has "controlled weapons" which includes some of NSW's prohibited weapons.³⁴ The maximum penalty for possession of a controlled weapon is 2 years' imprisonment and \$24,000.³⁵
- 3.33 Tasmania has the broadest definition of a prohibited weapon. There is no list of prescribed prohibited weapons. Rather, Tasmania regulates "dangerous articles" which are defined as any weapon other than a firearm, an adapted or modified article which could be used as a weapon, an article intended to be used as a weapon, and a knife.³⁶ The maximum penalty for possessing a dangerous article is 50 PU and/or 2 years' imprisonment.³⁷

Question 3.1: Maximum penalties for possession of prohibited weapon

- (1) Is the maximum penalty for possessing a prohibited weapon in NSW adequate?
- (2) Should maximum penalties depend on the type of prohibited weapon possessed? If yes, what categories should be used and what maximum penalty would be appropriate for each category of prohibited weapon?

Possession contrary to a weapons prohibition order

- 3.34 The maximum penalty for possession of a prohibited weapon contrary to a weapons prohibition order (10 years' imprisonment),³⁸ is lower than the maximum penalty for possession of a prohibited weapon generally (14 years' imprisonment).³⁹
- 3.35 In a preliminary consultation, we heard that these maximum penalties should be the same. As a comparative example, it was said the equivalent offences under the

30. *Weapons Control Act 2001* (NT) s 3 definition of "controlled weapon", s 7(1); *Weapons Control Regulations 2001* (NT) sch 1.

31. *Weapons Control Act 2001* (NT) s 3 definition of "night-time", s 7(3).

32. *Weapons Regulations 1999* (WA) sch 1.

33. *Weapons Act 1999* (WA) s 6(b).

34. *Weapons Regulations 1999* (WA) sch 2.

35. *Weapons Act 1999* (WA) s 7.

36. *Police Offences Act 1935* (Tas) s 3 definition of "dangerous article".

37. *Police Offences Act 1935* (Tas) s 15C.

38. *Weapons Prohibition Act 1998* (NSW) s 34(1).

39. *Weapons Prohibition Act 1998* (NSW) s 7(1).

Firearms Act had consistent maximum penalties.⁴⁰ That is, the maximum penalties for possession of a prohibited firearm or other firearm are the same as the maximum penalties for possession of a prohibited firearm or other firearm contrary to a firearms prohibition order.⁴¹

- 3.36 SA is the only other Australian jurisdiction that has weapons prohibition orders. In SA the maximum penalty for possession of a prohibited weapon, which is a summary offence, is \$35,000 or 4 years' imprisonment.⁴² This is a higher maximum penalty than for possession of a prohibited weapon generally in SA, which is \$20,000 or 2 years' imprisonment.⁴³
- 3.37 Some comparisons can be drawn between Australian jurisdictions in relation to firearm possession in breach of firearm prohibition orders. Like NSW, Tasmania's custodial maximum penalty for firearm possession generally is the same as its custodial maximum penalty for possession contrary to a firearms prohibition order (2 years' imprisonment).⁴⁴
- 3.38 In WA and the NT, the maximum penalty for firearm possession contrary to a firearms prohibition order is higher than the maximum penalty for firearm possession generally.⁴⁵
- 3.39 In SA, the maximum penalty for firearm possession contrary to a firearms prohibition order is higher than the maximum penalty for possession of a prescribed firearm.⁴⁶
- 3.40 Queensland and the ACT do not have firearms prohibition orders.
- 3.41 In 2022, the Local Court sentenced possession of a prohibited weapon contrary to a weapons prohibition order where it was the principal (most serious) offence on 18 occasions. Of these, eight received a custodial penalty, eight received a CCO and two received a fine.⁴⁷ Of the eight that received a custodial penalty, the average non-parole period was eight months and there was no head sentence greater than 22 months.⁴⁸ No relevant occasions were sentenced in the District Court.

40. Prosecutors' Roundtable, *Preliminary Consultation PWEC01*.

41. *Firearms Act 1996* (NSW) s 7, s 7A, s 74.

42. *Summary Offences Act 1953* (SA) s 21I(3).

43. *Summary Offences Act 1953* (SA) s 21F(1).

44. *Firearms Act 1996* (Tas) s 9(1), s 132(1).

45. *Firearms Act 1973* (WA) s 19(1ad), s 29J(1)–(2); *Firearms Act 1997* (NT) s 58(1), s 49P(2).

46. *Firearms Act 2015* (SA) s 9(1)–(2), s 9(4), s 45(2)(a).

47. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4.

48. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4, 5, 6.

- 3.42 The outcomes for occasions where possession or use of a prohibited weapon generally was the principal (most serious) offence are outlined at [3.22]–[3.24] above, for comparative purposes. However, care should be taken when comparing sentencing data, particularly in circumstances where the offence may cover a broad range of weapons and levels of seriousness of conduct.
- 3.43 Given the average non-parole period (subject to the caveats outlined earlier in the chapter at [3.25]), and that no matters were dealt with on indictment, it is not clear whether there is a need for the maximum penalty to be increased to be consistent with the penalty for possession of prohibited weapons generally.

Question 3.2: Possession contrary to a weapons prohibition order

Is the maximum penalty for possession contrary to a weapons prohibition order appropriate? If not, why, and what should be the maximum penalty?

Firearms possession or use generally

- 3.44 The *Firearms Act* divides firearm possession or use into two offences based on the type of weapon: possession or use of a pistol or prohibited firearm (with a maximum penalty of 14 years' imprisonment),⁴⁹ and possession or use of a firearm without licence or permit (with a maximum penalty of 5 years' imprisonment).⁵⁰ Unless for a limited purpose, it is not possible to obtain a licence for a pistol or prohibited firearm.⁵¹ Chapter 2 describes these offences in further detail.
- 3.45 In 2022, the Local Court sentenced the offence of possession or use of a pistol or prohibited firearm where it was the principal (most serious) offence (adult offenders only) on 184 occasions. Of these:
- six received no conviction (3%)
 - 25 were conditionally released without conviction (14%)
 - six received a conviction with no other penalty (3%)
 - 23 received a fine (13%)
 - seven received a CRO (4%)
 - 67 received a CCO (36%)
 - 17 received an ICO (9%), and
 - 33 received a custodial sentence (18%).⁵²

49. *Firearms Act 1996* (NSW) s 7(1).

50. *Firearms Act 1996* (NSW) s 7A.

51. Category C, D and H licences: *Firearms Act 1996* (NSW) s 8(1).

52. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4.

- 3.46 Of the 33 that received a custodial sentence, the average non-parole period was eight months for the offences of possession of a pistol and possession of a prohibited firearm, and six months for use pistol offences.⁵³
- 3.47 In 2022, the District Court sentenced the offence of possession or use of a pistol or prohibited firearm where it was the principal (most serious) offence (adult offenders only) on 26 occasions. Twenty-three received a custodial penalty and three received an ICO. The average non-parole period was 19 months for possession of a pistol and 25 months for possession of a prohibited firearm.⁵⁴
- 3.48 In relation to the offence of possession or use of a firearm (*Firearms Act 1996* (NSW) s 7A(1)), in 2022 the Local Court sentenced this offence where it was the principal (most serious) offence (adult offenders only) on 153 occasions. Of these:
- 10 had no conviction recorded (7%)
 - 48 were conditionally released without conviction (31%)
 - three received a conviction with no other penalty (2%)
 - 32 received a fine (21%)
 - five received a CRO (3%)
 - 35 received a CCO (23%)
 - four received an ICO (3%), and
 - 16 received a custodial sentence (10%).⁵⁵
- 3.49 Of the 16 that received a custodial sentence, the average non-parole period was six months for possession offences and two months for use offences. In 2022, there was only one occasion when the District Court sentenced the offence of possess or use a firearm where it was the principal (most serious) offence, which received a CCO.⁵⁶

Other jurisdictions

- 3.50 Other Australian jurisdictions largely follow a similar offence structure of separate offences for prohibited firearms and firearms generally. Some jurisdictions further divide the offences into aggravated offences, subsequent offences and possession by prohibited/non-prohibited persons, as discussed below.

53. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4, 5.

54. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4, 5.

55. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4

56. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4, 5.

- 3.51 NSW does not have the highest maximum penalty for prohibited firearm possession as other jurisdictions range from 3 years' imprisonment in the NT⁵⁷ to 21 years' imprisonment in Tasmania.⁵⁸ However, all offences punishable under the *Criminal Code Act 1924* (Tas) carry the same maximum penalty of 21 years.⁵⁹
- 3.52 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.⁶⁰
- 3.53 In SA, the maximum penalty for possession of a prescribed firearm (equivalent offence of prohibited firearm possession) is \$50,000 or 10 years' imprisonment.⁶¹ 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).⁶²

Separate penalties for “prohibited persons”

- 3.54 In questioning the adequacy of NSW's maximum penalties for firearms possession, one submission suggested that we consider Victoria's approach of increasing penalties for “prohibited persons”.⁶³
- 3.55 The Victorian equivalent of NSW prohibited firearms are category E longarms and category E handguns.⁶⁴ Victoria's possession offences are further divided into whether possession is by a “prohibited” or “non-prohibited” person and whether the firearm possession was a category E longarm or category E handgun.⁶⁵
- 3.56 “Prohibited person” status is automatically given to an individual who meets the criteria under the legislation, such as someone who is serving a term of imprisonment for certain offences, someone who is subject to a final domestic violence order or a community-based order, a mental health supervision order and certain individuals under the *Criminal Organisations Control Act 2012* (Vic).⁶⁶ It is an

57. *Firearms Act 1997* (NT) s 58(6).

58. *Firearms Act 1996* (Tas) s 9(1A).

59. *Criminal Code Act 1924* (Tas) s 389.

60. *Weapons Act 1990* (Qld) s 50(1)(c)(i); *Firearms Act 1996* (ACT) s 42(1).

61. *Firearms Act 2015* (SA) s 9(1).

62. *Firearms Act 2015* (SA) s 9(7).

63. Confidential, *Preliminary Submission PWE11*, 3.

64. *Firearms Act 1996* (Vic) s 3(1) definition of “category E handgun”, definition of “category E longarm”.

65. *Firearms Act 1996* (Vic) s 5(1), s 6A(3), s 7B(2).

66. *Firearms Act 1996* (Vic) s 3(1) definition of “prohibited person”.

offence for a prohibited person to possess any firearm, and the maximum penalty is 1200 PU or 10 years' imprisonment.⁶⁷

- 3.57 Prohibited person status operates differently from Victoria's firearms prohibition order scheme which, like NSW, requires the making of an order.⁶⁸

Subsequent offences

- 3.58 One submission stated that while NSW carries some of the highest penalties for unauthorised firearm possession in Australia, these penalties may not provide sufficient deterrence from repeat offending. The submission suggested we consider increased penalties for subsequent offences.⁶⁹
- 3.59 Both WA and Victoria prescribe increased maximum penalties for subsequent offences. In WA, the maximum penalty for a first offence is 5 years' imprisonment, and for subsequent offences, the maximum penalty is 10 years.⁷⁰
- 3.60 In Victoria, for a non-prohibited person, the possession of an unregistered category E longarm carries a maximum penalty of 600 PU or 7 years' imprisonment.⁷¹ Subsequent offences carry a maximum penalty of 1200 PU or 10 years' imprisonment.⁷²
- 3.61 Possession of an unregistered category E handgun by a non-prohibited person carries a higher maximum penalty of 1800 PU or 14 years' imprisonment.⁷³ Subsequent offences carry a maximum penalty of 2100 PU or 17 years' imprisonment.⁷⁴
- 3.62 We will be seeking further data on the prevalence of reoffending and the characteristics of recidivist offenders, which may also be relevant to establishing whether increased maximum penalties would result in increased deterrence for subsequent offences of firearm possession.

67. *Firearms Act 1996* (Vic) s 5(1); Victoria Police, "Firearms Prohibition Orders" (30 August 2022) <<https://www.police.vic.gov.au/firearm-prohibition-orders#firearm-prohibition-orders-and-prohibited-person-status>> (retrieved 14 September 2023).

68. Victoria Police, "Firearms Prohibition Orders" (30 August 2022) <<https://www.police.vic.gov.au/firearm-prohibition-orders#firearm-prohibition-orders-and-prohibited-person-status>> (retrieved 14 September 2023).

69. Confidential, *Preliminary Submission PWE11*, 2–3.

70. *Firearms Act 1973* (WA) s 6(1), s 6(3); *Firearms Regulations 1974* (WA) reg 23(2), reg 26(1).

71. *Firearms Act 1996* (Vic) s 6A(3).

72. *Firearms Act 1996* (Vic) s 6A(3).

73. *Firearms Act 1996* (Vic) s 7B(2).

74. *Firearms Act 1996* (Vic) s 7B(2).

Question 3.3: Maximum penalties for firearm possession

- (1) Are the maximum penalties for possessing a firearm, prohibited firearm or pistol adequate?
- (2) Should increased maximum penalties for “prohibited persons” be introduced? If yes, why and what criteria should be used for a “prohibited person”, and what should the maximum penalties be?
- (3) Should the maximum penalties for subsequent offences of firearm possession be increased? If yes, why, and what should the maximum penalties be?

Minimum or mandatory sentences for firearms offences

- 3.63 Minimum sentencing or mandatory sentencing laws require courts to impose a minimum penalty when sentencing an offender (for example, a minimum term of imprisonment).
- 3.64 One submission stated that current penalties for firearms offences may not adequately deter and suggested that we consider minimum sentencing for certain firearm offences.⁷⁵
- 3.65 Queensland has minimum custodial penalties for possession of weapons by adults in certain circumstances. Where a person possesses 10 or more weapons or possesses a category D, H, R, C or E firearm and:
- uses a firearm to commit an indictable offence, the minimum penalty is 18 months’ imprisonment,⁷⁶ or
 - possesses a firearm for the purpose of committing or facilitating the commission of an indictable offence, the minimum penalty is one year’s imprisonment,⁷⁷ or
 - possesses a short firearm in a public place, the minimum penalty is one year’s imprisonment.⁷⁸
- 3.66 Where a person possesses a category A, B or M firearm and uses the firearm to commit an indictable offence, the minimum penalty is nine months’ imprisonment.⁷⁹ Where a person possesses a category A, B or M firearm for the purpose of

75. Confidential, *Preliminary Submission PWE11*, 3.

76. *Weapons Act 1990* (Qld) s 50(1)(d)(i).

77. *Weapons Act 1990* (Qld) s 50(1)(d)(ii).

78. *Weapons Act 1990* (Qld) s 50(1)(d)(iii).

79. *Weapons Act 1990* (Qld) s 50(1)(e)(i).

committing an indictable offence, the minimum penalty is six months' imprisonment.⁸⁰

- 3.67 There are also minimum penalties for adults for certain weapons trafficking offences. Three years' imprisonment is the minimum penalty for the supply of five or more weapons where at least one weapon is a category D, E, H or R weapon and at least one is a short firearm.⁸¹ The supply of a category D, H or R weapon that is a short firearm has a minimum penalty of 2.5 years' imprisonment.⁸²
- 3.68 There is an additional mandatory term of 7 years to be imposed for offences aggravated by serious organised crime involvement (mandatory component). The mandatory component is served cumulatively with the sentence imposed for the offence under law (base component).⁸³
- 3.69 We have previously considered minimum or mandatory sentencing in the context of assaults on emergency services workers. We recommended against the introduction of mandatory sentencing for reasons including that it may be ineffective as a deterrent, that it limits the exercise of judicial discretion, and that it reduces the incentive to plead guilty and in turn, can increase court workloads.⁸⁴
- 3.70 In the context of homicide, we said that minimum sentences were inappropriate in situations where there is a broad range of offending.⁸⁵ Similarly, the NSW Law Reform Commission noted in its review of sentencing law that mandatory sentences would apply regardless of the circumstances of each case, and could therefore cause arbitrary and capricious results.⁸⁶

Question 3:4: Minimum or mandatory sentences for firearm offences

Should mandatory or minimum sentences be introduced for certain firearms offences? If so, what kind of minimum penalties should be introduced and for which offences?

80. *Weapons Act 1990* (Qld) s 50(1)(e)(ii).

81. *Weapons Act 1990* (Qld) s 50B(1)(d).

82. *Weapons Act 1990* (QLD) s 50B(1)(e).

83. *Weapons Act 1990* (QLD) s 50B(3); *Penalties and Sentences Act 1992* (Qld) s 161Q, s 161R.

84. NSW Sentencing Council, *Assaults on Emergency Services Workers*, Report (2021) [8.23]–[8.25].

85. NSW Sentencing Council, *Homicide*, Report (2021) [7.29]–[7.30].

86. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [9.11].

Gel blasters and imitation firearms

- 3.71 In NSW, imitation firearms and gel blasters fall within the definition of “firearm”.⁸⁷ The definition of “firearm” captures gel blasters because gel blasters can fall within the definition of air gun, pistol, or imitation firearm.⁸⁸ Children’s toys are excluded from the definition of “imitation firearm”.⁸⁹ See chapter 2 for more detail.
- 3.72 The maximum penalties that apply to imitation firearms and gel blasters are the same as the maximum penalties that apply to their corresponding firearm offences. The maximum penalties for gel blaster possession range from 14 years to 5 years’ imprisonment, depending on the type of firearm the gel blaster imitates (e.g. air gun or pistol).⁹⁰ Similarly, the maximum penalties for possession of an imitation firearm range from 14 years to 5 years’ imprisonment depending on the type of firearm it imitates.⁹¹
- 3.73 One submission noted that the most common firearm possession offence under s 7 of the *Firearms Act* related to possession of gel blaster replica firearms, which is increasing in prevalence, and that these offenders did not have criminal records.⁹² However, separate data is not available on cases involving gel blasters.
- 3.74 We heard mixed views as to how the criminal law should treat gel blasters. One view was that all gel blasters should continue to be treated as a “firearm” due to the public safety risks arising from their realistic appearance.⁹³ A different suggestion was that criminal regulation of mere gel blaster possession was problematic, but that criminal regulation may be appropriate for gel blasters that appear realistic or gel blasters that are used to threaten.⁹⁴
- 3.75 Legal Aid raised concerns about the severity of penalties being imposed for gel blaster possession, including sentences of imprisonment which later resulted in non-convictions on appeal.⁹⁵

87. *Firearms Act 1996* (NSW) s 4(1) definition of “firearm”, definition of “air gun”, definition of “pistol”, definition of “imitation firearm”, s 4D(1); *R v Zerafa* [2021] NSWDC 547 [12]; *R v Smith* [2023] NSWDC 88 [21].

88. *R v Zerafa* [2021] NSWDC 547 [12]; *R v Smith* [2023] NSWDC 88 [21].

89. *Firearms Act 1996* (NSW) s 4D(3)–(4).

90. *Firearms Act 1996* (NSW) s 7, s 7A.

91. *Firearms Act 1996* (NSW) s 4D(1), s 7, s 7A.

92. Confidential, *Preliminary Submission PWE11*, 1- 2.

93. Prosecutors’ Roundtable, *Preliminary Consultation PWEC01*.

94. Defence Roundtable, *Preliminary Consultation PWEC02*; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PWE08*, 3.

95. Legal Aid NSW, *Preliminary Submission PWE12*, 3.

- 3.76 Three submissions raised concerns about recreational items like gel blasters falling within the definition of a firearm⁹⁶ and one submission suggested that gel blasters are non-lethal nor capable of inflicting serious harm.⁹⁷ At preliminary consultations, we heard anecdotally that courts have rejected the argument that gel blasters are children’s toys rather than firearms.⁹⁸
- 3.77 The ODPP raised the issue of whether gel blasters should continue to be categorised as “firearms” and that gel blasters may be comparable to paintball guns, which are excluded from the definition of “firearm” and are regulated separately.⁹⁹ See [3.86] for a discussion of how South Australia regulates in this way.
- 3.78 In one case, a judge observed that gel blasters and paintball guns operate similarly, although the impact force of both a paintball and airgun is much greater than a gel blaster.¹⁰⁰ The judge further stated that urgent review of the legality of gel blasters was necessary and that if gel blasters were to remain illegal, they should be regulated in their own category with appropriate penalties, including fines.¹⁰¹
- 3.79 Further cases concerning gel blasters are outlined in chapter 5 in relation to the issue of objective seriousness.

Other jurisdictions – gel blasters

- 3.80 Gel blasters are regulated differently across the states and territories. Two preliminary submissions raised concerns about conflicting laws in relation to gel blasters.¹⁰² One submission noted that offenders may not be aware that gel blasters were illegal in NSW.¹⁰³ One solution explored in consultations was to ensure consistency of laws on gel blasters in all Australian jurisdictions.¹⁰⁴
- 3.81 Gel blasters are considered as children’s toys in Queensland. As a result, Queensland is the only Australian jurisdiction where gel blasters are not

96. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PWE08*, 3; Legal Aid NSW, *Preliminary Submission PWE12*, 3–4; Law Society of NSW, *Preliminary Submission PWE05*, 2.

97. Legal Aid NSW, *Preliminary Submission PWE12*, 3.

98. Defence Roundtable, *Preliminary Consultation PWEC02*.

99. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PWE08*, 3; *Firearms Act 1996* (NSW) s 4(1) definition of “firearm”; *Paintball Act 2018* (NSW).

100. *R v Smith* [2023] NSWDC 88 [14], [16].

101. *R v Smith* [2023] NSWDC 88 [19].

102. Legal Aid NSW, *Preliminary Submission PWE12*, 3; Law Society of NSW, *Preliminary Submission PWE05*, 2.

103. Confidential, *Preliminary Submission PWE11*, 2.

104. Prosecutors’ Roundtable, *Preliminary Consultation PWEC01*; Defence Roundtable, *Preliminary Consultation PWEC02*.

criminalised.¹⁰⁵ In Queensland, a person does not need a licence to possess or purchase a gel blaster.¹⁰⁶

- 3.82 However, in circumstances where a gel blaster appears like a real firearm, it may be a replica weapon, and therefore considered a weapon for the purposes of s 57 of the *Weapons Act 1990* (Qld). That provision prohibits certain conduct with weapons in public without reasonable excuse (such as carrying a weapon capable of being discharged, carrying an exposed weapon and discharging a weapon).¹⁰⁷
- 3.83 The Queensland Police Service has published information that a reasonable excuse for owning a gel blaster includes a person being a collector of replica weapons or a member of a club that uses gel blasters recreationally.¹⁰⁸
- 3.84 There have been recent media reports on the use of realistic gel blasters in criminal activity in Queensland.¹⁰⁹ One media outlet has reported that Queensland police are concerned about the significant risk posed by realistic gel blasters used in public, but that the government does not intend to reform the laws around gel blasters.¹¹⁰
- 3.85 NSW courts have commented on the ease of purchasing gel blasters from Queensland through online stores and market stalls.¹¹¹ In one case, the judge remarked that raising public awareness was necessary to educate people about the illegality of possessing and selling such firearms.¹¹²
- 3.86 WA and SA are the only jurisdictions that prescribe gel blasters within a legislative category. In SA, gel blasters are considered paintball guns.¹¹³ They are licensed and can only be used at paintball facilities.¹¹⁴ Unauthorised possession of a gel blaster or paintball gun carries a maximum penalty of \$20,000 or 4 years' imprisonment.¹¹⁵

105. *R v Smith* [2023] NSWDC 88 [10].

106. Queensland Police, "Gel Blasters" (15 August 2019) <<https://www.police.qld.gov.au/weapon-licensing/Gel-Blasters>> (retrieved 22 August 2023).

107. *Weapons Act 1990* (Qld) s 57.

108. Queensland Police, "Changes to Replica Firearm Legislation in Queensland" (15 January 2021) <<https://www.police.qld.gov.au/weapon-licensing/Gel-Blasters>> (retrieved 22 August 2023).

109. N McElroy, "Woman Charged after Allegedly Pointing Gel-Blaster Pistol at Car on M1 Motorway at Gold Coast", *ABC* (online, 21 March 2023); C Duffy, "Terror in the Suburbs: Queensland's Gel Blaster Crimes" *Cairns Post* (online, 3 August 2023).

110. S Meacham, "Queensland Government Refuses to Restrict Sale of Gel Blasters", *9News* (online, 28 July 2023).

111. *R v Yalim* [2023] NSWDC 111 [60]; *R v Andrew (No. 2)* [2018] NSWDC 382 [32]–[33].

112. *R v Andrew (No. 2)* [2018] NSWDC 382 [33].

113. *Firearms Regulations 2017* (SA) reg 4(1), reg 8A.

114. *Firearms Regulations 2017* (SA) reg 17.

115. *Firearms Act 2015* (SA) s 9(4)(c).

- 3.87 In WA, gel blasters are a prescribed prohibited weapon.¹¹⁶ Unauthorised possession of a gel blaster has a penalty of 3 years' imprisonment and a fine of \$36,000.¹¹⁷
- 3.88 Like NSW, the jurisdictions of Tasmania, the ACT and NT consider gel blasters to be firearms, prohibited firearms or imitation firearms (depending on their appearance).¹¹⁸ The NT regulates imitation firearms separately as prohibited weapons under the *Weapons Control Act 2001* (NT) (which has a slightly lower maximum penalty than possession of a prohibited firearm).¹¹⁹ Imitation firearms are discussed further below.
- 3.89 In Victoria, police treat gel blasters as firearms or imitation firearms.¹²⁰ However, in one case, a magistrate considered that the gel blaster in question was not a firearm. The magistrate's reason was that it did not fire "missiles" and accordingly, it was not a "firearm" as defined under the relevant legislation.¹²¹
- 3.90 In preferring an interpretation of "missile" that promoted the purpose of the legislation, the magistrate found that:
- gel balls generally could not cause significant harm
 - in this respect, gel balls generally do not impact upon public safety and peace, and
 - that parliament could not have intended to capture "these toys" under the definition of firearm.¹²²
- 3.91 However, the magistrate commented that a gel blaster could be an imitation firearm, depending on its appearance.¹²³

Other jurisdictions – imitation firearms

- 3.92 Like NSW, in the jurisdictions of the ACT, SA, and Tasmania, imitation firearms fall within the definition of "firearms" and are dealt with in the same way as firearms

116. *Weapons Regulations 1999* (WA) sch 1 item 11B.

117. *Weapons Act 1999* (WA) s 6(b).

118. *Tasmania v Milligan (No 2)* [2021] TASSC 60, 34 Tas R 106 [2], [6], [10]; Tasmania Police Firearms Services, "Imitation Firearms" <<https://fas.police.tas.gov.au/acquiring-a-firearm/imitation-firearms/>> (retrieved 24 August 2023); *Firearms Act 1996* (ACT) s 23A(3)-(4), sch 1 item 19; ACT Policing, "Police Issue Warning About Illegal Gel Blaster Firearms" (Media Release, 3 December 2019); NT Police, Fire and Emergency Services, "Possession of Firearms: Durack" (Media Release, 5 December 2018).

119. *Weapons Control Regulations 2001* (NT) sch 1 cl 30.

120. Victoria Police, "Firearms Licensing" (21 August 2023) <<https://www.police.vic.gov.au/firearms-licensing>> (retrieved 22 August 2023).

121. *Police v Eliassides* [2020] VMC 15 [37].

122. *Police v Eliassides* [2020] VMC 15 [37].

123. *Police v Eliassides* [2020] VMC 15 [37].

with the same maximum penalties.¹²⁴ However, in Tasmania and the ACT, imitation firearms do not need to be registered.¹²⁵

- 3.93 In WA, imitation firearms are a “controlled weapon”, not a firearm.¹²⁶ Possession of a controlled weapon has a slightly lower maximum penalty than possession of a prohibited weapon in WA and NSW.¹²⁷
- 3.94 In the NT and Victoria, imitation firearms are considered “prohibited weapons” rather than firearms.¹²⁸ In the NT, the maximum penalty for possession of an imitation firearm is 400 PU or 2 years’ imprisonment.¹²⁹
- 3.95 In Victoria, the maximum penalty for possession of an imitation firearm depends on whether the person is a “non-prohibited” person, “prohibited” person, or subject to a firearms prohibition order.¹³⁰ The maximum penalty for possession by a non-prohibited person is 240 PU or 2 years’ imprisonment.¹³¹ The maximum penalty is 1200 PU or 10 years’ imprisonment for possession by prohibited persons and those subject to a firearms prohibition order.¹³² One submission supported consideration of increased maximum penalties for subsequent weapons offences committed by prohibited persons.¹³³
- 3.96 In Queensland, imitation firearms are dealt with under the definition of “replica weapon”.¹³⁴ For the purposes of some offences under the *Weapons Act 1990* (Qld), “replica weapon” is included in the definition of “weapon”. For example, the following weapons offences also apply to replica weapons: dangerous conduct with a weapon in public,¹³⁵ and carrying an exposed weapon in public.¹³⁶ However, certain

124. *Firearms Act 1996* (ACT) s 23A, sch 1 item 19; *Firearms Regulations 2017* (SA) reg 4(1), reg 9; *Firearms Act 1996* (Tas) s 3 definition of “firearm”.

125. *Firearms Act 1996* (Tas) s 74; Tasmania Police Firearms Services, “Imitation Firearms” <<https://fas.police.tas.gov.au/acquiring-a-firearm/imitation-firearms/>> (retrieved 24 August 2023); *Firearms Act 1996* (ACT) s 23A(1)(c); South Australia Police, “Firearms and Weapons” <<https://www.police.sa.gov.au/services-and-events/firearms-and-weapons>> (retrieved on 24 August 2023).

126. *Weapons Regulations 1999* (WA) sch 2 item 10.

127. *Weapons Act 1999* (WA) s 6, s 7; *Weapons Prohibition Act 1998* (NSW) s 7.

128. *Weapons Control Regulations 2001* (NT) sch 2 cl 30; *Control of Weapons Act 1990* (Vic) s 3(1) definition of “imitation firearm”, definition of “prohibited weapon”.

129. *Weapons Control Act 2001* (NT) s 6.

130. See [3.54]-[3.57].

131. *Control of Weapons Act 1990* (Vic) s 5AB(1).

132. *Control of Weapons Act 1990* (Vic) s 5AB(2)-(3).

133. Confidential, *Preliminary Submission PWE11*, 3.

134. *Weapons Act 1990* (Qld) s 6A.

135. *Weapons Act 1990* (Qld) s 58(1)(b), s 58(2).

136. *Weapons Act 1990* (Qld) s 57(1)(b), s 57(2).

other weapons offences do not apply to replica weapons, such as possession of a weapon in general.¹³⁷

Question 3.5: Maximum penalties for gel blasters and imitation firearms

- (1) Are the maximum penalties for gel blaster use or possession in NSW appropriate?
- (2) If gel blasters should be dealt with separately from firearms and imitation firearms, what would be the appropriate way to do so and what would be the appropriate maximum penalties?
- (3) Are the maximum penalties for imitation firearm use/possession in NSW appropriate?
- (4) If imitation firearms should be dealt with separately from firearms, what would be the appropriate way to do so and what would be the appropriate maximum penalties?

3.97

137. *Weapons Act 1990* (Qld) s 50.

4. Standard non-parole periods

In brief

This chapter explains the standard non-parole period (SNPP) scheme, and then discusses the approach previously recommended by the Sentencing Council to determine appropriate SNPP offences and set appropriate SNPPs. We then apply this approach to one offence as an example. This chapter also sets out issues raised in preliminary submissions and consultations relevant to SNPPs.

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What is a standard non-parole period

- 4.1 A standard non-parole period (SNPP) is a type of non-parole period that applies to a limited number of offences (52 in total), identified in a table in part 4 division 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*Crimes Sentencing Procedure Act*).
- 4.2 A non-parole period is the time during which a person who is serving a sentence of imprisonment may not be released on parole. It is the “minimum period for which the offender must be kept in detention” for an offence.¹
- 4.3 The SNPP is the non-parole period for an offence that, “taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness”.²
- 4.4 The SNPP for an offence is one guidepost in the sentencing process, along with the maximum penalty.³ It is a matter to be taken into account by a court in determining an appropriate sentence, without limiting other matters that are required or permitted to be taken into account.⁴
- 4.5 The SNPP operates in a wider sentencing framework, and the court must also have regard to other sentencing principles when sentencing an offender. The sentence imposed will be the result of considering all relevant factors through a process of “instinctive synthesis”.⁵ See chapter 5 for more information about other sentencing principles and factors.

Offences in scope with an SNPP

- 4.6 There are 19 offences within the scope of the review that have an SNPP.

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(1).
2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).
3. *Muldock v R* [2011] HCA 39, 244 CLR 120 [27].
4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(2).
5. *Markarian v R* [2005] HCA 25, 228 CLR 357 [51]; *Muldock v R* [2011] HCA 39, 244 CLR 120 [26].

4.7 Table 4.1 lists eight of the 19 offences have optional or alternative elements that involve a weapon. Apart from attempted murder (by shooting), these elements are expressed as part of a list of circumstances of aggravation.

Table 4.1: SNPP offences with optional elements involving a weapon

Act and section	Brief description of offence	SNPP	Maximum penalty
<i>Crimes Act 1900 (NSW) s 29</i>	Attempt to murder	10 years	25 years
<i>Crimes Act 1900 (NSW) s 61J(1)</i>	Aggravated sexual assault	10 years	20 years
<i>Crimes Act 1900 (NSW) s 61JA(1)</i>	Aggravated sexual assault in company	15 years	Life
<i>Crimes Act 1900 (NSW) s 66C(2)</i>	Aggravated sexual intercourse with a child 10–14 years	9 years	20 years
<i>Crimes Act 1900 (NSW) s 66C(4)</i>	Aggravated sexual intercourse with a child 14–16 years	5 years	12 years
<i>Crimes Act 1900 (NSW) s 112(2)</i>	Breaking and entering into (or breaking out of) any house and committing serious indictable offence in circumstances of aggravation	5 years	20 years
<i>Crimes Act 1900 (NSW) s 112(3)</i>	Breaking and entering into (or breaking out of) any house and committing serious indictable offence in circumstances of special aggravation	7 years	25 years
<i>Crimes Act 1900 (NSW) s 154C(2)</i>	Taking motor vehicle or vessel with assault or with occupant on board in circumstances of aggravation	5 years	14 years

4.8 Table 4.2 lists 11 of the 19 offences have weapons as an essential element of the offence.

Table 4.2: SNPP offences with weapons as an essential element of the offence

Act and section	Brief description of offence	SNPP	Maximum penalty
<i>Firearms Act 1996</i> (NSW) s 7	Unauthorised possession or use of firearms (pistol or prohibited firearm)	4 years	14 years
<i>Firearms Act 1996</i> (NSW) s 51(1A) and s 51(2A)	Unauthorised sale/supply of prohibited firearm or pistol	10 years	20 years
<i>Firearms Act 1996</i> (NSW) s 51B	Unauthorised sale/supply of firearms on an ongoing basis	10 years	20 years
<i>Firearms Act 1996</i> (NSW) s 51D(2)	Unauthorised possession of more than 3 firearms any one of which is a prohibited firearm or pistol	10 years	20 years
<i>Weapons Prohibition Act 1998</i> (NSW) s 7	Unauthorised possession or use of prohibited-weapon – where the offence is prosecuted on indictment	5 years	14 years
<i>Crimes Act 1900</i> (NSW) s 33A(1)	Discharging a firearm with intent to cause grievous bodily harm	9 years	25 years
<i>Crimes Act 1900</i> (NSW) s 33A(2)	Discharging a firearm with intent to resist arrest or detention	9 years	25 years
<i>Crimes Act 1900</i> (NSW) s 93GA(1)	Fire a firearm at a dwelling-house or other building with reckless disregard for the safety of any person	5 years	14 years
<i>Crimes Act 1900</i> (NSW) s 93GA(1A)	Fire a firearm, during a public disorder, at a dwelling-house or other building with reckless disregard for the safety of any person	6 years	16 years
<i>Crimes Act 1900</i> (NSW) s 93GA(1B)	Fire a firearm, in the course of an organised criminal activity, at a dwelling-house or other building with reckless disregard for the safety of any person	6 years	16 years

Act and section	Brief description of offence	SNPP	Maximum penalty
<i>Crimes Act 1900</i> (NSW) s 98	Robbery (or assault with intent to rob) with arms (offensive weapon or instrument) and wounding (or inflict grievous bodily harm)	7 years	25 years

- 4.9 In preliminary submissions to the review, stakeholders raised issues about the SNPPs for some of the SNPP offences with weapons as an essential element of the offence. These issues are outlined further below. No issues have been raised with the SNPP offences which have optional weapons elements. Any changes to the SNPPs for these offences would require consideration of elements of offending that are not relevant to the review.
- 4.10 We propose that the review will focus on the 11 offences that have weapons as an essential element of the offence. The review will also consider other offences relevant to the terms of reference if issues are raised with such an offence in submissions or in consultations.

Question 4.1: SNPP offences to consider

- (1) Are there any issues with the SNPPs of the eight offences that may involve weapons that would justify considering them as part of the review?
- (2) Are there any other offences currently in the SNPP scheme, but not identified in the tables above, that we should consider? If so, why?
- (3) Are there any offences that do not currently have SNPPs that we should consider for inclusion (other than those we discuss from [4.51] onwards)? If so, why?

Approach to standard non-parole periods

- 4.11 In 2013, we produced a report on SNPPs, which recommended principles to identify SNPP offences and a process for setting an SNPP for an offence.⁶
- 4.12 The terms of reference for the 2013 review did not ask us to consider whether the SNPP scheme should exist or not. The terms of reference for this review also do not ask us to consider whether the SNPP scheme remains appropriate, but rather whether the SNPPs for offences within the scope of the review are appropriate.

6. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) rec 2.1.

4.13 This section of the chapter sets out what we recommended in 2013. Later in the chapter, we will give an example of how this approach can be applied to a particular offence. We seek your feedback on the approach, to help inform the review.

Principles to identify SNPP offences

4.14 In 2013, we made the following recommendation:

- (1) The principles that should apply in deciding whether to include an offence in the SNPP scheme are whether it:
 - (a) has a significant maximum penalty
 - (b) is triable on indictment only
 - (c) involves elements of aggravation
 - (d) involves a vulnerable victim(e) involves special risk of serious consequences to the victim and the community
 - (f) is prevalent
 - (g) is subject to a pattern of inadequate sentencing, and
 - (h) is subject to a pattern of inconsistent sentences.
- (2) The fact that an offence potentially encompasses a wide range of offending behaviour should be a factor that can be considered in deciding whether to exclude an offence from the SNPP scheme.⁷

4.15 Our report noted that these factors are to be applied “flexibly and with careful judgement” and that not all the factors need to be present for an offence to be considered appropriate to be added to the SNPP scheme.⁸

4.16 Our report also recommended that the principles listed above should govern whether offences should be included in, retained, or removed from the SNPP scheme.⁹

4.17 In 2013, the following offences in the scope of the review were SNPP offences:

Table 4.3: Offences in the scope of the review that had SNPPs in 2013

Act and section	Brief description of offence	SNPP	Maximum penalty
<i>Firearms Act 1996</i> (NSW) s 7	Unauthorised possession or use of firearms (pistol or prohibited firearm)	3 years in 2013 (now 4 years)	14 years
<i>Firearms Act 1996</i> (NSW) s 51(1A) and s 51(2A)	Unauthorised sale/supply of prohibited firearm or pistol	10 years	20 years

7. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) rec 2.1.

8. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [2.3].

9. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) rec 5.1(1).

Act and section	Brief description of offence	SNPP	Maximum penalty
<i>Firearms Act 1996</i> (NSW) s 51B	Unauthorised sale/supply of firearms on an ongoing basis	10 years	20 years
<i>Firearms Act 1996</i> (NSW) s 51D(2)	Unauthorised possession of more than 3 firearms any one of which is a prohibited firearm or pistol	10 years	20 years
<i>Weapons Prohibition Act 1998</i> (NSW) s 7	Unauthorised possession or use of prohibited weapon - where the offence is prosecuted on indictment	3 years in 2013 (now 5 years)	14 years
<i>Crimes Act 1900</i> (NSW) s 98	Robbery (or assault with intent to rob) with arms (offensive weapon, or instrument) and wounding (or inflict grievous bodily harm)	7 years	25 years
<i>Crimes Act 1900</i> (NSW) s 29	Attempt to murder	10 years	25 years
<i>Crimes Act 1900</i> (NSW) s 61J(1)	Aggravated sexual assault	10 years	20 years
<i>Crimes Act 1900</i> (NSW) s 61JA(1)	Aggravated sexual assault in company	15 years	Life
<i>Crimes Act 1900</i> (NSW) s 112(2)	Breaking and entering into (or breaking out of) any house and committing serious indictable offence in circumstances of aggravation	5 years	20 years
<i>Crimes Act 1900</i> (NSW) s 112(3)	Breaking and entering into (or breaking out of) any house and committing serious indictable offence in circumstances of special aggravation	7 years	25 years
<i>Crimes Act 1900</i> (NSW) s 154C(2)	Taking motor vehicle or vessel with assault or with occupant on board in circumstances of aggravation	5 years	14 years

4.18 We considered that all these offences were “sufficiently serious” to be retained and that the factors that might support their removal were not sufficient when considered with the principles outlined above.¹⁰

10. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [3.4].

4.19 We recommended that, on the basis of these principles, the following offences which are relevant to the review, should be added to the SNPP scheme.¹¹ The government adopted our recommendations to add these offences to the scheme.¹²

(1) Discharge a firearm with intent to cause grievous bodily harm,¹³ or with intent to resist arrest or detention¹⁴

We recommended these offences be added to the SNPP scheme, having regard to the following specific principles:

- (a) significant maximum penalty – the offences carry a very high maximum penalty of 25 years’ imprisonment
- (b) triable on indictment only, and
- (c) involves a special risk of serious consequences to the victim and community – we noted the offences were similar to the offences of wounding with intent under s 33 of the *Crimes Act 1900* (NSW) (*Crimes Act*) which were already included in the SNPP scheme. We regarded offences under s 33A of the *Crimes Act* as aggravated forms of the s 33 offences, “increasing the risk of serious harm both to ordinary members of the community and law enforcement officers”.¹⁵

We noted that while the prevalence of these offences was relatively low, with only 11 charges being finalised in 2012, the inclusion in the SNPP scheme was justified based on the factors mentioned above.

(2) Fire a firearm at a dwelling-house or other building with reckless disregard,¹⁶ including during a public disorder,¹⁷ or in the course of organised criminal activity¹⁸

We recommended these offences be added to the SNPP scheme, having regard to the following specific principles:

- (a) significant maximum penalty – these offences have maximum penalties of between 14 and 16 years’ imprisonment.
- (b) triable on indictment only, and

11. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) rec 3.2.

12. *Crimes Legislation Amendment (Child Sex Offences) Act 2015* (NSW); *Crimes (Sentencing Procedure) Amendment (Firearms Offences) Act 2015* (NSW). Only one offence (*Crimes Act 1900* (NSW) s 38) was not added to the SNPP scheme as recommended.

13. *Crimes Act 1900* (NSW) s 33A(1).

14. *Crimes Act 1900* (NSW) s 33A(2).

15. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [3.32].

16. *Crimes Act 1900* (NSW) s 93GA(1).

17. *Crimes Act 1900* (NSW) s 93GA(1A).

18. *Crimes Act 1900* (NSW) s 93GA(1B).

- (c) involves a special risk of serious consequences to the victim and community– we noted these offences carry this risk inherently and through the “irresponsible circumstances of their commission”. We also considered there was a special risk arising from members of the community becoming unintended victims, the apprehension in the communities where these crimes are committed and because these crimes commonly occur in the context of organised crime-related activity.¹⁹

We noted the prevalence of these offences was low, and that they were relatively new offences at the time. We noted however that incidents of this nature were being “frequently reported” citing police incidents data.²⁰

Question 4.2: Principles to be applied in determining SNPP offences

- (1) Are the principles set out at [4.9] appropriate for determining whether weapons offences should be included in, retained or removed from the SNPP scheme?
- (2) Are there any other principles that would be appropriate for determining whether a weapons offence should be included in, retained or removed from the SNPP scheme? If so, why?

Process for setting standard non-parole periods

4.20 In our 2013 report, we noted the concerns expressed in submissions about a lack of transparency in the process by which SNPPs were determined, and a considerable variation in the proportion of SNPPs to the corresponding maximum penalties. We noted the variation in SNPPs at the time did “not suggest an entirely coherent approach”²¹ and that this was creating “significant difficulties for sentencing”.²²

4.21 To address this, we made the following recommendation:²³

The process for specifying an SNPP for an SNPP offence should assume as a starting point a non-parole period that is 37.5% of the maximum penalty for the offence. The resulting figure can then be reduced or increased (to no more than 50% of the maximum penalty for the offence) as is appropriate, having regard to the following matters:

- (a) the special need for deterrence
- (b) the need to recognise the exceptional harm which the offence may cause
- (c) the potential vulnerability of those who may be victims
- (d) the extent to which the offence may involve a breach of trust or abuse of authority, and

19. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [3.38].

20. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [3.40].

21. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [4.4].

22. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [4.6].

23. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) rec 4.1.

- (e) sentencing statistics and practice, including relevant appellate guidance as to appropriate levels of sentencing for the offence.

- 4.22 The formula was devised from the general propositions that assume:
- a mid-range offence should attract a head sentence of 50% of the maximum sentence, and
 - the non-parole period (before allowing for subjective circumstances) should be 75% of the head sentence (for non-life sentences) in accordance with s 44 of the *Crimes Sentencing Procedure Act*.
- 4.23 This results in a common starting point for calculating an SNPP that is 37.5% of the maximum penalty (that is, 75% of 50% of the maximum penalty).
- 4.24 We recommended that this process should apply in the future when setting an SNPP for each new SNPP offence.²⁴
- 4.25 We favoured this process over an offence-by-offence analysis which we noted would be complex, time-consuming and may result in even more variation in SNPPs.²⁵ We also favoured this process over a single fixed ratio process, which we considered could be “rigid and potentially arbitrary” in application.²⁶
- 4.26 We recommended that, by applying this process, the following offences relevant to the review should have their SNPPs set as described below.²⁷ These recommendations were adopted by the government and remain the SNPPs for these offences.²⁸

(1) Unauthorised possession or use of a pistol or prohibited firearm²⁹

We recommended the SNPP for this offence be increased from 3 years (21.4% of the maximum penalty) to 4 years (28.6% of the maximum penalty) to recognise the exceptional harm which the offence may cause. We considered that the existing SNPP of 3 years was “disproportionately low”.³⁰

24. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) rec 5.1(2).

25. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [4.24].

26. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [4.36].

27. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) rec 4.1, rec 4.2, rec 4.3.

28. See *Crimes Legislation Amendment (Child Sex Offences) Act 2015* (NSW); *Crimes (Sentencing Procedure) Amendment (Firearms Offences) Act 2015* (NSW).

29. *Firearms Act 1996* (NSW) s 7(1).

30. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [4.57].

(2) Unauthorised possession or use of a prohibited weapon³¹

We recommended the SNPP for this offence be increased from 3 years (21.4% of the maximum penalty) to 5 years (35.7% of the maximum penalty) to recognise the exceptional harm which this offence may cause.

We recommended a higher SNPP for this offence than for the equivalent offence under the *Firearms Act 1996* (NSW) (*Firearms Act*) because we considered there was a special need for deterrence of prohibited weapons, particularly military-style weapons, the use or possession of which we noted can cause exceptional harm to potentially large numbers of victims.³²

(3) Discharge firearm with intent to cause grievous bodily harm or with intent to resist arrest or detention³³

We recommended the SNPPs for these offences should be set at 9 years (36% of the maximum penalty) to recognise the exceptional harm this offence may cause, and for consistency with another SNPP offence we considered to be just as serious.³⁴ We noted it was appropriate that the SNPP for this offence is higher than for the offences at (1) and (2) above as those offences do not require proof of any specific intent concerning possession or use of a weapon.

(4) Fire a firearm at a building with reckless disregard for safety,³⁵ including during a public disorder,³⁶ or in the course of an organised criminal activity³⁷

We recommended the SNPPs for these offences should be 5 years for the basic s 93GA(1) offence (36% of the maximum penalty) and 6 years for the aggravating offences (38% of the maximum penalty), recognising the exceptional harm these offences may cause. We noted that while deterrence is an important consideration for these offences, there was no special need for deterrence as serious outcomes involving injury or death would be covered by other offences with appropriate penalties.³⁸

31. *Weapons Prohibition Act 1998* (NSW) s 7(1).

32. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [4.58].

33. *Crimes Act 1900* (NSW) s 33A.

34. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [4.65].

35. *Crimes Act 1900* (NSW) s 93GA(1).

36. *Crimes Act 1900* (NSW) s 93GA(1A).

37. *Crimes Act 1900* (NSW) s 93GA(1B).

38. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [4.66].

Question 4.3: Process for setting SNPPs

- (1) Is the process set out at [1.8] appropriate for determining the length of an SNPP for a weapons offence? Why or why not?
- (2) Are there any principles that are particularly appropriate or inappropriate for weapons offences?
- (3) Is there any other process that would be appropriate for setting an SNPP for a weapons offence?

Example application of the approach

- 4.27 This section looks at how our 2013 approach might apply to one offence (s 36(1) of the *Firearms Act*) as an example of how it could apply to offences being considered in the review.
- 4.28 Section 36(1) prohibits a person from supplying, acquiring, possessing or using a firearm that is not registered. The maximum penalty for this offence is 14 years' imprisonment if the firearm is a pistol or prohibited firearm, or 5 years' imprisonment for other less serious types of firearms. In the example below, we consider the offence only as it applies to pistols and prohibited firearms. Chapter 2 explains the definition of firearm in more detail.
- 4.29 We have chosen s 36(1) because its exclusion from the SNPP scheme was used as an example of a potential inconsistency in the SNPP scheme in a preliminary submission,³⁹ and because we have not previously applied our 2013 approach to this offence.

Applying the principles

Significant maximum penalty

- 4.30 The maximum penalty for an offence is an indication of parliament's view of the seriousness of an offence.⁴⁰
- 4.31 Section 36(1) has a maximum penalty of 14 years' imprisonment. When compared to the maximum penalties of current SNPP offences in the scope of the review, this falls somewhere in the middle. The lowest maximum penalty for current SNPP offences in the scope of the review is 12 years.⁴¹ Three weapons-specific SNPP

39. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PWE08*, 2.

40. *Muldock v R* [2011] HCA 39, 244 CLR 120 [31] citing *Gilson v R* (1991) 172 CLR 353, 364.

41. *Crimes Act 1900* (NSW) s 66C(2), aggravated sexual intercourse with a child 14–16 years.

offences have maximum penalties of 14 years,⁴² and two current SNPP offences (outside of the scope of the review) have maximum penalties of 7 years' imprisonment.⁴³ Eight of the 11 weapons-specific SNPP offences have higher maximum penalties.⁴⁴

- 4.32 The maximum penalty for s 36(1) could be considered in the mid-range of penalties for offences of its type. On this basis, maximum penalty would not be a determinative factor for whether it should be included in the SNPP scheme.

Triable on indictment only

- 4.33 The fact that an offence is triable only on indictment provides a further indication of its seriousness.
- 4.34 Section 36(1) is a table 2 offence, meaning that it is an indictable offence that is to be dealt with summarily unless the prosecutor elects otherwise. We noted in our 2013 report that the fact that an indictable offence can be tried summarily should not by itself determine whether it should or should not be included in the SNPP scheme, and that some offences that are triable summarily can be quite serious.⁴⁵ Section 36(1) can encompass serious conduct; in particular, supplying or using (firing or holding in a manner to cause reasonable belief that it will be fired) an unregistered pistol or prohibited firearm.
- 4.35 Three SNPP offences in the scope of the review are indictable offences that may be dealt with summarily, including the similar offence of unauthorised possession or use of a pistol or prohibited firearm.⁴⁶
- 4.36 The fact that this offence is triable summarily, by itself, may not be a basis on which to exclude it from the SNPP scheme.

Involves elements of aggravation

- 4.37 Section 36(1) does not involve any circumstances of aggravation. This factor would therefore not be a basis to include the offence in the SNPP scheme.

42. *Firearms Act 1996* (NSW) s 7(1) (unauthorised possession or use of pistol or prohibited firearm); *Weapons Prohibition Act 1998* (NSW) s 7(1) (unauthorised possession or use of a prohibited weapon, where prosecuted on indictment); *Crimes Act 1900* (NSW) s 93GA(1) (fire a firearm at a dwelling-house or other building with reckless disregard for safety).

43. *Crimes Act 1900* (NSW) s 35(4), s 60(2).

44. *Firearms Act 1996* (NSW) s 51(1A), s 51(2A), s 51B, s 51D(2); *Crimes Act 1900* (NSW) s 33A(1)–(2), s 93GA(1A)–(1B), s 98.

45. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [2.14]–[2.15].

46. *Firearms Act 1996* (NSW) s 7(1). Other indictable offences triable summarily that have SNPPs and that are in the scope of the review are *Weapons Prohibition Act 1998* (NSW) s 7(1) and *Crimes Act 1900* (NSW) s 154C(2) (taking motor vehicle or vessel with occupant on board, or assault with intent to take motor vehicle or vessel, in circumstances of aggravation).

Involves a vulnerable victim

- 4.38 Section 36(1) does not necessarily involve vulnerable victims, in the sense that there may not be any specific victim of the offence at all. A person may commit an offence under s 36(1) by possessing an unregistered pistol or prohibited firearm without using it to cause direct harm to any person. This factor would therefore not be a basis on which to include the offence in the SNPP scheme.

Special risk of serious consequences to the victim or the community

- 4.39 We noted in our 2013 report that this factor can be applied specifically (for example, sexual offences against children) and more generally to offences that have a wide-ranging impact on the community, including some offences related to organised criminal activities.⁴⁷
- 4.40 An offence against s 36(1) involving pistols or prohibited firearms may sometimes arise in the context of organised criminal activities, in particular because it involves supply, use, possession or acquisition of pistols and prohibited firearms, the most serious and dangerous types of firearms. Dealing in unregistered pistols or prohibited firearms may be considered to give rise to serious consequences for the community, even where no direct harm arises from the offence. However, whether this risk may be regarded as a special risk is less clear.
- 4.41 We considered in our 2013 report that firearms offences involving the discharge or firing of firearms (*Crimes Act* s 33A, s 93GA(1)–(1B)) met the threshold of “special risk” to the community sufficiently to include these offences in the SNPP scheme. These offences involve using a firearm with specific intent or with reckless disregard for safety, elements that are absent from s 36(1). There may be instances of this offence involving a person who is licensed to use a pistol or prohibited firearm and who comes into possession of a pistol or prohibited firearm that they were not aware was unregistered. An offence under s 36(1) may occur in contexts outside of organised crime, including animal control, sport or target shooting or firearm collecting.
- 4.42 Following this analysis, it could be said that while s 36(1) poses serious consequences to the community, it does not necessarily give rise to any particular special risk.

Is prevalent

- 4.43 We noted in our 2013 report that prevalence is not determinative by itself, but that this factor may give rise to public concern about particular offending and lead the

47. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [2.26]–[2.27].

courts to consider the need to make particular provision in a sentence for specific and general deterrence.⁴⁸

- 4.44 We considered that a number of measures can be used to assess prevalence, including crime rates, the number of charges for an offence or the number of successful prosecutions in higher courts (District and Supreme Courts).⁴⁹ For the purposes of this example application, we have included prevalence data from the Local Court as well as the higher courts.
- 4.45 In relation to crime rates, the Bureau of Crime Statistics and Research (BOCSAR) recorded crime statistics tracking violent offences involving firearms shows no increase in violent offences involving firearms in the year to March 2023.⁵⁰ This data shows that the number of murders, attempted murders, assaults and robberies involving firearms were lower in the year to March 2023 than in almost any other year in the past two decades.
- 4.46 For s 36(1) offences specifically, in the Local and higher courts:
- From 2013 to 2022, there were 1148 finalised charges for possessing an unregistered prohibited firearm (652 of which were proven), and 1078 finalised charges for possessing an unregistered pistol (588 of which were proven).
 - Proven charges for possessing an unregistered pistol have increased steadily from 2018 to 2022 (from 46 to 112).
 - There are significantly lower volumes for using, selling, purchasing, acquiring and supplying an unregistered pistol or prohibited firearm from 2013 to 2022:
 - 12 finalised charges (five of which were proven) for selling or purchasing an unregistered pistol or prohibited firearm
 - eleven finalised charges (two of which were proven) for use of an unregistered pistol and 26 finalised charges (14 of which were proven) for use of an unregistered prohibited firearm
 - 34 finalised charges (nine of which were proven) for acquiring an unregistered pistol or prohibited firearm, and
 - 51 finalised charges (29 of which were proven) for supplying an unregistered pistol or prohibited firearm.⁵¹

48. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [2.29].

49. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [2.31].

50. NSW Bureau of Crime Statistics and Research, *Offences Involving Weapons; Firearm and Knife Violence Statistics, April 2003 to March 2023 (1 August 2023)* <https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/weapons.aspx> (retrieved 3 August 2023).

51. NSW Bureau of Crime Statistics and Research, ab23-22460, table 1.

- 4.47 Overall, from 2013 to 2022, the proven charges volumes for s 36(1) as they apply to possession or use of pistols and prohibited firearms (1256) are considerably lower than proven charges for s 7(1) (4143), a similar offence relating to the use or possession of pistols or prohibited firearms that is currently included in the SNPP scheme. Proven charges volumes for possession or use of pistols under s 36(1) (590) are around four times lower than s 7(1) proven charges for possession or use of pistols (2407). Proven charges volumes for possession or use of pistols under s 36(1) (590) are almost three times lower than s 7(1) proven charges for possession or use of prohibited firearms (1736).⁵²
- 4.48 However, s 36(1) is still among the most prevalent offences within the scope of the review. Of all weapons offences we have identified, s 36(1) has the ninth highest number of proven charges in the five-year period from 2018 to 2022 with a total of 2131 proven charges in that time (this total is for possession or use of all firearms under s 36(1), including firearms other than pistols and prohibited firearms). Based on this measure, s 36(1) is far more prevalent than a similar firearms offence that currently has an SNPP, such as unauthorised possession of more than three firearms any of which is a prohibited firearm or pistol (102 proven charges from 2018 to 2022).⁵³
- 4.49 When compared to more serious firearms offences that have SNPPs (s 93GA and s 33A of the *Crimes Act* - offences that involve elements of intent or recklessness), it is far more prevalent.⁵⁴ However, prevalence may be a less relevant factor for these more serious offences.
- 4.50 From 2013 to 2022 there were 367 occasions where a person was found guilty of a s 36(1) offence involving possession or use of a pistol or prohibited firearm (for adult defendants only). Of these, 97% (356) occurred in the Local Court. From 2013 to 2022, none of these matters were dealt with by the Supreme Court and only 3% (11 matters) were dealt with by the District Court. Of the total 367 occasions, only two involved the use of a pistol or prohibited firearm and the remainder involved possession of a pistol or prohibited firearm.⁵⁵
- 4.51 Overall, the data shows that the more serious conduct captured by s 36(1) of using or supplying an unregistered pistol or prohibited firearm is not prevalent but possessing an unregistered pistol or prohibited firearm is quite prevalent.

52. NSW Bureau of Crime Statistics and Research, ab23-22460, table 1.

53. *Firearms Act 1996* (NSW) s 51D(2).

54. NSW Bureau of Crime Statistics and Research, ab23-22460, table 1.

55. NSW Bureau of Crime Statistics and Research, ab23-22643, table 2.

Has a pattern of inadequate sentencing

- 4.52 We noted in our 2013 report that this factor can be measured by reference to public opinion, views formed by the government or the number of successful Crown appeals against sentences imposed, and this was favoured as the best guide.⁵⁶
- 4.53 We are not currently aware of any published opinions or cases that would suggest a pattern of inadequate sentencing for s 36(1) based on any of these measures.

Has a pattern of inconsistent sentences

- 4.54 We noted in our 2013 report that this factor is relevant because one of the purposes of the SNPP scheme is to achieve consistency in sentencing.⁵⁷
- 4.55 We considered in our 2013 report that disparity can be “expected and justified” where an offence covers a wide range of offending behaviour, particularly where it has infrequent prevalence.⁵⁸ Section 36(1) does cover a wide range of offending behaviour (supply, acquisition, possession and use) and the prevalence of supply, acquisition or use of pistols or prohibited firearms is low and infrequent.
- 4.56 We noted in our 2013 report that comparison between sentences is only meaningful where there is like offending, which means that the facts of each relevant case will be important, and we must be careful not to give too much weight to mathematical disparity in sentencing alone.⁵⁹
- 4.57 From 2013 to 2022, where the s 36(1) offence involving use or possession of a pistol or prohibited firearm was the principal (most serious) offence being sentenced, only 72 which resulted in a custodial penalty.⁶⁰ Sixty-five of these matters were in the Local Court.
- 4.58 All of these Local Court matters and 71% (five) of the District Court matters resulted in a sentence of 2 years or less.⁶¹ Given that the number of custodial penalties handed down per year is so low (an average of seven per year in the Local Court and less than one per year in the District Court), it is difficult to conclude that there is any pattern of inconsistent sentencing for these offences.

The offence covers a wide range of offending behaviour

- 4.59 This is a factor that may justify exclusion of this offence from the SNPP scheme.

56. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [2.35]–[2.40].

57. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [2.42].

58. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [2.44].

59. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [2.45].

60. NSW Bureau of Crime Statistics and Research, ab23-22643 table 3.

61. NSW Bureau of Crime Statistics and Research, ab23-22643, table 6.

- 4.60 However, as noted in our 2013 report, this factor should not “inevitably constitute a barrier to inclusion”;⁶² for example, where it is possible to break up an offence into categories of conduct that reflect different levels of offending and potentially include some but not all these categories in the SNPP scheme.
- 4.61 Section 36(1) is broken up into categories of conduct when it comes to firearm type: a higher maximum penalty applies to instances of the offence involving pistols and prohibited firearms than other types of less serious firearms. In this section, as noted above in [1.11], we are considering the offence only as it applies to pistols and prohibited firearms.
- 4.62 Even after limiting the offence to particular firearm types, s 36(1) still captures a wide range of offending conduct, such as:
- (1) supplying the firearm, which includes transferring ownership, offering, receiving, possessing, exposing or exhibiting for supply, conducting negotiations for supply, consigning or delivering for supply, or causing or allowing supply, or
 - (2) acquiring the firearm, meaning accepting or receiving supply, or
 - (3) possessing the firearm, meaning knowingly have custody of it or have it in the custody of another person, or having it at any premises whether or not that place belongs to or is occupied by the person, or
 - (4) using the firearm, meaning to fire it or hold it in a manner that causes a reasonable belief that it will be fired, whether or not the firearm is capable of being fired.
- 4.63 Moreover, s 36(1) does not require a person to have any specific intent concerning the supply, acquisition, possession or use of a firearm.
- 4.64 Therefore, it could be considered that s 36(1) covers a wide range of offending behaviour.

Conclusion

- 4.65 A factor weighing in favour of including s 36(1) in the SNPP scheme is that it is fairly prevalent, particularly when compared with other weapons offences, however only for possession of an unregistered pistol or prohibited firearm.
- 4.66 Factors not relevant or that weigh against its inclusion are:
- (1) Significant maximum penalty.
 - (2) It is not triable on indictment only.
 - (3) It does not involve elements of aggravation.

62. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [2.51].

- (4) It does not involve vulnerable victims.
 - (5) It does not carry a special risk of serious consequences to the victim or community, although it does carry a risk of serious consequences.
 - (6) It does not have a pattern of inadequate sentencing.
 - (7) It covers a wide range of offending behaviour.
- 4.67 Following the approach of applying these principles would therefore not result in s 36(1) being recommended for inclusion in the SNPP scheme.

Applying the process for setting an SNPP

- 4.68 Below, we show how the process for setting an SNPP might apply to s 36(1) if it were considered appropriate to be added to the SNPP scheme.
- 4.69 The starting point we recommended in 2013 was for an SNPP of 37.5% of the maximum penalty. For s 36(1), this would be around 5 years.
- 4.70 This starting point may be adjusted upwards or downwards to take into account any particular features of the offence or sentencing concerns. Each of these factors are considered below.

Special need for deterrence

- 4.71 While there is a need for deterrence, we do not consider that this is a particularly special need, unlike offences involving more serious weapons. We noted in our 2013 report that a special need for deterrence arose for s 7(1) of the *Weapons Prohibition Act 1998* (NSW) (*Weapons Prohibition Act*) because the military-style weapons covered by this offence can cause exceptional harm to large numbers of victims. We concluded that this special need for deterrence did not arise for s 7(1) of the *Firearms Act*, which covers the same types of weapons as s 36(1) (pistols and prohibited firearms).
- 4.72 We also considered that there was no special need for deterrence for the more serious firearms offences of firing at a building with reckless disregard for safety, because serious outcomes arising from these offences would be covered by other offences with appropriate penalties.⁶³
- 4.73 It is therefore unlikely that this factor would form a basis to adjust the SNPP for s 36(1) any higher than the starting point.

63. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [4.66].

Need to recognise the exceptional harm which the offence may cause

- 4.74 Similar to the above, while serious harm may arise from unregistered pistols and prohibited firearms, this harm is less likely to be exceptional when compared with more serious weapons like military-style prohibited weapons. Any serious harm arising from the use of an unregistered pistol or prohibited firearm would likely be addressed by other more serious offences with appropriate higher penalties.

Potential vulnerability of victims

- 4.75 This would not be a relevant factor for s 36(1) as the offence does not require there to be any particular victim.

Extent to which the offence may involve a breach of trust or abuse of authority

- 4.76 This would not be a relevant factor for this offence.

Sentencing statistics and practice including relevant appellate guidance as to appropriate levels of sentencing for the offence

- 4.77 In 2022, 9% (five in total) of s 36(1) matters involving possession or use of a pistol or prohibited firearm resulted in a custodial penalty, all sentenced in the Local Court.⁶⁴ All of these matters resulted in a head sentence of 22 months or less.⁶⁵ The most common penalty for these types of s 36(1) matters in 2022 was a conditional release order without conviction (26% or 15 matters in total). A fine was a more common penalty for these types of offences than custody, comprising 19% or 11 matters in 2022.⁶⁶
- 4.78 This trend is also reflected over 2013–2022, where the Local and higher courts handed down custodial penalties in 20% of sentences for possession or use of a pistol or prohibited firearm (*Firearms Act 1995* s 36(1)) where this was the principal (most serious) offence sentenced.⁶⁷
- 4.79 These statistics suggest that the s 36(1) possession and use matters coming before the courts are not particularly serious. This does not weigh in favour of adjusting any SNPP for this offence upward. We note the very low counts of custodial penalties make it difficult to draw any meaningful conclusions based on the sentencing data alone.
- 4.80 We have not identified any cases to date with specific appellate guidance as to the appropriate levels of sentencing for s 36(1).

64. NSW Bureau of Crime Statistics and Research, ab23-22643, table 3.

65. NSW Bureau of Crime Statistics and Research, ab23-22643, table 6.

66. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4.

67. NSW Bureau of Crime Statistics and Research, ab23-22643, table 3.

Conclusion

- 4.81 Following the approach of applying this process would therefore result in any SNPP for s 36(1) being adjusted below the 37.5% threshold, most likely at a similar level to the offence in s 7(1) of the *Firearms Act*, which is set at 4 years or 28.6% of its maximum penalty.

Question 4.4: Application of the principles and process

- (1) Do you have any feedback on the above application of the principles and process to a weapons offence?
- (2) Is there other relevant information (for example, cases or data) that we have not considered for s 36(1) or similar offences in our application of the principles and process?

SNPPs and firearms offences

- 4.82 In this section, we set out issues relating to SNPPs for offences in the *Firearms Act* that were raised by stakeholders in preliminary submissions to the review.

Similar offences not all having an SNPP

- 4.83 The Office of the Director of Public Prosecutions (ODPP) pointed to the potential inconsistency of the offence of unauthorised possession or use of a pistol or prohibited firearm having an SNPP of 3 years while the following similar offences in the *Firearms Act* with the same maximum penalty (14 years) do not have an SNPP:

- (1) supply, acquire, possess or use an unregistered pistol or prohibited firearm - s 36(1)
- (2) acquire, possess or use a pistol or prohibited firearm in contravention of a firearms prohibition order - s 74(1), and
- (3) shorten a firearm, or possess or supply a shortened firearm - s 62(1).⁶⁸

- 4.84 Section 7(1) concerns only pistols and prohibited firearms. Sections 36(1) and 74(1) apply generally to firearms but provide for differentiated maximum penalties depending on the type of firearm (14 years for a pistol or prohibited firearm or 5 years for any other firearm).

- 4.85 A pistol is defined as being a firearm that is reasonably capable of being raised and fired by one hand.⁶⁹ Prohibited firearms are set out in schedule 1 of the *Firearms Act* and include machine guns, some self-loading guns, cannons, concealed or disguised firearms and any firearm capable of being silenced or muffled.

68. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PWE08*, 2.

69. *Firearms Act 1996* (NSW) s 4(1) definition of “pistol”.

- 4.86 Section 7(1) is directed to circumstances where a person uses or possesses a pistol or prohibited firearm without a licence or permit to do so. Licences may be granted for pistols and certain prohibited firearms in limited circumstances.⁷⁰ Prohibited firearms are expressly excluded from all licence categories except for category D, which allows certain types of prohibited firearms and expressly excludes others.
- 4.87 Section 36(1) relates to circumstances where the pistol or prohibited firearm is unregistered.
- 4.88 Section 74(1) is directed to circumstances where a person acquires, possesses or uses a pistol or prohibited firearm while subject to a firearms prohibition order (FPO). A FPO may be imposed on a person if, in the opinion of the Commissioner of the NSW Police Force, the person is not fit, in the public interest, to possess a firearm.⁷¹ The effect of a FPO is that a person cannot acquire, possess, supply or use a firearm, or reside in premises where there are firearms, or attend certain premises including shooting ranges, unless otherwise exempted by the Commissioner.⁷²
- 4.89 Section 62(1) concerns a firearm that has been shortened, excluding pistols. A firearm may be shortened so as to convert it into a pistol if a person is authorised by permit to do so.⁷³ Shortening a firearm can have the effect of converting it into a firearm that is capable of being concealed, or allowing it to be altered; for example, to fit it with a silencer as in the case of *Lee v R*.⁷⁴
- 4.90 The fact that these four offences have the same maximum penalty suggests that it was parliament's intention that they be considered equally serious offences.
- 4.91 However, offences merely having the same maximum penalty as an existing SNPP offence has not been considered sufficient reason to add offences to the SNPP scheme. The SNPP offences within the scope of the review have maximum penalties ranging from 12 years to life imprisonment, and we have identified 14 other weapons offences in the scope of the review with maximum penalties ranging from 20 to 25 years' imprisonment that do not have SNPPs.⁷⁵
- 4.92 The Law Society of NSW (Law Society) considered that, while disparities in SNPPs may need to be examined by the review, the solution is not simply raising the

70. *Firearms Act 1996* (NSW) s 15 category D licence allows for certain types of prohibited firearms, s 16 category H is for pistols.

71. *Firearms Act 1996* (NSW) s 73(1).

72. *Firearms Act 1996* (NSW) s 74.

73. *Firearms Act 1996* (NSW) s 63.

74. *Lee v R* [2016] NSWCCA 146 [9].

75. *Crimes Act 1900* (NSW) s 61K(b), s 91G(3), s 97(1), s 97(2), s 109(2), s 109(3), s 111(3), s 113(3); *Firearms Act 1996* (NSW) s 50A(2), s 51BB(1); *Weapons Prohibition Act 1998* (NSW) s 23A(2), s 23B(1), s 25A(2).

SNPPs that currently sit proportionally lower to the maximum penalty. They instead favoured a “nuanced investigation” that would consider the appropriateness of maximum penalties, the range of conduct captured in offence provisions and whether sentencing patterns indicate that an SNPP is necessary.⁷⁶

Question 4.5: Similar firearms offences not all having an SNPP

- (1) Should the offences in s 36(1) and s 74(1) (as they relate to pistols and prohibited firearms) and s 62(1) of the *Firearms Act 1996* (NSW) have an SNPP?
- (2) If so, what principles or factors are relevant to their inclusion in the SNPP scheme, and what is an appropriate length of an SNPP for each?

Inconsistent proportions of SNPPs to maximum penalties

- 4.93 The ODPP noted that an SNPP of 4 years for the s 7(1) *Firearms Act* offence:
- places offences that are characterised as within the middle of the range of objective seriousness (and those characterised as falling below this range) necessarily towards the bottom of the 14-year sentencing range as set by the maximum penalty, which may have the capacity to distort the sentencing process.⁷⁷
- 4.94 We understand this to mean that a s 7(1) offence that is of mid-range objective seriousness could attract a four year SNPP, and then, because of the operation of s 44(2) of the *Crimes Sentencing Procedure Act*, which requires the parole period to not exceed one-third of the non-parole period unless there are special circumstances, the total head sentence for a mid-range s 7(1) offence would be around 5 years (or less for an offence that falls below the mid-range of objective seriousness).
- 4.95 We are aware of two Court of Criminal Appeal cases which have commented on the proportion of the SNPP of s 7 to its maximum penalty. In 2008, the Court of Criminal Appeal noted that it would be expected that the SNPP for this offence should be half of the maximum penalty.⁷⁸ In a more recent case, after the increase of the SNPP to 4 years, it was commented that the SNPP was “relatively low”.⁷⁹
- 4.96 As noted by the ODPP, all other *Firearms Act* offences with SNPPs have their SNPPs set at half their maximum penalty.
- 4.97 The Law Society also raised a concern that s 7(1) of the *Firearms Act* has an SNPP of 4 years while s 51(1A) has an SNPP of 10 years.⁸⁰ We note that s 51(1A) has a higher

76. Law Society of NSW, *Preliminary Submission PWE05*, 2.

77. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PWE08*, 2.

78. *R v Najem* [2008] NSWCCA 32 [39].

79. *Chandab v R* [2021] NSWCCA 186 [81].

80. Law Society of NSW, *Preliminary Submission PWE05*, 1–2.

maximum penalty of 20 years than s 7(1) for which the maximum penalty is 14 years, which suggests that it was parliament’s intention that this offence be considered more serious than s 7(1), and accordingly, have a higher SNPP.

Question 4.6: Inconsistent proportions of SNPPs to maximum penalties

Has the proportion of the SNPP to maximum penalty for s 7(1) of the *Firearms Act 1996* (NSW) (or any other offence) caused distortions or challenges in sentencing? If so, please provide examples.

SNPPS and prohibited weapons offences

- 4.98 The ODPP noted that the SNPP of 5 years for unauthorised possession of prohibited weapons is “notably higher” than the equivalent offence of unauthorised possession of a pistol or prohibited firearm, which has an SNPP of 4 years.
- 4.99 As noted above, we recommended a higher SNPP for the *Weapons Prohibition Act* offence than for the *Firearms Act* offence in 2013 on the basis that there was a special need for deterrence with prohibited weapons, particularly military-style weapons. At the time, we did not consider that there was the same need for special deterrence with firearms.
- 4.100 The ODPP noted further that the SNPP for the prohibited weapons offence may have “limited utility” given the breadth of offending it encompasses.⁸¹ This submission pointed to the case of *Jacob v R*, in which Acting Justice Hulme noted that the wide variety of weapons in the non-military categories of prohibited weapons made it difficult to assess what type of offending would be in the mid-range of objective seriousness for the purpose of determining an appropriate SNPP.⁸² We discuss the issue of breadth of offences further in chapter 3.

Question 4.7: Difference in SNPP of similar offences

What is the appropriate SNPP for the offence in s 7(1) of the *Weapons Prohibition Act 1998* (NSW) offence. Why?

81. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PWE08*, 2.

82. *Jacob v R* [2014] NSWCCA 65 [181]–[185].

5. Sentencing principles and factors

In brief

This chapter explains the principles and factors relevant to the sentencing of adults for offences within the scope of the review and sets out issues raised in preliminary submissions and consultations.

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Sentencing discretion generally

- 5.1 In sentencing an offender, the court will exercise broad sentencing discretion to ensure that it considers all the relevant circumstances of the case before it. Each sentence must be individualised to each case. This is known as the principle of individualised justice.¹
- 5.2 A court takes into account the sentencing principles outlined in this chapter by identifying all the factors relevant to sentencing the matter before it, assessing their significance, and making a value judgment as to the appropriate sentence.²

Purposes of sentencing

- 5.3 Section 3A of the *Crimes (Sentencing Procedure) Act 1999 (NSW) (Crimes (Sentencing Procedure) Act)* sets out the following purposes of sentencing:
- to ensure that the offender is adequately punished for the offence,
 - to prevent crime by deterring the offender and other persons from committing similar offences,
 - to protect the community from the offender,
 - to promote the rehabilitation of the offender,
 - to make the offender accountable for his or her actions,
 - to denounce the conduct of the offender,
 - to recognise the harm done to the victim of the crime and the community.
- 5.4 There may be tension between some of these purposes in some cases. However, a court must consider all the purposes when sentencing an offender, at least to the extent that they are relevant to the facts of the case.³ There may be legitimate differences in opinion as to the weight that each purpose should have in the sentencing exercise.⁴

1. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 [147].

2. *Markarian v R* [2005] HCA 25, 228 CLR 357 [51].

3. *R v AS* [2006] NSWCCA 309 [25]; *R v Stunden* [2011] NSWCCA 8 [111]–[112].

4. *R v Stunden* [2011] NSWCCA 8 [111]–[112].

- 5.5 Below, we identify the purposes of sentencing that are particularly relevant to weapons offences.

Deterrence

- 5.6 In relation to the carrying and/or use of a knife in offences of personal violence, specific and general deterrence have a significant role to play in determining the appropriate sentence.⁵ Such sentences should aim to discourage people from arming themselves with weapons that are capable of inflicting serious injuries.⁶
- 5.7 In one case involving the use of a knife to stab and kill the victim, the judge found that the circumstances of the offence were particularly serious – a “suburban street became the venue for a showdown with a knife” and that “[g]eneral deterrence is a significant factor in such cases”.⁷
- 5.8 The courts have repeated the need for general and specific deterrence for firearm offences.⁸ Even the mere possession of firearms is “calculated to lead to substantial damage” and sentencing for firearm possession must discourage people who would otherwise seek to illegally possess firearms.⁹
- 5.9 In another case, the judge considered that the offender’s intellectual capacity and mental condition lessened the influence of general deterrence, retribution and denunciation on the sentencing assessment. Even so, the judge emphasised that there was a need for general deterrence in this case to:

reflect the affront that crimes involving violence committed in public represent to the peace and good order of the community. Gun violence carried out in public with lethal intention and effect is abhorrent in our community, and courts must send a clear and consistent message of deterrence in their sentencing responses.¹⁰

- 5.10 In the context of firearms and weapons generally, the Court of Criminal Appeal (CCA) has said:

The possession and use of firearms in society is an extremely troubling aspect, for which general deterrence and specific deterrence loom large. The possession of weapons generally, by which I include knives, has become far too common in society. The possession of such weapons undermines the fabric of society and, when possessed for the purpose of other criminal activity, puts at risk the rule of law and the appropriate relationship between members of society.¹¹

5. *R v Archer* [2021] NSWSC 1485 [40]; *R v Forbes* [2005] NSWCCA 377 [145].

6. *R v Archer* [2021] NSWSC 1485 [40].

7. *R v Phanekham (No 3)* [2014] NSWSC 508 [78].

8. *R v Howard* [2004] NSWCCA 348 [66]; *R v AZ* [2011] NSWCCA 43 [73]; *Athos v R* [2013] NSWCCA 205 [39]; *R v Leota* [2020] NSWDC 244 [19]; *R v Yealland* [2018] NSWDC 364 [28].

9. *R v Lachlan* [2015] NSWCCA 178 [68].

10. *R v Keleklio* [2022] NSWSC 62 [83].

11. *R Campbell* [2019] NSWCCA 1 [9].

Rehabilitation

- 5.11 Rehabilitation aims to ensure that offenders renounce their offending, refrain from reoffending and become or return to being honourable law-abiding citizens.¹² The courts have recognised that rehabilitation benefits both the offender and society.¹³
- 5.12 Rehabilitation may take precedence over the purposes of deterrence and retribution in the case of extremely young offenders, such as minors, and young offenders generally.¹⁴ This is particularly relevant to the knives aspect of the review because preliminary submissions and consultations suggested that children and young people are more likely to carry or use knives over other weapons.¹⁵ This will be discussed further in a separate issues paper about children and young people and weapons offences.

The impact of mental illness and cognitive impairment on the purposes

- 5.13 Mental illness and cognitive impairment may affect a court’s consideration of the purposes of sentencing in the following ways:
- An offender’s moral culpability may be reduced if their mental illness contributes to the commission of the offence. Accordingly, a court might give less weight to the purposes of denunciation and punishment.
 - An offender’s mental illness may cause them to be “an inappropriate vehicle for general deterrence”.¹⁶
- 5.14 However, there may be a counteracting consideration as to the level of danger the offender presents to the community and whether the sentence imposed should account for specific deterrence.¹⁷
- 5.15 The Aboriginal Legal Service (ALS) and Legal Aid NSW (Legal Aid) noted that mental illness and cognitive impairment are common characteristics of offenders

12. *R v Pogson* [2012] NSWCCA 225, 82 NSWLR 60 [124].

13. *R v Lian* (1990) 47 A Crim R 444, 449; *R v Andrew (No. 2)* [2018] NSWDC 382 [34].

14. *R v Lachlan* [2015] NSWCCA 178 [81]–[82].

15. Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PWE13*, 1–3; Legal Aid NSW, *Preliminary Submission PWE12*, 2; Confidential, *Preliminary Submission PWE11*, 2; Youth Against Violence, *Preliminary Submission PWE06*, 1; Prosecutors’ Roundtable, *Preliminary Consultation PWEC01*; Defence Roundtable, *Preliminary Consultation PWEC02*; Children and Young People Roundtable, *Preliminary Consultation PWEC03*.

16. *R v Hemsley* [2004] NSWCCA 228 [33], [34]; *DPP (Cth) v De La Rosa* [2010] NSWCCA 194, 79 NSWLR 1 [177].

17. *R v Hemsley* [2004] NSWCCA 228 [36]; *DPP (Cth) v De La Rosa* [2010] NSWCCA 194; 79 NSWLR 1 [177].

that are charged with the custody of knife offence.¹⁸ This was further supported in preliminary consultations.¹⁹ The characteristics of offenders are addressed in chapter 6.

Question 5.1: Purposes of sentencing

Are there any other cases or issues that should be considered in relation to the purposes of sentencing, specific to the offences within the scope of the review?

Guideposts: maximum penalties and standard non-parole periods

- 5.16 The maximum penalties and standard non-parole periods (SNPPs) for offences are legislative guideposts, rather than matters that determine a sentence.²⁰ SNPPs are listed in the table to part 4 division 1A of the *Crimes (Sentencing Procedure) Act*.
- 5.17 The SNPP is the non-parole period for an offence that, “taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness”.²¹ The maximum penalty represents the “legislature’s assessment of the seriousness of the offence” and the worst possible case of the offence.²² It also provides a “sentencing yardstick”.²³
- 5.18 Chapters 3 and 4 explore maximum penalties and SNPPs in detail.

Objective seriousness

Assessing objective seriousness

- 5.19 A court’s assessment of the objective seriousness or gravity of an offence is an essential element of the sentencing process. It is also instrumental in ensuring that a court imposes a proportionate sentence and adequate punishment.²⁴

18. Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PWE13*, 1–2; Legal Aid NSW, *Preliminary Submission PWE12*, 2.

19. Defence Roundtable, *Preliminary Consultation PWEC02*.

20. *Muldock v R* [2011] HCA 39, 244 CLR 120 [32].

21. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).

22. *Elias v R* [2013] HCA 31, 248 CLR 483 [27]; *Markarian v R* [2005] HCA 25, 228 CLR 357 [31]; *R v Shankley* [2003] NSWCCA 253 [19].

23. *Elias v R* [2013] HCA 31, 248 CLR 483 [27]; *Markarian v R* [2005] HCA 25, 228 CLR 357 [31].

24. *Zreika v R* [2012] NSWCCA 44 [46].

- 5.20 The common law principle of proportionality requires that sentences reflect the objective seriousness of the offending. This principle finds statutory expression in the purpose of adequate punishment.²⁵
- 5.21 The courts have recognised the unanimous view of the High Court that:
- a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender.²⁶
- 5.22 Below we set out some of the factors that courts take into account when determining the objective seriousness of an offence.

Knives

- 5.23 Generally, the presence of a knife or being armed with a knife during the commission of a personal violence offence will increase the dangerousness of a situation, so that a judge is:
- entitled to take into account the fact that during the incident the applicant was armed with a knife ... [T]he presence of any such weapon in an emotionally charged situation raises the stakes greatly, both in terms of the danger created and in terms of the penalty which is liable to be imposed.²⁷
- 5.24 The courts have recognised that the “carriage and use of a knife, of any kind, in the course of an offence is regarded by the community with abhorrence”.²⁸
- 5.25 The size of a knife is not proportionate to the seriousness of an offence and the CCA has recognised that even small pocketknives can cause fatal harm.²⁹
- 5.26 The CCA has also considered a meat cleaver or machete to be capable of causing terrible wounds and that they compound the community’s abhorrence to knives.³⁰ Similarly, the CCA has recognised that a machete is “a very dangerous weapon”.³¹
- 5.27 We heard in preliminary consultations that while the use of a knife in the commission of a murder is relevant to the court’s assessment of objective seriousness, it may not make a material contribution or affect that assessment to a great extent.³²

25. *R v Scott* [2005] NSWCCA 152 [15].

26. *Veen v R (No 2)* (1988) 164 CLR 465, 472.

27. *R v Hampton* [1999] NSWCCA 341 [10].

28. *R v Doorey* [2000] NSWCCA 456 [26].

29. *R v Doorey* [2000] NSWCCA 456 [26]–[27].

30. *R v Zhang* [2004] NSWCCA 358 [29].

31. *R v Drew* [2000] NSWCCA 384 [15].

32. *R v Dion* [2021] NSWSC 1043 [59]; *R v Wang* [2020] NSWSC 1335 [84]; Prosecutors’ Roundtable, *Preliminary Consultation PWEC01*.

Question 5.2: Objective seriousness and knife offences

Are there any other cases or issues that should be considered in relation to assessing the objective seriousness of offences where a knife is involved in the commission of an offence?

Firearms

Possession offences

- 5.28 The courts view the mere unauthorised possession of a firearm as a very serious offence.³³ The rationale underpinning the offence prohibiting firearm possession contrary to s 7 of the *Firearms Act 1996* (NSW) (*Firearms Act*) includes:
- at least a recognition that firearms and pistols, if possessed, are liable to be used, and if used, are liable to be a source of great danger or damage. It includes also a recognition that not all persons can be relied on to avoid or minimise such danger and not misuse the weapons and that misuse, even without discharge, is liable to amount to a great infringement of others rights.³⁴
- 5.29 In addition, “[t]he policy behind firearms offences is to control the use of weapons in the community generally and not simply to disarm the criminally minded”.³⁵
- 5.30 In a CCA decision, a judge was critical of the way courts have dealt with firearm offences by having regard to whether the firearms were intended to be used for a criminal purpose. The judge emphasised that this underplayed the seriousness of firearm offences including mere possession.³⁶ Subsequent cases have quoted this comment with approval.³⁷
- 5.31 The fact that an offender’s possession of firearms led to the firearms being circulated in the community, even if the offender did not intend that to happen, is a matter that increases the objective seriousness of the offence.³⁸ Similarly, in *R v Hamze*, the Supreme Court observed that the firearms possession offences in that case were serious, irrespective of the absence of evidence pointing to the offender’s intention to use the firearms for an unlawful purpose.³⁹

33. *Rickaby v R* [2007] NSWCCA 288 [18].

34. *R v Najem* [2008] NSWCCA 32 [40].

35. *R v Hamze* [2005] NSWSC 136 [20].

36. *Laspina v R* [2016] NSWCCA 181 [6].

37. *R v Leota* [2020] NSWDC 244 [19]; *R v Ali* [2020] NSWSC 125 [31]; *Harris v R* [2019] NSWCCA 236 [74]; *R v Yealland* [2018] NSWDC 364 [31]; *R v Debnam* [2018] NSWDC 139 [28].

38. *Cooper v R* [2005] NSWCCA 428 [20].

39. *R v Hamze* [2005] NSWSC 136 [20].

- 5.32 However, the courts have recognised that firearm possession offences were more serious where the possession was for the purpose of sale,⁴⁰ or was part of an offender's involvement in other crimes in which the offender was prepared to use the firearm.⁴¹
- 5.33 The period of firearm possession is relevant to the assessment of objective seriousness.⁴²

Whether a firearm is loaded

- 5.34 Possession of a firearm that is not loaded is considered a serious offence,⁴³ and can still cause panic and fear in victims.⁴⁴
- 5.35 The court has considered a loaded shotgun to be more dangerous than a knife, as it is much more capable of causing death or grievous bodily harm.⁴⁵ Further, possession of a loaded pistol in a public place increases the objective seriousness of a possession offence.⁴⁶ Similarly, pointing a loaded firearm at someone is considered by courts as very serious.⁴⁷
- 5.36 Section 93G of the *Crimes Act 1900* (NSW) (*Crimes Act*) creates an offence of possessing a loaded firearm in a public place or any place so as to endanger the life of another person.
- 5.37 In assessing the objective gravity of this offence, a court may consider:
- whether the weapon was concealed, which would make the offence more serious⁴⁸
 - the reason for possession (for example, criminal enterprise)⁴⁹
 - whether more than one shot is fired (which increases the weight of general and specific deterrence)⁵⁰
 - whether the firearm was discharged in the direction of another person,⁵¹ and

40. *Laspina v R* [2016] NSWCCA 181 [6]; *R v Goktas* [2004] NSWCCA 296 [24], [26].

41. *Lamis v R* [2016] NSWCCA 274 [52].

42. *R v Goktas* [2004] NSWCCA 296 [26]; *Lamis v R* [2016] NSWCCA 274 [54].

43. *R v Mangan* [1999] NSWCCA 194 [13].

44. *R v Campbell* [2000] NSWCCA 157 [22].

45. *R v Campbell* [2000] NSWCCA 157 [22].

46. *R v Mahmud* [2010] NSWCCA 219 [63]–[64].

47. *R v Do* [2005] NSWCCA 183 [25].

48. *Saad v R* [2007] NSWCCA 98 [38].

49. *Sumrein v R* [2019] NSWCCA 83 [34]–[36].

50. *R v Cicekdag* [2004] NSWCCA 357 [38].

51. *R v Adams* [2004] NSWCCA 279 [33].

- the type of weapon (for example, an air rifle was considered to be less dangerous than other firearms captured by the *Firearms Act*).⁵²

Possessing three or more firearms

5.38 In relation to the offence of unauthorised possession of three or more firearms,⁵³ the following matters are relevant to the court’s assessment of objective seriousness:

- the volume of firearms
- the number of which are prohibited firearms or are pistols
- the nature and type of the firearms
- the purpose for their possession
- any relationship between the possession of the firearms and drug trade
- the location of the property, and
- the security under which the firearms are kept.⁵⁴

Question 5.3: Objective seriousness and firearms offences

Are there any other cases or issues that should be considered in relation to assessing the objective seriousness of firearms offences?

Gun-like objects: gel blasters and air guns

- 5.39 An air gun is a gun that propels a projectile through gas (such as air) or a spring and is operated by means of a trigger or similar device.⁵⁵
- 5.40 Gel blasters propel hydrated gel pellets through a mechanism involving compressed air.⁵⁶ The courts have found that gel blasters are “firearms” under the *Firearms Act* as they can fall within the definition of an air gun, pistol, or imitation firearm.⁵⁷ A submission noted that gel blasters are developed and marketed for recreational purposes.⁵⁸ Further discussion of the definitions and maximum penalties relevant to gel blasters can be found in chapters 2 and 3.
- 5.41 The seriousness of possessing air guns and gel blasters will depend on the facts of each case. Some judges have commented that these firearms cannot cause

52. *Crago v R* [2006] NSWCCA 68 [47].

53. *Firearms Act 1996* (NSW) s 51D.

54. *Mack v R* [2009] NSWCCA 216 [40]. See also *R v Mahmud* [2010] NSWCCA 219 [62]–[66].

55. *Firearms Act 1996* (NSW) s 4(1) definition of “air gun”.

56. *R v Smith* [2023] NSWDC 88 [10].

57. *R v Zerafa* [2021] NSWDC 547 [12]; *R v Smith* [2023] NSWDC 88 [18], [21].

58. Legal Aid NSW, *Preliminary Submission PWE12*, 3. See also *R v Smith* [2023] NSWDC 88 [18], [72].

physical harm or serious physical harm when discharged,⁵⁹ but that the ability for their realistic appearance to be mistaken as real weapons is relevant to the assessment of objective seriousness.⁶⁰

- 5.42 In a recent case, a defendant possessed 15 gel blasters and was charged with various counts of possessing more than three firearms. In assessing the seriousness of the offences, the judge accepted that the gel blasters were “firearms” but that the offender only intended to use them as toys.⁶¹ The judge also had regard to expert evidence indicating that a gel blaster’s impact force was lower than that of a paintball gun and much lower than that of an air gun.⁶²
- 5.43 In finding that a custodial penalty was not appropriate, the judge remarked that gel blasters, which are in fact toys, are significantly different from firearms that can cause serious or even fatal injuries.⁶³ The judge dismissed the firearm possession matters without proceeding to conviction.⁶⁴
- 5.44 In another recent case, the judge assessed the possession of gel blasters to fall within the low range of objective seriousness, noting that they do not fire bullets and that there was insufficient evidence as to what the offender would use them for.⁶⁵
- 5.45 In a different case where the court was commenting on a defendant’s criminal history, it stated that the offences of possessing unauthorised firearms and ammunition were not as serious as they sounded because they related to possession of gel blasters and gel blaster pellets.⁶⁶
- 5.46 There are other cases that have considered the possession of gel blasters to be more serious. In a recent case, the judge remarked that although the gel blasters possessed by the defendant were not modified to be made more dangerous, they “presented a measure of risk and could be dangerous in the wrong hands”.⁶⁷
- 5.47 In another case regarding an armed robbery, the judge stated that while the gel blasters were not capable of causing injury, their realistic appearance would have

59. *R v Smith* [2023] NSWDC 88 [16]–[17].

60. *R v JW* [2022] NSWDC 169 [73]–[74]; *R v Andrew (No 2)* [2018] NSWDC 382 [19].

61. *R v Smith* [2023] NSWDC 88 [18].

62. *R v Smith* [2023] NSWDC 88 [16].

63. *R v Smith* [2023] NSWDC 88 [72].

64. *R v Smith* [2023] NSWDC 88 [75].

65. *R v Foster* [2020] NSWDC 660 [12]–[13].

66. *R v Holmes (No 7)* [2021] NSWSC 570 [55].

67. *R v Yalim* [2023] NSWDC 111 [59].

created a “terrifying experience for the victim” and that the “victims would not have known that they were not capable of inflicting injury”.⁶⁸

- 5.48 The case of *R v Andrew (No 2)* concerned possession of seven air guns. The judge remarked that the air guns could fire a gel pellet or “nerf” pellet (foam projectile). The judge also found that while members of the public may regard the air guns as toys, they were not toys and that due to their appearance, they could have been mistaken for real weapons. The judge noted that the defendant’s possession of the air gun on a bus posed a significant risk to community safety and was a key factor in assessing the objective seriousness of the offence.⁶⁹
- 5.49 In preliminary consultations, some stakeholders also expressed concern about the realistic appearance of gel blasters and the implications for public safety.⁷⁰

Question 5.4: Objective seriousness and gel blasters

Are there any other cases or issues that should be considered in relation to assessing the objective seriousness of gel blaster-related offences?

Prohibited weapons

- 5.50 The courts have noted the wide variety of weapons captured under the definition of “prohibited weapons” under the *Weapons Prohibition Act 1998* (NSW) (*Weapons Prohibition Act*) and that it is difficult to determine what kind of offence would fall in the middle range of objective seriousness, based on weapon type:

“Prohibited weapons” ... include military style weapons such as bombs, IEDs, grenades, rockets, missiles, mines and flame throwers – weapons vastly more dangerous, or at least with a much greater capacity to kill or injure, than the non-military prohibited weapons such as flick knives, star knives, crossbows, cat-o-nine-tails, Taser guns, extendable batons, knuckle dusters and slingshots.

I doubt if it is possible to find a feature common to all of the weapons in the non-military category other than their capacity to assist in the infliction of serious injury although a feature of many is the ease with which they can be concealed.

...

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.⁷¹

- 5.51 The Office of the Director of Public Prosecutions (ODPP) expressed a similar concern about the difficulty in assessing the objective seriousness of individual

68. *R v JW* [2022] NSWDC 169 [73]–[74].

69. *R v Andrew (No 2)* [2018] NSWDC 382 [9], [19], [31], [20].

70. Prosecutors’ Roundtable, *Preliminary Consultation PWEC01*; Defence Roundtable, *Preliminary Consultation PWEC02*.

71. *Jacob v R* [2014] NSWCCA 65 [180]–[181], [184].

offences.⁷² Legal Aid stated that the wide array of prohibited weapons may give rise to inconsistent sentencing outcomes.⁷³ This issue is also explored in relation to maximum penalties for prohibited weapons offences in chapter 3.

Question 5.5: Objective seriousness and firearms offences

Are there any other cases or issues that should be considered in relation to assessing the objective seriousness of prohibited weapons offences?

Aggravating factors

5.52 Section 21A(2) of the *Crimes (Sentencing Procedure) Act* contains a list of aggravating factors that a court must take into account on sentence where relevant and known. Section 21A(2) includes the following factors that may be particularly relevant to weapons offences:

...

(b) the offence involved the actual or threatened use of violence,

(c) the offence involved the actual or threatened use of a weapon,

...

(i) the offence was committed without regard for public safety,

...

(ib) the offence involved a grave risk of death to another person or persons,

...

(n) the offence was part of a planned or organised criminal activity.

5.53 The prosecution must establish the existence of an aggravating factor beyond a reasonable doubt.⁷⁴

5.54 A court is not permitted to approach the aggravating factors as “a checklist for the mechanical application of criteria that add to or subtract from the seriousness of an offence”.⁷⁵ Neither is a court required to increase the sentence for the offence if an aggravating factor is relevant and known to the court.⁷⁶

5.55 A court is not permitted to consider any aggravating factor if it is already an element of the offence,⁷⁷ or is an inherent characteristic of an offence.⁷⁸ Further, a

72. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PWE08*, 4.

73. Legal Aid NSW, *Preliminary Submission PWE12*, 4.

74. *R v Olbrich* [1999] HCA 54, 199 CLR 270 [27].

75. *R v Hookey* [2018] NSWCCA 147 [42].

76. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5).

77. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).

78. *Elyard v R* [2006] NSWCCA 43 [40].

court is not to take into account or “double count” an aggravating factor if the court has already considered it in assessing the objective seriousness of the offence.⁷⁹

- 5.56 Neither can a court take into account an aggravating factor that would give rise to a more serious offence, as this would infringe the “De Simoni principle”. The rationale behind this principle is that a person should not be punished for an offence they were not convicted of.⁸⁰

Actual or threatened use of violence

- 5.57 The CCA found that the pointing of a gun to the victim’s head aggravated the offence of occasioning actual bodily harm during detention without consent. The court stated that it was a serious aggravating factor especially because the gun was discharged during a melee and while no one was hurt by it, there was a possibility of really serious harm being occasioned by the victim and/or innocent bystanders.⁸¹
- 5.58 In another case, the CCA held that the offence of robbery while armed with a dangerous weapon was aggravated by the offender pointing a pistol at the victim’s neck.⁸²

Actual or threatened use of a weapon

- 5.59 The use of a knife can aggravate the commission of manslaughter.⁸³ However, where a weapon is used for the offence of murder, it may have reduced significance or no significance as an aggravating factor.⁸⁴
- 5.60 On the other hand, there is a case where the judge considered that a shot gun was a “particularly dangerous” weapon used in the murder and that it was an aggravating factor.⁸⁵

Grave risk of death

- 5.61 Discharging a firearm directly at another person carries a grave risk of death and a court can find that it aggravated the offence.⁸⁶ Similarly, the grave risk of death

79. *Lee v R* [2011] NSWCCA 169 [27].

80. *R v De Simoni* (1981) 147 CLR 383, 389.

81. *Dong v R* [2010] NSWCCA 107 [54].

82. *Dougan v R* [2006] NSWCCA 34 [33].

83. *R v Phanekham (No 3)* [2014] NSWSC 508 [78].

84. *Milat v R* [2014] NSWCCA 29 [95]; *R v Turnbull* [2020] NSWSC 1785 [16].

85. *R v Spinks* [2021] NSWSC 649 [43].

86. *Z v R* [2015] NSWCCA 274 [77], [89].

may be relevant where a gun, with a bullet in its chamber, is cocked during a confrontation with another person.⁸⁷

Disregard for public safety

- 5.62 Disregard for public safety as an aggravating factor may be relevant where an offender is in public and within close proximity to members of the public, and they nonetheless proceed to commit an assault and put the public in fear of their safety.⁸⁸
- 5.63 This aggravating factor may also be relevant to shooting offences that take place in a public place (for example, a TAFE college) and in daylight.⁸⁹ However, this is not a rigid rule and will depend on the facts of each case.⁹⁰ For example, the aggravating factor may be present where there is shooting in the garden of a private residence at midnight where there is also a crowded party at the time.⁹¹
- 5.64 Disregard for public safety was an aggravating factor in a case where the offender carried a loaded firearm in a public street and on a private property in a residential area, where there were people present.⁹²
- 5.65 In *R v Gall*, the Supreme Court found that the firearms possession offences were aggravated due to disregard for public safety. The offender kept a loaded firearm unsecured in a domestic dwelling.⁹³
- 5.66 In relation to the use of knives, the CCA found that this aggravating factor should have been taken into account in circumstances where the offender engaged in a knife attack in an enclosed public place (a bar) in the immediate presence of members of the public. The CCA inferred that the offender had limited or no regard for others, and that despite being intoxicated, he must have known that there would have been people in the bar when he entered.⁹⁴

The offence was part of a planned or organised criminal activity

- 5.67 The possession or use of a weapon can be used to show that an offence was part of a planned or organised criminal activity. The level of planning required for this aggravating factor to be proven beyond a reasonable doubt is a level that exceeds

87. *Colomer v R* [2014] NSWCCA 51 [39].

88. *R v Saleib* [2005] NSWCCA 85 [55]–[56].

89. *R v Tuala* [2015] NSWCCA 8 [85]–[86].

90. *Z v R* [2015] NSWCCA 274 [92].

91. *Z v R* [2015] NSWCCA 274 [93].

92. *Z v R* [2015] NSWCCA 274 [94].

93. *R v Gall (No 6)* [2012] NSWSC 1432 [123].

94. *R v Fryar* [2008] NSWCCA 171 [33]–[34].

the degree of planning ordinarily expected for an offence of this kind.⁹⁵ It is not sufficient that the offence was simply planned.⁹⁶

5.68 *R v Gall* also involved a murder in which the defendant shot the deceased. The Supreme Court found that the murder was aggravated because of the evidence of planning. The offender used a gun that he carried in his satchel for months and as he approached the victim's location, he had the gun in his hand, ready to fire.⁹⁷

5.69 The Supreme Court also found that the firearm possession offence was aggravated by being a planned or organised criminal activity.⁹⁸ On appeal, the CCA found there was no error in this finding, noting that the defendant had ready access to firearms and stored firearms at premises occupied by him and owned by the co-defendant. Further, "[t]he degree of planning went beyond what one would normally expect for an offence of this kind in that the firearm was in a position where it was readily available for use and was loaded".⁹⁹

Question 5.6: Aggravating factors and weapons offences

Are there any other cases or issues that should be considered in relation to aggravating factors and weapons offences?

Mitigating factors

5.70 Section 21A(3) contains a list of mitigating factors that a court must take into account on sentence where relevant and known. Relevant to the review, it includes:

- (a) the injury, emotional harm, loss or damage caused by the offence was not substantial,
- (b) the offence was not part of a planned or organised criminal activity,
- ...
- (e) the offender does not have any record (or any significant record) of previous convictions,
- (f) the offender was a person of good character,
- ...
- (h) the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise,
- ...

95. *Knight v R* [2010] NSWCCA 51 [16].

96. *Fahs v R* [2007] NSWCCA 26 [21]; *Kinchela v R* [2010] NSWCCA 167 [49].

97. *R v Gall (No 6)* [2012] NSWSC 1432 [70].

98. *R v Gall (No 6)* [2012] NSWSC 1432 [123].

99. *Gall v R* [2015] NSWCCA 69 [216]–[218].

- (j) the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability,
- (k) a plea of guilty by the offender (as provided by section 22 or Division 1A).

- 5.71 The defence bears the onus of proving the existence of any mitigating factors on the balance of probabilities.¹⁰⁰
- 5.72 Even if a court is satisfied that there are mitigating factors, it is not obligated to reduce a sentence below what is required for the objective seriousness of the offence and other sentencing considerations.¹⁰¹ Further, the fact that a mitigating factor is relevant and known to the court does not require the court to decrease the sentence.¹⁰²

Nil or limited criminal record, and good character

- 5.73 The weight a court gives to good character may vary according to the circumstances of the case, including the nature of the offence.¹⁰³ Good character has limited weight for offences where a person's good character helped them commit the offence or where the offence is frequently committed by people with good character.¹⁰⁴
- 5.74 The CCA has noted that firearm possession is not an offence for which good character will have less significance than other offences.¹⁰⁵

Youth

- 5.75 In sentencing a young offender, a court can give precedence to rehabilitation over deterrence and retribution. In the case of a minor, a court may give more weight to rehabilitation at the expense of deterrence.¹⁰⁶ Nonetheless, a court must have regard to the age of a young offender and the circumstances of each case.¹⁰⁷ Where a young person's offending conduct is like an adult's, rehabilitation cannot override the purpose of punishment or the need to protect society.¹⁰⁸
- 5.76 In one case a young person, aged 19 at the time of the offence, was sentenced for possession of a rifle and three shotguns (including a shortened firearm), as well as a

100. *R v Olbrich* [1999] HCA 54, 199 CLR 270 [27].

101. *Carruthers v R* [2007] NSWCCA 276 [25].

102. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5).

103. *Ryan v R* [2001] HCA 21, 206 CLR 267 [25], [143]–[144]; *Athos v R* [2013] NSWCCA 205 [35].

104. *Athos v R* [2013] NSWCCA 205 [36]–[38]; *R v Leroy* (1984) 2 NSWLR 441, 446–447.

105. *Athos v R* [2013] NSWCCA 205 [37], [43].

106. *GDP v R* (1991) 53 A Crim R 112; *R v DM* [2005] NSWCCA 181 [61]; *R v Lachlan* [2015] NSWCCA 178 [81].

107. *R v MA* [2004] NSWCCA 92 [28].

108. *R v AEM Snr* [2002] NSWCCA 58 [97].

stun gun.¹⁰⁹ The purpose of the possession was sale and recreational use.¹¹⁰ In addition to youth, the offender had other mitigatory matters such as a “dysfunctional childhood and adolescence, his problems with alcohol and drugs and his social isolation and distrust of others”.¹¹¹

- 5.77 The CCA found the sentences imposed were manifestly inadequate because the young offender had similar prior convictions, he conducted himself like an adult and “committed a crime of considerable gravity”.¹¹² The court remarked that the young offender’s subjective circumstances incorrectly determined the sentence.¹¹³

Intellectual disability

- 5.78 The case of *R v Andrew (No 2)* concerned the possession of seven air guns (see [5.48]). The judge found that this was an exceptional case, noting that the defendant had 47 XYY syndrome, that a fitness hearing was previously held and that the offences were “committed in complete ignorance of the seriousness of the offence and complete ignorance of the strict requirements of the *Firearms Act*”.¹¹⁴
- 5.79 The judge considered that in an ordinary case, the objective seriousness of the matters would warrant consideration of a custodial sentence. However, due to the offender’s exceptional circumstances, it was not appropriate to make an example of the offender.¹¹⁵ The judge imposed conditional release orders without conviction.¹¹⁶

Question 5.7: Mitigating factors and weapons offences

Are there any other cases or issues that should be considered in relation to mitigating factors and weapons offences?

109. *R v Lachlan* [2015] NSWCCA 178 [3]–[4]; *Firearms Act 1996* (NSW s 51D(2); *Weapons Prohibition Act 1998* (NSW) s 7(1).

110. *R v Lachlan* [2015] NSWCCA 178 [32].

111. *R v Lachlan* [2015] NSWCCA 178 [80].

112. *R v Lachlan* [2015] NSWCCA 178 [84].

113. *R v Lachlan* [2015] NSWCCA 178 [84].

114. *R v Andrew (No. 2)* [2018] NSWDC 382 [23], [30].

115. *R v Andrew (No. 2)* [2018] NSWDC 382 [22].

116. *R v Andrew (No. 2)* [2018] NSWDC 382 [47].

Guideline judgment for armed robbery: *R v Henry*

Guideline judgments generally

- 5.80 Guideline judgments are judgments by appellate courts that formulate general principles for a group or kind of cases. They can indicate an appropriate range of sentence for particular types of offending.¹¹⁷
- 5.81 Guideline judgments are intended to be “indicative”, rather than binding on sentencing judges.¹¹⁸ A court does not have to find exceptional circumstances before imposing a sentence that is less than the sentence identified in a guideline judgment.¹¹⁹ A guideline can act as a check, guide or sounding board.¹²⁰
- 5.82 The rationale underpinning guideline judgments is that they help ensure an appropriate balance between the court’s broad discretion to uphold individualised justice in each case and consistency in sentencing, which in turn maintains public confidence in the sentencing process.¹²¹
- 5.83 As guideline judgments contain offence-specific considerations, it is likely that once the guideline factors have been considered there may be few, if any, further aggravating and mitigating factors that are relevant.¹²²

Section 97(1) of the *Crimes Act*

- 5.84 *R v Henry* applies to the offence under s 97(1) of the *Crimes Act*, which provides:
- Whosoever, being armed with an offensive weapon, or instrument, or being in company with another person,
- robs, or assaults with intent to rob, any person ...
- shall be liable to imprisonment for twenty years.
- 5.85 An offensive weapon is defined as a dangerous weapon, anything that is made or adapted for offensive purposes, or anything that is used, intended for use or threatened to be used for offensive purposes, even if ordinarily it is not used for offensive purposes.¹²³

117. *R v Jurisic* (1998) 45 NSWLR 209, 216.

118. *R v Jurisic* (1998) 45 NSWLR 209, 220–221.

119. *Legge v R* [2007] NSWCCA 244 [44].

120. *Legge v R* [2007] NSWCCA 244 [58].

121. *R v Jurisic* (1998) 45 NSWLR 209, 220–221.

122. R Howie, “Section 21A and the Sentencing Exercise” (2005) 17 *Judicial Officers’ Bulletin* 43, 44.

123. *Crimes Act 1900* (NSW) s 4(1) definition of “offensive weapon or instrument”.

R v Henry

- 5.86 In *R v Henry*, the court stated that a total sentence of four to five years was an appropriate range for an offence under s 97(1) with the following characteristics:
- (i) Young offender with no or little criminal history
 - (ii) Weapon like a knife, capable of killing or inflicting serious injury
 - (iii) Limited degree of planning
 - (iv) Limited, if any, actual violence but a real threat thereof
 - (v) Victim in a vulnerable position such as a shopkeeper or taxi driver
 - (vi) Small amount taken
 - (vii) Plea of guilty, the significance of which is limited by a strong Crown case.¹²⁴
- 5.87 The court identified a range rather than a single starting point because the characteristics above do not represent the full range of relevant sentencing factors and some characteristics contain their own variables.¹²⁵
- 5.88 The CCA recently considered *R v Henry*. The court observed that the guideline judgment “contemplated an offender with a reasonably strong subjective case”.¹²⁶ The court also remarked that it was not correct to start with the sentencing range in *R v Henry*, then cross-check the features of a case against the factors identified in *R v Henry* and finally adjust the range accordingly.¹²⁷
- 5.89 In relation to the characteristic of “young offender with no or little criminal history”, the CCA has noted that this characteristic is so broad that it does not define the matters a court is to consider in relation to youth.¹²⁸ Furthermore, the fact that the guideline judgment applies to a young offender with no or little criminal antecedents does not mean that youth is an irrelevant factor or that it should not be considered in the overall sentencing exercise.¹²⁹
- 5.90 *R v Henry* also identifies factors that may aggravate an offence under s 97(1):
- (i) Nature of the weapon
 - (ii) Vulnerability of the victim
 - (iii) Position on a scale of impulsiveness/planning
 - (iv) Intensity of threat, or actual use, of force
 - (v) Number of offenders

124. *R v Henry* [1999] NSWCCA 111, 46 NSWLR 346 [162], [165].

125. *R v Henry* [1999] NSWCCA 111, 46 NSWLR 346 [164].

126. *Makouk v R* [2023] NSWCCA 142 [28].

127. *Makouk v R* [2023] NSWCCA 142 [29].

128. *R v Faaoloi* [2016] NSWCCA 263 [72]; *Yildiz v R* [2020] NSWCCA 69 [6].

129. *Yildiz v R* [2020] NSWCCA 69 [48].

- (vi) Amount taken
- (vii) Effect on victim(s).¹³⁰

5.91 Where an offender is armed with a firearm, the robbery will escalate in seriousness from the carrying of a firearm, a firearm being loaded, a loaded firearm being discharged, and a discharge being aimed at a victim or target.¹³¹

Questions 5.8: Guideline judgments

- (1) Are there any concerns with the application of *R v Henry*?
- (2) Is there a need for any new guideline judgments in relation to weapons offences?

Questions 5.9: Sentencing principles and factors generally

Are there any other sentencing considerations, principles or factors specific to weapons offences that should be considered as part of the review?

130. *R v Henry* [1999] NSWCCA 111, 46 NSWLR 346 [170].

131. *R v Readman* (1990) 47 A Crim R 181, 185.

6. Other issues

In brief

This chapter addresses other issues relevant to the review, not covered in previous chapters. It includes the summary offences relevant to the review, the penalty notice offences relevant to the review, the characteristics of offenders, the experiences of victims, and alternative approaches to weapons crimes committed by adult offenders.

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Whether any summary offences should be made indictable

The difference between summary and indictable offences

- 6.1 The terms of reference for the review require us to consider whether there are any summary offences relating to firearms, knives and other weapons that should be made indictable.
- 6.2 In NSW, criminal offences are either summary offences or indictable offences. However, some indictable offences may, in certain cases, be tried summarily.

Summary offences

- 6.3 Unless otherwise stated, any offence that has a maximum penalty of 2 years' imprisonment or less, or that is a fine-only offence, is a summary offence.¹
- 6.4 Summary offences are usually required to be dealt with in the Local Court by magistrates (without a jury).² The Local Court has a jurisdictional limit of two years' imprisonment for a single offence or five years' imprisonment when sentencing for more than one offence.³
- 6.5 There is a mechanism through which the District Court or the Supreme Court can deal with summary offences (usually in cases where they are charged together with indictable offences).⁴ The Supreme Court can also try summary offences in other circumstances if permitted by statute.⁵

1. See eg *Criminal Procedure Act 1986* (NSW) s 3 definition of "summary offence", s 6.

2. *Criminal Procedure Act 1986* (NSW) s 6(2), s 7.

3. *Criminal Procedure Act 1986* (NSW) s 267(2), s 268(1A).

4. *Criminal Procedure Act 1986* (NSW) ch 3, pt 3, div 7.

5. *Criminal Procedure Act 1986* (NSW) s 6(2), s 245.

6.6 There is a very large number of summary offences across many NSW statutes. Some summary offences, including some related to knives and offensive implements, can be found in the *Summary Offences Act 1988* (NSW) (*Summary Offences Act*). Summary offences do not exist at common law.⁶

Indictable offences

6.7 An indictable offence is one that involves a maximum penalty of more than 2 years' imprisonment, or that is not otherwise expressly stated to be a summary offence.⁷

6.8 Offences prosecuted on indictment generally start with committal proceedings in the Local Court before going to trial (generally before a judge and jury), or in the case of a guilty plea, to sentence in the Supreme Court or the District Court.

6.9 However, it is possible that an indictable offence may be prosecuted summarily in the Local Court. There are, therefore, two categories of indictable offences:

- indictable offences that may be dealt with summarily (known as “table offences”), and
- strictly indictable offences.

6.10 Under the *Criminal Procedure Act 1986* (NSW) (*Criminal Procedure Act*) offences listed in tables 1 and 2 of schedule 1 must be dealt with summarily unless:

- in the case of table 1, either the prosecutor or the accused elects to have the offence dealt with on indictment, or
- in the case of table 2, the prosecutor elects to have the offence dealt with on indictment.⁸

6.11 In the absence of any other provision, the remaining indictable offences can only be tried on indictment. They are sometimes referred to as “strictly indictable” or “indictable only” offences.

6.12 When considering whether a summary offence should be made indictable, it is important also to consider whether the offence should be made a table offence (either table 1 or 2) or strictly indictable.

Summary offences relevant to the review

6.13 The following summary offences relevant to the review, found in division 2 of the *Summary Offences Act*, were raised in preliminary consultations for consideration as to whether they be made indictable:

6. P Crofts *Criminal Law Elements* (LexisNexis Butterworths, 6th ed, 2018) [1.11].

7. *Criminal Procedure Act 1986* (NSW) s 3 definition of “indictable offence”, s 5(1), s 8(1), s 46.

8. *Criminal Procedure Act 1986* (NSW) s 260.

- the custody of knife in a public place or school (s 11C)
 - parents who knowingly authorised or permitted a child to commit an offence related to custody of knife in a public place or school (s 11D)
 - wielding (using or carrying in a way that is visible) of knife in a public place or school (s 11E), and
 - the sale of knife to a child under the age of 16 years (s 11F).
- 6.14 As explained in chapter 2, the review will focus on these offences, which are discussed in detail later in this chapter.
- 6.15 We have excluded the following summary offences from this aspect of the review because they were not raised in preliminary submissions or consultations for consideration to be made indictable:
- custody of offensive implement in a public place or school⁹ (244 finalised charges for adults in 2022)
 - custody or use of a laser pointer in a public place¹⁰ (34 finalised charges for adults in 2022)
 - armed with any weapon or loaded arms of anything which used as a weapon is likely to cause death or grievous bodily harm (GBH)¹¹ (no finalised charges for adults in 2022)
 - carry a razor, razor blade or other cutting weapon at the time or immediately before being in lawful custody¹² (153 finalised charges for adults in 2022)
 - offences relating to possession of dangerous articles other than firearms in a public place¹³ (15 finalised charges for adults in 2022)
 - possession of a firearm barrel without licence or permit¹⁴ (16 finalised charges for adults in 2022), and
 - possession of ammunition without authorisation¹⁵ (633 finalised charges in for adults 2022).¹⁶

9. *Summary Offences Act 1988* (NSW) s 11B.

10. *Summary Offences Act 1988* (NSW) s11FA.

11. *Crimes Act 1900* (NSW) s 545C(2).

12. *Crimes Act 1900* (NSW) s 547D.

13. *Crimes Act 1900* (NSW) s 93FB(1).

14. *Firearms Act 1996* (NSW) s 58(1).

15. *Firearms Act 1996* (NSW) s 65(3).

16. NSW Bureau of Crime Statistics and Research, kf23-22711, table 1.

Question 6.1: Summary offences considered by the review

- (1) Do you agree with the list of summary offences to be excluded from consideration as to whether any should be made indictable?
- (2) Are there any other summary offences, not listed above, which should be considered suitable for indictment in some cases?

Prevalence and penalties for knife offences in the *Summary Offences Act*

- 6.16 Preliminary consultations suggested that the offences in s 11C–11F of the *Summary Offences Act* might appropriately be made indictable.
- 6.17 In relation to s 11C (custody of knife in public or school), for adults in the Local and higher criminal courts in 2022:
- there were 3452 finalised charges, 2336 of which were for a first offence and 1116 for a subsequent offence¹⁷
 - the number of finalised charges has increased between 2013 (1442) and 2022 (3452), with most of the increase occurring between 2013 and 2016 (2700), then again from 2018 (2719) to 2022¹⁸
 - in 2022 there were 1444 occasions where s 11C was the principal (most serious) offence being sentenced (1443 in the Local Court and one in the District Court)¹⁹
 - of these, 894 received a fine, 221 received a community correction order (CCO), 97 received a conditional release without conviction, 66 received a custodial sentence, 62 received a conviction only, 50 received a conditional release order with conviction, 44 had no conviction recorded, and 10 received an intensive correction order (ICO)²⁰ (see appendix D for a glossary of penalties), and
 - each custodial sentence had a head sentence of 22 months or less.²¹
- 6.18 Offences under s 11C have a relatively high prevalence when compared with other offences relevant to the review. Where s 11C is the principal (most serious) offence being sentenced, it is more likely to receive a fine than any other penalty, suggesting that the offending that comes before the courts is generally not of high seriousness.
- 6.19 There is a much lower prevalence of offences under s 11E (wielding or carrying a knife in a public place or school). There were 132 finalised charges for adults in the

17. NSW Bureau of Crime Statistics and Research, kf23-22711, table 1.

18. NSW Bureau of Crime Statistics and Research, kf23-22711, table 1.

19. NSW Bureau of Crime Statistics and Research, ab23-22643, table 1.

20. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4.

21. NSW Bureau of Crime Statistics and Research, ab23-22643, table 6.

Local and higher criminal courts in 2022, remaining broadly stable since 2019 (although there was a gradual increase from 77 finalised charges in 2013 to 119 in 2019).²²

- 6.20 There were 23 occasions for adults in the Local Court where s 11E was the principal (most serious) offence being sentenced; seven received a CCO, six received a fine, four received a custodial sentence, three received a CRO, two received an ICO, and one received a conditional release without conviction.²³ Each custodial sentence had a head sentence of 22 months or less.²⁴ There were no occasions where s 11E was the principal (most serious) offence being sentenced in the District or Supreme Court.
- 6.21 The elements of the offence in s 11E, and the distribution of penalties where this was the principal (most serious) offence being sentenced, both suggest that this offence is more serious than offences under s 11C.
- 6.22 There were no finalised charges relating to s 11D (parent allowing child to carry a knife) or s 11F (sale of a knife to child) in 2022. Since 2013 there have been no finalised charges for s 11D, and only one finalised charge for s 11F.²⁵

The Criminal Legislation Amendment (Knife Crimes) Act 2023

- 6.23 On 20 June 2023 Attorney General, Michael Daley MP, introduced the Criminal Legislation Amendment (Knife Crimes) Bill 2023. The Bill passed parliament on 29 June 2023 and is now the *Criminal Legislation Amendment (Knife Crimes) Act 2023* (NSW) (*Knife Crimes Act*), however it has not yet commenced.
- 6.24 The *Knife Crimes Act* will apply to the two of the focus offences for the review, being s 11C and s 11E of the *Summary Offences Act*.
- 6.25 The *Knife Crimes Act* will amend the *Crimes Act 1900* (NSW) (*Crimes Act*) to:
- create a new offence of having custody of knife in a public place or school (s 93IB) and repeal the existing offence in s 11C of the *Summary Offences Act*
 - create a new offence of using or carrying knife in a public place or school (s 93IC) and repeal the existing offence in s 11E of the *Summary Offences Act*
 - double the maximum imprisonment penalty for those two offences from 2 years to 4 years
 - increase the maximum penalty units from 20 to 40 penalty units for custody of knife, and from 50 to 100 penalty units for using or carrying a knife

22. NSW Bureau of Crime Statistics and Research, kf23-22711, table 1.

23. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4.

24. NSW Bureau of Crime Statistics and Research, ab23-22643, table 6.

25. NSW Bureau of Crime Statistics and Research, kf23-22711, table 1.

- insert new definitions of blade and knife for the purpose of these new offences (s 93IA), and
 - provide that public place and school have the same meaning as in the *Summary Offences Act* for the purpose of these new offences (s 93IA).
- 6.26 The *Knife Crimes Act* will also make consequential amendments to:
- the *Criminal Procedure Act* to provide that the new offences in s 93IB and s 93IC of the *Crimes Act* are table 1 offences, and
 - the *Summary Offences Act* to repeal sections 11C, 11E and 29A, and to make consequential amendments to s 11D to cross-reference to the new offences in the *Crimes Act*.
- 6.27 The *Knife Crimes Act* will broadly retain the same provisions relating to the defence of reasonable excuse, currently available under s 11C of the *Summary Offences Act*, for the new offence in s 93IB of the *Crimes Act*.
- 6.28 The *Knife Crimes Act* is awaiting commencement on proclamation. In the second reading speech, the Attorney General noted that time is required to draft amendments to the *Criminal Procedure Regulation 2017* (NSW) “to ensure that there is no gap in the ability to issue penalty infringement notices for a first offence of custody of knife”.²⁶ Penalty notices are discussed later in this chapter.
- 6.29 The *Knife Crimes Act* will likely commence before the completion of the review. However, there will not be sufficient time for relevant sentencing data and case law to become available for consideration. This will limit our ability to consider the impact of the reforms, especially in light of the issues outlined below.

Issues raised about summary knife offences

- 6.30 It should be noted that preliminary submissions were received before the Bill for the *Knife Crimes Act* was introduced to NSW parliament. Similarly, preliminary consultations were conducted before the *Knife Crimes Act* was passed.
- 6.31 The Office of the Director of Public Prosecutions (ODPP) did not consider that any of the current summary offences should be made indictable offences.²⁷
- 6.32 One confidential submission called for maximum penalties for summary knife offences to be increased, and consequently for them to be made table 2 offences, arguing it would be beneficial for targeting knife crime.²⁸

26. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 20 June 2023, 23.

27. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PWE08*, 3.

28. Confidential, *Preliminary Submission PWE11*, 3.

- 6.33 The *Knife Crimes Act* will instead make only s 11C and s 11E offences (not all summary knife offences) table 1 offences (not table 2). See above for an explanation of table offences.
- 6.34 During preliminary consultations, it was suggested that some consideration could be given to whether the remaining knife offences (excluding the offence in s 11B relating to blades and offensive implements) in part 2 division 2 subdivision 1 of the *Summary Offences Act* should also be moved into the *Crimes Act* and become table 1 offences.²⁹ These offences are:
- section 11D: parents who knowingly authorise or permit a child under the age of 18 to commit an offence under s 11C of the *Summary Offences Act*, and
 - section 11F: a person who sells a knife to a child under the age of 16 years.
- 6.35 These two offences are not addressed by the *Knife Crimes Act*.
- 6.36 Legal Aid NSW (Legal Aid) opposed making any existing summary offences indictable and noted that summary offences relating to knives already have a disproportionately negative impact on vulnerable people.³⁰
- 6.37 Three submissions noted that people who are homeless or rough sleepers, who regularly use items like multi-tools and Swiss army knives for practical purposes, are regularly caught by this provision.³¹
- 6.38 The Aboriginal Legal Service (ALS) observed that the most common groups it sees caught by the provision are men with cognitive impairment experiencing homelessness, and young people.³²
- 6.39 These submissions, as well as discussions at the preliminary consultations, also suggested that vulnerable people:
- may have difficulty proving to police that they have a reasonable excuse for possessing a knife,
 - even if they do provide a valid reasonable excuse, police consider this an issue for the courts to determine,
 - may be more likely to be arrested and bail refused by police, or if a court attendance notice is issued, may be less likely to appear in court, and

29. Prosecutors' Roundtable, *Preliminary Consultation PWEC01*.

30. Legal Aid NSW, *Preliminary Submission PWE12*, 1.

31. Law Society of NSW, *Preliminary Submission PWE05*, 2; Legal Aid NSW, *Preliminary Submission PWE12*, 2–3; Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PWE13*, 1–3.

32. Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PWE13*, 2–3.

- will often plead guilty to avoid the prospect of onerous bail conditions or being in custody.³³
- 6.40 Legal Aid suggested that one option to address these concerns could be to exempt small scissors and small bladed multi-tools from s 11C.³⁴ Legal Aid noted the case of *Police v O'Brien* [2012] NSWLC 7, in which Favretto LCM considered that s 11C was not intended to capture scissors or screwdrivers. There is a mechanism in the *Summary Offences Act* which provides that the section does not apply to any specified class or description of knife.³⁵ However, no such class has been prescribed in the regulations. The regulation-making power is continued in the new definition of knife in the *Knife Crimes Act*.
- 6.41 An alternative suggestion made in preliminary consultations was that an additional factor could be added to the list of reasonable excuses that relates to the experience of homelessness directly.³⁶ For example, a reasonable excuse that the person is homeless and had custody of the knife in a public place for the purpose of consuming food or preparing shelter. This reasonable excuse could be introduced in conjunction with introducing a specific class of knife, such as scissors or multi-tools, which are predominantly used for such purposes.
- 6.42 We also heard that the language in the provision relating to reasonable excuse suggests that the types of reasonable excuses aren't closed (the list is not exhaustive), and that preparation of food or other reasons related to homelessness could already be acceptable.³⁷
- 6.43 In addition, we heard that where mixed reasonable excuses are provided, one of which includes self-defence, these are not accepted by the courts.³⁸ This is despite the *Summary Offences Act* providing that self-defence may be acceptable as a reasonable excuse if it is not the sole purpose.³⁹
- 6.44 The *Knife Crimes Act* is unlikely to address many of these concerns because it will:
- increase the maximum penalties for these offences and makes them indictable (which may have the effect of increasing the likelihood of arrest and matters proceeding to court)

33. Defence Roundtable, *Preliminary Consultation PWEC02*; Children and Young People Roundtable, *Preliminary Consultation PWEC03*.

34. Legal Aid NSW, *Preliminary Submission PWE12*, 3.

35. *Summary Offences Act 1988* (NSW) s 11C(6).

36. Defence Roundtable, *Preliminary Consultation PWEC02*.

37. Prosecutors' Roundtable, *Preliminary Consultation PWEC01*.

38. Defence Roundtable, *Preliminary Consultation PWEC02*.

39. *Summary Offences Act 1988* (NSW) s 11C(3).

- introduce a new definition of “knife” to the *Crimes Act* for the purpose of the new offences (this definition is not substantively different from the existing definition in the *Summary Offences Act*)
- retain the existing list of reasonable excuses (using similar language to suggest that the list is not exhaustive), and
- provide that self-defence (or the defence of another person) is not a reasonable excuse, removing the word “solely”, thereby potentially removing the availability of mixed reasonable excuses.⁴⁰

Question 6.2: Summary offences relating to knives

- (1) Should the offences in s 11D and s 11F of the *Summary Offences Act 1988* (NSW) be made indictable? Why or why not? And if so, should they be made table 1 or table 2 offences?
- (2) Should certain specified classes of knives or blades be excluded from the definitions in s 93IA of the *Crimes Act 1900* (NSW) (uncommenced)? If so, what should be excluded?
- (3) Should the reasonable excuse provisions in s 92IB of the *Crimes Act 1900* (NSW) (uncommenced) include an excuse that recognises circumstances of homelessness? Why or why not?
- (4) Should the excuse of self-defence, or defence of another person, be available as a reasonable excuse when mixed with other purposes?

The appropriateness of penalty notice offences

Penalty notice offences relevant to the review

- 6.45 A penalty notice is an option for certain offences, known as “penalty notice offences”. If an offence is prescribed in an Act or Regulation as a penalty notice offence, police or other issuing officers have the option of issuing a penalty notice to a person who appears to have committed the offence.⁴¹ The person may pay the fine identified in the penalty notice or elect to have the matter determined by a court.⁴²
- 6.46 None of the preliminary submissions to the review raised concerns about any penalty notice offences in the scope of the review.

40. *Criminal Legislation Amendment (Knife Crimes) Act 2023* (NSW) sch 1 (uncommenced).

41. *Fines Act 1996* (NSW) s 19(1)(a1).

42. *Fines Act 1996* (NSW) s 23A.

- 6.47 Within the four main Acts we identified that contain weapons offences,⁴³ there is only one penalty notice offence relating to possession of a weapon, being custody of knife in a school or public place under s 11C(1) of the *Summary Offences Act*. There are no penalty notice offences within these Acts relating to use of a weapon.
- 6.48 A penalty notice may be issued for an offence under s 11C(1) only if the person “has not previously been dealt with for a knife-related offence”.⁴⁴ A knife-related offence is currently defined under s 29A(8) of the *Summary Offences Act* as:
- an offence under 11B (custody of offensive implement in a public place or school), s 11C (custody of knife in a public place or school) or s 11E (wielding a knife in a public place or school) under the *Summary Offences Act*, or
 - any other offence, whether in NSW or another Australian jurisdiction, punishable on conviction for 2 years or more if a knife was used in the commission of the offence.
- 6.49 Sections 11C, 11E and 29A will be repealed by the *Knife Crimes Act*, however the Attorney General’s second reading speech suggested that the ability for police to issue penalty notices for a first offence of having custody of a knife will be retained.⁴⁵

Penalty notices for summary knife offences

- 6.50 Legal Aid suggested that the review could explore the potential impact of allowing penalty notices to be issued for subsequent knife-related offences.⁴⁶ We also heard that while penalty notices are “not a perfect solution”, they have the practical benefit of moving low-level matters out of the court system.⁴⁷
- 6.51 The custody of knife offence on its own may be considered a lower-level matter because the offence does not involve any violence. During a preliminary consultation it was observed that it is “very rare” for someone to be charged with a custody of knife offence where the person has brandished or used the knife.⁴⁸ In these cases, a more serious offence is usually charged.
- 6.52 Imprisonment is much more likely for second or subsequent custody of knife offences.⁴⁹ In 2022, 966 first-time offences of custody of knife in a public place (where this was the principal (most serious) sentenced offence) went to court, of

43. *Crimes Act 1900* (NSW); *Firearms Act 1996* (NSW); *Summary Offences Act 1988* (NSW); *Weapons Prohibition Act 1998* (NSW).

44. *Summary Offences Act 1988* (NSW) s 29A(6).

45. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 20 June 2023, 23.

46. Legal Aid NSW, *Preliminary Submission PWE12*, 3.

47. Defence Roundtable, *Preliminary Consultation PWEC02*.

48. Defence Roundtable, *Preliminary Consultation PWEC02*.

49. NSW Bureau of Crime Statistics and Research, ab23-22460, table 3.

which 2% (19) resulted in a custodial penalty and 63% (611) resulted in a fine. For second or subsequent custody of knife in a public place offences, the percentage resulting in a custodial sentence increased to 10% (47), and the proportion that resulted in a fine decreased to 59% (280).

- 6.53 Revenue NSW’s penalty notice dashboard indicates that penalty notices for custody of knife in a public place have declined since 2019–2020 from 1000 issued in the 2019–2020 financial year to 547 in the 2022–2023 financial year.⁵⁰
- 6.54 Custody of knife in a school is a far less common offence: in 2022, it arose on only three occasions where this was the principal (most serious) offence⁵¹, and a total of three penalty notices were issued for a first offence in 2022–2023.⁵²
- 6.55 However, some concerns were raised in a preliminary consultation about penalty notices as an option.⁵³ It was observed that fines can be an ineffective way of preventing and deterring crime and can even be an incentive in some instances for a person to commit more offences to pay off the debt. It was also observed that the availability of issuing a penalty notice as an option may result in less use of the diversionary options available to children and young people under the *Young Offenders Act 1997 (NSW)*.⁵⁴
- 6.56 There are known issues with penalty notices being issued to vulnerable groups including children and young people, people with mental health or cognitive impairment and homeless people. Key issues for these groups include capacity to pay, the extent of comprehension of the effect of a penalty notice, and not being aware, or able to keep track, of penalty notices.
- 6.57 As we noted in our 2006 interim report on the effectiveness of fines as a sentencing option, a lack of understanding by the recipient can render a penalty notice “meaningless” and, rather than reducing reoffending, may instead produce “mounting debt, fine default and eventual incarceration for non-payment”.⁵⁵ The NSW Law Reform Commission expressed similar concerns in its 2012 report on penalty notices, in which it noted that non-payment of penalty notices can lead to accumulated debt and an “escalation of enforcement costs or sanctions, including driver licence disqualification”.⁵⁶

50. Revenue NSW, “Penalty Notice Dashboard” <<https://www.revenue.nsw.gov.au/help-centre/resources-library/statistics/penalty-notice-dashboard>> (retrieved 31 August 2023).

51. NSW Bureau of Crime Statistics and Research, ab23-22643, table 4.

52. Revenue NSW, “Penalty Notice Dashboard” <<https://www.revenue.nsw.gov.au/help-centre/resources-library/statistics/penalty-notice-dashboard>> (retrieved 31 August 2023).

53. Children and Young People Roundtable, *Preliminary Consultation PWEC03*.

54. Children and Young People Roundtable, *Preliminary Consultation PWEC03*.

55. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [2.88].

56. NSW Law Reform Commission, *Penalty notices*, Report 132 (2012) [14.7].

- 6.58 If it is considered that penalty notices should be available for second or subsequent custody of knife offences, one option is to allow penalty notices to be issued only if the person's previous knife-related offending was custody of knife or offensive implement (current s 11B and s 11C of the *Summary Offences Act*). This would continue to exclude people who had committed knife offences that involved actual use of a knife, not the mere possession of a knife.

Question 6.3: Penalty notices for subsequent custody of knife offences

- (1) Should penalty notices be generally available for second or subsequent custody of knife offences? Why or why not?
- (2) Should penalty notices be available for second or subsequent custody of knife offences in circumstances where the person's only previous knife-related offence is custody of knife and/or offensive implement (current s 11B and s 11C), not a violent knife offence?

Penalty notice offences in the prohibited weapons Acts

- 6.59 Both the *Firearms Act* and the *Weapons Prohibition Act* allow for certain offences to be prescribed as penalty notice offences.⁵⁷
- 6.60 The *Firearms Regulation 2017* (NSW) (*Firearms Regulation*) prescribes 11 offences within the *Firearms Act* and nine offences in the *Firearms Regulation* as penalty notice offences.⁵⁸ These offences apply only to people who are authorised to use and possess firearms and relate to compliance with safekeeping, record-keeping, information sharing and other licence requirements.
- 6.61 The ODPP proposed grouping the fine-only offences under the *Weapons Prohibition Act* and *Weapons Prohibition Regulation 2017* (NSW) (*Weapons Prohibition Regulation*) as offences for which a penalty notice may be issued, similar to schedule 1 of the *Firearms Regulation*.⁵⁹
- 6.62 We have identified 14 fine-only offences in the *Weapons Prohibition Act* and three fine-only offences in the *Weapons Prohibition Regulation*. These offences, which are set out below, are similar in nature to the *Firearms Act* and *Firearms Regulation* penalty notice offences in that they apply only to people authorised to hold a prohibited weapons permit (with the exception of s 24(1) and s 24(3) which prohibit a person who does not hold a permit to send or receive a prohibited weapon), and they mostly relate to compliance with permit requirements.

57. *Firearms Act 1996* (NSW) s 85A; *Weapons Prohibition Act 1998* (NSW) s 42.

58. *Firearms Regulation 2017* (NSW) sch 1.

59. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PWE08*, 2.

Table 6.1: Penalty notice offences for prohibited weapons

Legislation	Offence	Penalty
<i>Weapons Prohibition Act (1998) (NSW) s 12</i>	Requirement to notify Commissioner if genuine reason for possessing/using prohibited weapon ceases to exist	50 PU
<i>Weapons Prohibition Act (1998) (NSW) s 13</i>	Requirement that a permit be in a particular form	20 PU
<i>Weapons Prohibition Act (1998) (NSW) s 20A</i>	Authorised weapons dealer/theatrical weapons armourer to keep records of sale and produce record and other information to police officer on request	50 PU
<i>Weapons Prohibition Act (1998) (NSW) s 21(1)</i>	Authorised weapons dealer/theatrical weapons armourers not to take possession of prohibited weapon for repair/testing unless they have seen the person's permit	50 PU
<i>Weapons Prohibition Act (1998) (NSW) s 22(1) and (2)</i>	Authorised weapons dealer/theatrical weapons armourer to ensure security of displayed weapons	50 PU
<i>Weapons Prohibition Act (1998) (NSW) s 24(1), (2) and (3)</i>	Restrictions on sending and receiving prohibited weapons	50 PU
<i>Weapons Prohibition Act (1998) (NSW) s 25</i>	Requirements for advertising sale of prohibited weapons	50 PU
<i>Weapons Prohibition Act (1998) (NSW) s 30</i>	Requirement for permit-holder to notify Commissioner of change in particulars	50 PU
<i>Weapons Prohibition Regulation 2017 (NSW) cl 8</i>	Permit-holder to notify Commissioner of any change of premises where weapons are kept	50 PU
<i>Weapons Prohibition Regulation 2017 (NSW) cl 9</i>	Permit-holder to notify Commissioner of lost, stolen or damaged permit	20 PU
<i>Weapons Prohibition Regulation 2017 (NSW) cl 19(6)</i>	Record-keeping and safekeeping requirements for a prohibited weapons – production permit	50 PU

Question 6.4: Fine-only offences in the prohibited weapons Acts

Should the above fine-only offences be prescribed as penalty notice offences in the *Weapons Prohibition Regulation 2017 (NSW)*?

Penalty notice offences in other legislation

- 6.63 We identified a number of penalty notice offences in other Acts and regulations relating to possessing or using firearms, knives and other weapons in different settings (for example, prisons, forestry areas and inclosed lands).⁶⁰
- 6.64 Most of these offences show no record of a finalised charge by a court from 2013-2022.⁶¹ This indicates that these matters result either in no action or the issuing of a penalty notice. The Revenue NSW dashboard indicates that few of these matters result in the issuing of a penalty notice: of the relevant offences able to be identified on the dashboard, only 66 penalty notices have been issued since the 2018-2019 financial year.⁶²
- 6.65 In preliminary consultations,⁶³ it was observed that these offences are only used for people who are authorised (by licence or permit) to use a firearm or prohibited weapon. Where an unlicensed person is carrying or using a firearm or prohibited weapon, or where harm arises from any person carrying or using a firearm or prohibited weapon, police charge the person with a more serious offence with higher penalties.
- 6.66 On this basis, we do not propose to consider these offences in any more detail in the review.

Question 6.5: Other penalty notice offences relating to use or possession

Is there any reason why the review should consider penalty notice weapons offences other than s 11C of the *Summary Offences Act 1988* (NSW)?

60. See eg *Court Security Act 2005* (NSW) s 8(1)(a); *Crimes (Administration of Sentences) Act 1999* (NSW) s 253E(1); *Forestry Act 2012* (NSW) s 68(1)(a); *Inclosed Lands Protection Act 1901* (NSW) s 4B(1)(e).

61. NSW Bureau of Crime Statistics and Research, ab23-22493.

62. Revenue NSW, "Penalty Notice Dashboard" <<https://www.revenue.nsw.gov.au/help-centre/resources-library/statistics/penalty-notice-dashboard>> (retrieved 11 July 2023). Offences are not able to be identified by provision in the dashboard, so our search was based on offence description only and covers offences with the following descriptions: carry and possess firearm etc or prohibited weapon, carry/discharge or possess airgun, speargun etc, carry/discharge/possess airgun/speargun/other lethal weapon, carry/discharge/possess firearm/imitation firearm/prohibited weapon, carry/discharge/possess prohibited weapon on Trust land, carry/use or possess any ammunition, carry/use/possess any ammunition, carry/use/possess or have custody of a knife in park, carry/use/possess/have custody of knife in park and discharge firearm etc or prohibited weapon.

63. Prosecutors' Roundtable, *Preliminary Consultation PWEC01*; Defence Roundtable, *Preliminary Consultation PWEC02*.

Alternative approaches to weapon crime

- 6.67 Sentencing laws are only one part of the response to weapon-related crime. In some cases, it may be appropriate to consider alternative approaches to crime prevention and deterrence.
- 6.68 The High Court in *Munda v Western Australia* recognised that general deterrence through sentencing may not always be effective especially where entrenched social disadvantage has criminogenic effects upon communities. In these circumstances, heavy sentences may not reduce crime. The High Court went on to say that the state has a key role to play in protecting the community against violence.⁶⁴
- 6.69 Neither preliminary submissions nor consultations raised alternative approaches to adult offending related to firearms, knives and other weapons. However, below we have outlined some of the alternative approaches that were identified in relation to offending by young people. We seek your feedback about whether any of these approaches may be appropriate to address adult offending (whether in relation to knife offences, firearms offences or other weapons offences). We will release a separate issues paper on young people and weapon-related offending, including alternative approaches.
- 6.70 At a broad level, the ALS suggested that any alternative approaches should be consistent with the targets, the spirit and the Priority Reforms of the National Agreement on Closing the Gap.⁶⁵ In particular, the way government works with Aboriginal people should be transformed to identify racism and systemic disadvantage.⁶⁶

Targeted intervention and education

- 6.71 In preliminary submissions and consultations, there was broad support for educational and holistic responses to address the root causes of knife crime amongst young people.⁶⁷ Some of these responses may be relevant to adults.

64. *Munda v Western Australia* [2013] HCA 38; 249 CLR 600 [54].

65. Australia, Joint Council on Closing the Gap, “Priority Reforms” <https://www.closingthegap.gov.au/national-agreement/priority-reforms> (retrieved 1 September 2023).

66. Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PWE13*, 4.

67. P White, *Preliminary Submission PWE01*, 1; Youth Against Violence, *Preliminary Submission PWE06*, 6; Youth Justice NSW, *Preliminary Submission PWE07*, 2; Advocate for Children and Young People, *Preliminary Submission PWE10*, 1–2; Prosecutors’ Roundtable, *Preliminary Consultation PWEC01*; Defence Roundtable, *Preliminary Consultation PWEC02*; Children and Young People Roundtable, *Preliminary Consultation PWEC03*.

- 6.72 In relation to targeted intervention, in March 2023 the NSW Government announced \$36 million in funding for various initiatives targeting young people and violent crime, including a two-year pilot of violence reduction units (VRUs) in Penrith and Wagga Wagga.⁶⁸ The units bring together a range of organisations to coordinate local responses to violence. Youth Against Violence supported the introduction of VRUs on a state-wide basis in relation to young people.⁶⁹
- 6.73 The pilot is based on the model of VRUs introduced in the United Kingdom (UK) in 2018–2019, as part of a public health approach to serious violence.⁷⁰ A recent evaluation of the first three years of operation of VRUs in the UK found that overall, they have made good progress towards a whole-of-systems approach to preventing violence at a local level.⁷¹
- 6.74 The Northern Territory (NT) has recently announced a strategy to reduce knife crime, which states that it builds on existing research from Australia and overseas for a holistic approach, which includes targeting violent crime generally (rather than focusing solely on knife crime).⁷² Actions include developing uniform practice for security of knives and weapons to prevent theft, developing an evidence-informed violence awareness campaign, and continuing to partner across agencies to develop de-escalation training for schools and service providers.⁷³
- 6.75 In relation to education, we heard that the NSW Police and the Police Citizens Youth Clubs have educational campaigns that target young people and knife offending at a local level.⁷⁴ In 2021, Queensland introduced the “I Live My Life ... without a Knife” campaign, which promoted community awareness of the risks and penalties of carrying knives through advertising, community events and engagement, and

68. L Leeming, “\$36m to Cut Youth Crime” *Daily Telegraph*, (1 March 2023) 16; M Bonvoy, “\$36 Million to Keep the Next Generation on Track”, *Mirage News* (online, 2 March 2023); Youth Justice NSW, *Preliminary Submission PWE07*, 2.

69. Youth Against Violence, *Preliminary Submission PWE06*, 6.

70. J Brown, “How is the Government Implementing a ‘Public Health Approach’ to Serious Violence?” (22 July 2019) *UK, House of Commons Library* < <https://commonslibrary.parliament.uk/how-is-the-government-implementing-a-public-health-approach-to-serious-violence/>> (retrieved 31 August 2023).

71. M Cutmore and others, “Violence Reduction Units, Year Ending March 2022 Evaluation Report” (updated 2 February 2023) *UK Home Office, Research and Analysis* < <https://www.gov.uk/government/publications/violence-reduction-units-year-ending-march-2022-evaluation-report/violence-reduction-units-year-ending-march-2022-evaluation-report>> (retrieved 14 August 2023) [2.2].

72. Northern Territory Government, *Knife Crime Reduction Strategy* (2023).

73. Northern Territory Government, *Knife Crime Reduction Strategy* (2023).

74. Prosecutors’ Roundtable, *Preliminary Consultation PWEC01*; Defence Roundtable, *Preliminary Consultation PWEC02*.

school presentations.⁷⁵ It may be that such campaigns could be of benefit to the adult population in NSW.

Police powers to search the general public for weapons

- 6.76 Increased detection by police is another option for achieving deterrence. One suggestion was to consider the adoption of metal detectors or “wands” to detect knives and other weapons in public places.⁷⁶

Powers in other jurisdictions

- 6.77 A number of jurisdictions in Australia have introduced legislation regarding police powers to use handheld electronic scanning devices, such as metal detectors or “wands”, to search people in public places for knives and other weapons. These schemes operate without the requirement for a warrant or a reasonable suspicion relating to an offence:
- In Queensland, a trial of the authority to use scanning devices to detect knives in Surfers Paradise and Broadbeach Safe Night Precincts (for up to 12 hours) commenced in 2021 (see below for further detail).⁷⁷
 - In Victoria, police have the power to search persons for weapons in public places in temporarily designated areas (for up to 12 hours).⁷⁸
 - In South Australia, police have the power to conduct searches for the purpose of detecting weapons offences if the person is attempting to enter or leave a licensed premise, a declared public place holding an event or a car park for those areas.⁷⁹
 - In Western Australia, police have the power to conduct a basic search, which includes scanning a person with an electronic device “to detect any thing”.⁸⁰
 - The NT has passed legislation (that has not yet commenced), which will allow police to use metal detectors when searching.⁸¹

75. Queensland Police, “New Campaign to Tackle Youth Knife Crime” (10 May 2021) <<https://mypolice.qld.gov.au/news/2021/05/18/new-campaign-to-tackle-youth-knife-crime/>> (retrieved 14 August 2023).

76. Youth Against Violence, *Preliminary Submission PWE06*, 6.

77. *Youth Justice and Other Legislation Amendment Act 2021* (Qld) inserting *Police Powers and Responsibilities Act 2000* (Qld) ch 2 pt 3A, replaced by *Police Powers and Responsibilities (Jack’s Law) Amendment Act 2023* (Qld) s 4.

78. *Control of Weapons Act 1990* (Vic) s 10C–10L.

79. *Summary Offences Act 1953* (SA) s 66R.

80. *Criminal Investigation Act 2006* (WA) s 63 definition of “basic search”.

81. A Bowles, “Police ‘Wanding’ Laws Pass Amid Racial Profiling Concerns” *NT News* (online, 26 July 2023). *Police Legislation Further Amendment Act 2023* (NT) s 6–7, inserting *Police Administration Act 1978* (NT) s 116K–116KQ (uncommenced).

- 6.78 The goal of the Queensland scanning devices ("wandering") trial was to minimise the risks of harm associated with the unlawful possession of knives in the two trial sites.⁸²
- 6.79 A review of the trial presented data that, over the course of the trial, 13,073 people were wanded, 27.5% (approximately 3596) of whom were under the age of 18. The average age was 23.64 years and the median age was 20 years.⁸³
- 6.80 The review found that there were only observable changes of significance in drug offences at both trial sites, and in weapons offences at only one site. However, it was noted in both trial sites the overall number of detected offences involving weapons was historically very low. There was no quantitative data supporting changes in the type of weapons carried, the severity of offences, or the displacement of offending or diffusion of benefits to other areas.⁸⁴
- 6.81 The review of the trial found that there was no evidence to suggest any deterrent effect, and any continuation of the trial should target only those areas where data shows a proportionately higher prevalence of knife offences occurring over a sustained period.⁸⁵ The review also noted that the trial period overlapped with COVID-19, which meant that trial outcomes could not be compared with pre-COVID patterns or generalised for the future, and that 12 months is too short a time to accurately identify any longer term trends such as changes in offending patterns or possible deterrent effects.⁸⁶
- 6.82 On 2 April 2023 the *Police Powers and Responsibilities (Jack's Law) Amendment Act 2023* (Qld) commenced, which expanded the trial to all safe night precincts in Queensland, as well as public transport stations and vehicles.⁸⁷

Search powers in NSW

- 6.83 In NSW the power to search the general public for weapons without a warrant or without forming reasonable suspicion appears to be more restricted than other jurisdictions. In general, part 4 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (*LEPRA*) outlines the circumstances in which the police can search people and vehicles without a warrant. To stop, search and detain a person (whether

82. Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2021 (Qld) 1–2.

83. J Ransley and others, *Review of the Queensland Police Service Wandering Trial*, (Griffith Criminology Institute, 2022), 97.

84. J Ransley and others, *Review of the Queensland Police Service Wandering Trial*, (Griffith Criminology Institute, 2022), 53.

85. J Ransley and others, *Review of the Queensland Police Service Wandering Trial*, (Griffith Criminology Institute, 2022) iv.

86. J Ransley and others, *Review of the Queensland Police Service Wandering Trial*, (Griffith Criminology Institute, 2022) iii.

87. *Police Powers and Responsibilities Act 2000* (Qld) ch 2 pt 3A.

in public or not), a police officer must suspect on reasonable grounds that one of the four circumstances in section 21(1) of *LEPRA* exists. The circumstances include that the person has a stolen or unlawfully obtained anything in their possession or control, or they have anything that has been used or is intended to be used in connection with an offence.⁸⁸

- 6.84 A police officer can stop, search and detain a person in a public place or school, without a warrant, if the police officer suspects on reasonable grounds that the person has unlawful possession or control of a dangerous implement.⁸⁹ A dangerous implement includes a dangerous article (such as a firearm), any implement made or adapted to cause injury and a knife.⁹⁰
- 6.85 In NSW, part 6B of *LEPRA* provides that a senior police officer may make a public safety order that prohibits a specified person, or a class of persons, from attending a particular public event, or from entering or being present at a specified premises or area.⁹¹ A senior police officer may make the order if satisfied that the presence of the person (or class of persons) at a public event, area or other premises poses a serious risk to public safety or security and the order is reasonably necessary.⁹² A police officer may then search premises, areas and vehicles in connection with the public safety order.⁹³
- 6.86 We understand that public safety orders were issued to prevent specific individuals from attending the Sydney Royal Easter Show this year, following a fatal stabbing event in 2022.⁹⁴

Considerations

- 6.87 A Bureau of Crime Statistics and Research (BOCSAR) study, which assessed how the probability of arrest, the probability of imprisonment and the imprisonment duration might impact on property and violent crime rates, highlighted that

88. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 21; *R v Rondo* [2001] NSWCCA 540 [53].

89. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 23.

90. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 3(1) definitions of “dangerous article” and “dangerous implement”.

91. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 87Q definition of “public safety order”, s 87R.

92. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) 87R(1).

93. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)s 87ZB.

94. D Wu, “NSW Police Issue Rare Public Safety Orders to Risky Individuals Ahead of Sydney Royal Easter Show Opening its Doors this Week” *Sky News* (online 4 April 2023) <<https://www.skynews.com.au/australia-news/crime/nsw-police-issue-rare-public-safety-orders-to-risky-individuals-ahead-of-sydney-royal-easter-show-opening-its-doors-this-week/news-story/71691ae3f3e61ed0f23808f050131816>> (retrieved 30 August 2023).

increasing the risk of arrest or the risk of imprisonment reduces crime, while increasing the duration of prison sentences “exerts no measurable effect at all”.⁹⁵

- 6.88 However, research in the UK has suggested that strategies such as stop and search and knife amnesties did not make a significant difference on youth knife crime in the UK. The research suggested it may have been because such methods do not address the driving causes of knife crime, and that being stopped and searched may be seen as an act of violence itself by the person being searched.⁹⁶
- 6.89 In preliminary consultations, there were mixed views as to whether police should be empowered to use metal detectors on the general population (or young people) to locate and seize weapons, either for amnesty purposes and/or to lay charges. Some stated that this could have the effect of reducing the unnecessary presence of knives in the community. However, it was also stated that metal detectors could be used to target young people and other vulnerable groups, and that this strategy would not address the root causes of knife crime.⁹⁷
- 6.90 Youth Justice NSW emphasised that “place-based, locally designed, targeted interventions are likely to be effective with respect to young people who are carrying and/or using knives”.⁹⁸ These considerations may be relevant to adult offenders as well.
- 6.91 Individuals who are searched by police may be charged and later sentenced. However, the exercise of police powers is distinct from the sentencing process. Further consideration of the introduction of metal detectors or “wands” in NSW may be out of scope of the review. Other approaches, more directly connected with sentencing, are outlined below.

Post-conviction schemes targeting reoffending

- 6.92 Two schemes that have been trialled in the UK are relevant to the review: Serious Violence Reduction Orders (SVROs) and Knife Crime Prevention Orders (KCPOs).⁹⁹ Both schemes target weapons-based offending but have different features. For example, SVROs provide police with additional powers to search adult offenders for weapons, while KCPOs are targeted at young people and include conditions such as counselling and curfews.

95. W-Y Wan and others, *The Effect of Arrest and Imprisonment on Crime*, Crime and Justice Bulletin No 158 (NSW Bureau of Crime Statistics and Research, 2012) 15-16.

96. K D Browne and others, “Knife Crime Offender Characteristics and Interventions: A Systematic Review” (2022) 67 *Aggression and Violent Behaviour* 1, 13.

97. Defence Roundtable, *Preliminary Consultation PWEC02*; Children and Young People Roundtable, *Preliminary Consultation PWEC03*.

98. Youth Justice NSW, *Preliminary Submission PWE07*, 2.

99. Confidential, *Preliminary Submission PWE11*, 3.

Serious Violence Reduction Orders

6.93 In April 2023, the UK commenced a two-year trial of SVROs across four police areas.¹⁰⁰ The key features of SVROs include:

- SVROs can be made against someone aged 18 or over, who has been convicted of an offence involving a bladed article or offensive weapon.
- An SVRO gives police the power to search an individual subject to the order for bladed articles or offensive weapons and to detain them. The power may only be exercised if the individual is in a public place.¹⁰¹
- In making an SVRO, the courts must be satisfied of the following:
 - on the balance of probabilities the offender used a bladed article or offensive weapon when the offence was committed, or “another person who committed the offence used or had with them a bladed article or offensive weapon in the commission of the offence and the offender knew or ought to have known”, and
 - it is necessary to make the order to protect the public or a particular member of the public, including the offender themselves, “from the risk of harm involving a bladed article or offensive weapon or to prevent the offender from committing an offence involving a bladed article or offensive weapon”.¹⁰²
- Breach of an SVRO is a criminal offence, punishable by up to 12 months’ imprisonment, a fine or both.¹⁰³

6.94 The public safety order scheme (discussed above), while not directly comparable to SVROs because the searches are targeted at finding the individual rather than searching the individual for weapons, does have some similarities.

100. C Fuller, “Stop and Search: Four Police Forces to Trial New Order” (2023) *BBC News* (online, 18 April 2023).

101. UK Home Office, “Serious Violence Reduction Orders: Draft Statutory Guidance” (updated 30 March 2023) < <https://www.gov.uk/government/publications/serious-violence-reduction-orders/serious-violence-reduction-orders-draft-statutory-guidance-accessible> > (retrieved 14 August 2023) [10], [40]–[41].

102. UK Home Office, “Serious Violence Reduction Orders: Draft Statutory Guidance” (updated 30 March 2023) < <https://www.gov.uk/government/publications/serious-violence-reduction-orders/serious-violence-reduction-orders-draft-statutory-guidance-accessible> > (retrieved 14 August 2023) [13]–[14], [17].

103. UK Home Office, “Serious Violence Reduction Orders: Draft Statutory Guidance” (updated 30 March 2023) < <https://www.gov.uk/government/publications/serious-violence-reduction-orders/serious-violence-reduction-orders-draft-statutory-guidance-accessible> > (retrieved 14 August 2023) [62].

Knife Crime Prevention Orders

- 6.95 KCPOs were introduced as a preventative mechanism with the aim of diverting young people away from crime.¹⁰⁴ KCPOs were piloted in London from July 2021 to March 2023, and an evaluation is currently underway.¹⁰⁵
- 6.96 The main features of KCPOs include:
- A KCPO may contain a range of conditions including the requirement to participate in a restorative justice activity, attend counselling and/or youth mentoring, not to use or have particular articles and to obey a curfew and/or non-association orders.¹⁰⁶
 - A KCPO can be made against any person from the age of 12.¹⁰⁷
 - A KCPO can be made on conviction of a relevant offence, upon complaint by the police (without a conviction), and without notice (also without a conviction) in exceptional or urgent circumstances.¹⁰⁸
 - Where a KCPO is made upon complaint by the police (without a conviction), the court must be satisfied of various conditions, including that the defendant, on the balance of probabilities, has had on at least two occasions a bladed article in a relevant place without good reason or lawful authority.¹⁰⁹
 - Breaching a KCPO is a criminal offence and carries a maximum penalty of 2 years' imprisonment.¹¹⁰
- 6.97 Unlike SVROs, KCPOs do not explicitly give police more power to search individuals. However, the court can impose any conditions it thinks are necessary to protect against the risk of harm involving a bladed article.¹¹¹ For example, the court can prohibit a person from using or having a knife.¹¹² Further, a specified person is responsible for supervising the defendant's compliance with the order and is to promote their compliance.¹¹³

104. UK Home Office, *Knife Crime Prevention Orders KCPOs: Practitioners' Guidance* (2021) 4.

105. UK, UCL, "Evaluating New Legislation Piloted to Help Knife-Enabled Violence" *UCL Jill Dando Institute of Security and Crime Science* (17 August 2021) < <https://www.ucl.ac.uk/jill-dando-institute/news/2021/aug/evaluating-new-legislation-piloted-help-prevent-knife-enabled-violence> > (retrieved 1 September 2023).

106. UK Home Office, *Knife Crime Prevention Orders KCPOs: Practitioners' Guidance* (2021) 17, 18; *Offensive Weapons Act 2019* (UK) s 21-22.

107. *Offensive Weapons Act 2019* (UK) s 14(1).

108. *Offensive Weapons Act 2019* (UK) s 14-19.

109. *Offensive Weapons Act 2019* (UK) s 14(3)-(4).

110. *Offensive Weapons Act 2019* (UK) s 29.

111. *Offensive Weapons Act 2019* (UK) s 21(1).

112. *Offensive Weapons Act 2019* (UK) s 21(4).

113. *Offensive Weapons Act 2019* (UK) s 22(1), s 22(5)(b).

- 6.98 A distinguishing feature of KCPOs is that they can be made without a conviction for a relevant offence. Most existing schemes in NSW require a conviction, except for example, serious crime prevention orders (see below).
- 6.99 Some criticism of KCPOs includes that they potentially subject individuals to more frequent stops and searches as a way of ensuring compliance and are disproportionately employed to regulate the behaviour of vulnerable populations.¹¹⁴

Existing approaches in NSW

- 6.100 There are several schemes in NSW that require an adult offender to submit to conditions that are intended to deter reoffending and protect the community. Some of these schemes are specifically targeted at weapon-related offending, although usually only serious offending conduct. Depending on the scheme, offenders can be required to submit to conditions that include rehabilitative aspects, as well as increased supervision and monitoring and, in some cases, searches.
- 6.101 **The firearms prohibition order (FPO) and weapons prohibition order (WPO) schemes** prohibit certain individuals from possessing or using prohibited weapons and firearms (as well as firearm parts and ammunition).¹¹⁵ FPOs also give police powers to search specified individuals for firearms.¹¹⁶ Both schemes operate alongside detailed regulatory and licensing regimes for some weapon types, and only apply to a restricted list of knives that are captured within the definition of prohibited weapon.¹¹⁷ Chapter 2 provides more information about weapon types covered by the *Firearms Act* and the *Weapons Prohibition Act*. Given the majority of knives are unregulated, there may be limited relevance of these schemes to the offences considered in the review.
- 6.102 **Drug supply prohibition orders (DSPOs)** can be made against an adult who has been convicted of a serious drug offence within the last 10 years - possession is not an eligible offence.¹¹⁸ A DSPO allows a police officer (without warrant) to stop, detain and search person, to enter and search premises, to stop, detain and search a vehicle, and to seize and detain things from searches.¹¹⁹ Powers can only be exercised in a pilot scheme area.¹²⁰

114. J Hendry, “‘The Usual Suspects’: Knife Crime Prevention Orders and the ‘Difficult’ Regulatory Subject” (2022) 62 *British Journal of Criminology* 378, 379, 382.

115. *Firearms Act 1996* (NSW) s 74; *Weapons Prohibition Act 1998* (NSW) s 34(1).

116. *Firearms Act 1996* (NSW) s 74A.

117. *Weapons Prohibition Act 1998* (NSW) s 4 definition of “prohibited weapon”, sch 1.

118. *Drug Supply Prohibition Order Pilot Scheme Act 2020* (NSW) s 5 definition of “serious drug offence”.

119. *Drug Supply Prohibition Order Pilot Scheme Act 2020* (NSW) s 4.

120. *Drug Supply Prohibition Order Pilot Scheme Act 2020* (NSW) s 4(3)(a).

- 6.103 **Serious crime prevention orders (SCPOs)** apply to adults, if convicted of a serious criminal offence or involved in serious crime related activity for which the person has not been convicted.¹²¹ SCPOs can include any prohibitions, restrictions, requirements that are considered appropriate to protect the public by preventing or disrupting the person’s engagement in serious crime related activities.¹²² Eligible offences include some firearms offences and armed robbery.¹²³
- 6.104 There are a range of **supervision and detention schemes** NSW that provide for extended supervision orders (ESOs) and continuing detention orders (CDOs) after an offender has been sentenced.¹²⁴ Generally, a court can make these orders if it considers that the offender poses an unacceptable risk of committing a further relevant offence. In deciding whether to make an order, community safety is the paramount consideration.¹²⁵ ESOs can require offenders to submit to any condition the court considers appropriate, such as participation in rehabilitation programs, electronic monitoring, non-association orders and restrictions on movement.¹²⁶ These schemes generally apply to offenders who are serving a sentence of imprisonment for a relevant indictable offence,¹²⁷ or are currently supervised or detained under one of the schemes.¹²⁸
- 6.105 The **sentencing penalties for adults that provide for supervision** (an ICO, a CCO and a CRO) can include conditions such as rehabilitation, curfews, non-association and restrictions on movement.¹²⁹ Appendix D includes an explanation of these orders and the conditions that may be included. However, for low-level offending, these supervisory penalties are often not the most common outcome (see chapters 2 and 6).

Considerations

- 6.106 None of the existing approaches in NSW are directly comparable to either SVROs or KCPOs. There does appear to be a gap in NSW in relation to a scheme that

121. *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) s 5(1)(b).

122. *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) s 6(1).

123. *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) s 3(1) definition of “serious criminal offence”; *Criminal Assets Recovery Act 1990* (NSW) s 6(2) definition of “serious criminal offence”.

124. See for example the *Crimes (High Risk Offenders) Act 2006* (NSW); *Terrorism (High Risk Offenders) Act 2017* (NSW).

125. *Crime (High Risk Offenders) Act 2006* (NSW) s 17(2), s 9(2); *Terrorism (High Risk Offenders) Act 2017* (NSW) s 25(2), s 39(2).

126. *Crimes (High Risk Offenders) Act 2006* (NSW) s 11(1).

127. *Crimes (High Risk Offenders) Act 2006* (NSW) s 4 definition of “serious offence”, s 5, s 5A; *Terrorism (High Risk Offenders) Act 2017* (NSW) s 7(b), s 8, s 9, s 10, s 20(a), s 20(c), s 34(1)(a), s 34(1)(c).

128. *Crimes (High Risk Offenders) Act 2006* (NSW) s 51, s 13B.

129. See for example *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 5, div 4; pt 6, div 3; pt 8, div 3; pt 8A.

targets lower-level weapon-related offending (particularly knife-related offending) by adults.

- 6.107 However, it is not clear whether there is a need for such a scheme in NSW, especially in relation to adult offenders and low-level offending (see chapter 2 for more discussion of sentencing data for offences relevant to the review).

Rehabilitation programs

- 6.108 There are a range of rehabilitation programs available to adult offenders who are serving a sentence of imprisonment or who are subject to supervision by Community Corrections.
- 6.109 Corrective Services provides rehabilitation programs to offenders in custody. Corrective Services assess offenders and develop programs which contain various structured activities and interventions that aim to support behavioural change and address factors that are directly linked to the person's offending.¹³⁰ There are programs that directly address aggression, domestic and family violence (EQUIPS) and violent offending (VOTP).¹³¹
- 6.110 Community Corrections may help rehabilitate offenders who they supervise while in the community. Community Corrections carry out supervision by monitoring offenders for compliance with their court order and developing a case management plan for each offender that aims to address the offending behaviour.¹³²
- 6.111 Youth Against Violence submitted that rehabilitation programs for young people who have been sentenced for violent crimes involving the use of a weapon are crucial to address reoffending.¹³³ They also considered that rehabilitation programs should be available, and even mandatory, for those who are found guilty of possession or other knife crime offences (not necessarily involving the use of violence), and for firearms and other weapons offences.¹³⁴
- 6.112 It does not appear that any of the existing rehabilitation programs in NSW available to adults specifically target weapon-related offending.

130. Corrective Services NSW, "Offender Programs" Factsheet 6 (2019) 1.

131. Corrective Services NSW, "What Programs are Provided to Offenders?" (11 May 2023) <<https://correctiveservices.dcj.nsw.gov.au/reducing-re-offending/initiatives-to-support-offenders/about-offender-services-and-programs/how-do-we-choose-the-group-programs-we-use.html>> (retrieved on 30 August 2023).

132. Corrective Services NSW, "Community Corrections" Factsheet 2 (2023) 1.

133. Youth Against Violence, *Preliminary Submission PWE06*, 5.

134. Youth Against Violence, *Preliminary Submission PWE06*, 6.

Question 6.6: Alternative approaches to dealing with adult weapons offences

- (1) Are there examples of early intervention programs and education campaigns that we should consider in the context of adult weapon-related offending?
- (2) Are there any other examples of schemes relating to police powers to search for weapons that should be considered?
- (3) Are there any schemes that place conditions on adult weapon-related offenders that should be considered?
- (4) Are there any examples of rehabilitation programs that should be considered when dealing with adults who have been convicted of weapon-related offences?

Characteristics of offenders

- 6.113 The terms of reference for the review require us to provide information on the characteristics of weapons offenders. We intend to include a chapter on the characteristics and motivations of offenders in our final report, drawing from data and other observations arising from our research.
- 6.114 Below, we identify some issues in preliminary submissions and consultations and seek input on any other areas that should be considered in the review.

Knife offences

- 6.115 Stakeholders cited several characteristics as being common among knife offenders. These included:
- low socio-economic status¹³⁵
 - ongoing experience of homelessness¹³⁶
 - aged between 14–17 years, or otherwise under the age of 18 years¹³⁷
 - male¹³⁸

135. L Henderson-Lancett, *Preliminary Submission PWE04*, 1–2; Legal Aid NSW, *Preliminary Submission PWE12*, 2; Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PWE13*, 2.

136. Legal Aid NSW, *Preliminary Submission PWE12*, 2–3; Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PWE13*, 1–3; Defence Roundtable, *Preliminary Consultation PWEC02*; Children and Young People Roundtable, *Preliminary Consultation PWEC03*.

137. Youth Against Violence, *Preliminary Submission PWE06*, 1; Confidential, *Preliminary Submission PWE11*, 1; Legal Aid NSW, *Preliminary Submission PWE12*, 2; Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PWE13*, 2–3; Prosecutors' Roundtable, *Preliminary Consultation PWEC01*; Defence Roundtable *Preliminary Consultation PWEC02*; Children and Young People Roundtable, *Preliminary Consultation PWEC03*.

138. Youth Justice NSW, *Preliminary Submission PWE07*, 2; Confidential, *Preliminary Submission PWE11*, 1; Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PWE13*, 2.

- Aboriginal or Torres Strait Islander offenders¹³⁹
 - ongoing experience of mental health issues and/or cognitive impairment or intellectual disability,¹⁴⁰ and
 - past experience of domestic violence or another form of violence.¹⁴¹
- 6.116 One confidential submission noted that most young knife offenders have minimal or no criminal history, while most adult knife offenders have a substantial criminal history.¹⁴²
- 6.117 Both the ALS and Legal Aid noted that clients charged with a custody of knife offence are often repeat offenders who do not have a history of violence.¹⁴³
- 6.118 For cases where the principal (most serious) offence was a knife offence under the *Summary Offences Act* s 11C(1) (custody of knife in public place), s 11E(1)(a) (wield knife in public place) and s 11E(1)(b) (carry knife visibly in public place), the Local Court and higher courts sentenced these offences on 1467 occasions in 2022 (adult defendants only).¹⁴⁴ Of these occasions, 85% of individuals were male and 37% were Aboriginal.¹⁴⁵
- 6.119 Defendants in the most disadvantaged Socio-Economic Indexes for Areas (SEIFA) category formed the largest proportion of occasions (around 38%).¹⁴⁶ The Australian Bureau of Statistics uses SEIFA to rank areas across Australia according to relative socio-economic advantage and disadvantage. SEIFA is based on census data, such as income, education, employment, occupation and housing and family structure.¹⁴⁷
- 6.120 Whilst there is no available data showing the number of homeless defendants dealt with by police and/or courts for summary knife offences, there may be some

139. Legal Aid NSW, *Preliminary Submission PWE12*, 2–3; Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PWE13*, 2–3; Defence Roundtable, *Preliminary Consultation PWEC02*.

140. Legal Aid NSW, *Preliminary Submission PWE12*, 2; Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PWE13*, 1–2; Defence Roundtable, *Preliminary Consultation PWEC02*.

141. Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PWE13*, 1–2; Legal Aid NSW, *Preliminary Submission PWE12*, 2; Defence Roundtable, *Preliminary Consultation PWEC02*; Children and Young People Roundtable, *Preliminary Consultation PWEC03*.

142. Confidential, *Preliminary Submission PWE11*, 1.

143. Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PWE13*, 2; Legal Aid NSW, *Preliminary Submission PWE12*, 3.

144. NSW Bureau of Crime Statistics and Research, ab23-22643, table 2.

145. NSW Bureau of Crime Statistics and Research, ab23-22643, table 7.

146. NSW Bureau of Crime Statistics and Research, ab23-22643, table 8, 15.

147. Australian Bureau of Statistics, “Using and Interpreting SEIFA” <<https://www.abs.gov.au/statistics/detailed-methodology-information/concepts-sources-methods/socio-economic-indexes-areas-seifa-technical-paper/2021/using-and-interpreting-seifa>> (retrieved 31 August 2023).

connection between homelessness and individuals who are convicted in their absence for these offences. In discussing how the prohibition of penalty notices for subsequent knife custody offences may impact vulnerable individuals and communities, Legal Aid stated that people often do not attend court and are accordingly convicted in their absence.¹⁴⁸

- 6.121 We intend to explore the characteristics of young offenders and include Children’s Court outcomes in a separate issues paper on young people and knife-related offending.

Weapons offences (including knives)

- 6.122 In 2022, the highest volume of sentences for offences that included some kind of weapon as an essential element of the offence (where that weapon may be a knife, firearm, prohibited weapon, or an offensive weapon or instrument as defined by the relevant provision) and where the offence was the principal (most serious) offence (adult defendants only) in the Local and higher criminal courts were:¹⁴⁹
- armed with any weapon or instrument, with intent to commit an indictable offence¹⁵⁰ (580 occasions)
 - use/possess offensive weapon with intent to commit indictable offence, prevent/hinder apprehension or investigation¹⁵¹ (247 occasions), and
 - robbery armed with offensive weapon, including in company¹⁵² (121 occasions).

Armed with intent to commit an indictable offence

- 6.123 Of the 580 occasions of armed with intent to commit an indictable offence, the majority were male defendants (78%) and non-Aboriginal defendants (54%). In terms of age, around a quarter were aged 18–25 years old at charge date.¹⁵³

Use offensive weapon with intent

- 6.124 Of the 247 occasions of use or possess offensive weapon with intent to commit indictable offence, prevent/hinder apprehension or investigation,¹⁵⁴ 84% were male defendants, 46% were Aboriginal defendants, and 37% were Aboriginal male defendants. In terms of age, a quarter were aged 18–25 years old at charge date.

148. Legal Aid NSW, *Preliminary Submission PWE12*, 2.

149. NSW Bureau of Crime Statistics and Research, ab23-22643, table 2.

150. *Crimes Act 1900* (NSW) s 114(1)(a).

151. *Crimes Act 1900* (NSW) s 33B(1)(a), (2).

152. *Crimes Act 1900* (NSW) s 97(1)-(2)

153. NSW Bureau of Crime Statistics and Research, ab23-22643, table 2, 7, 8

154. *Crimes Act 1900* (NSW) s 33B(1)(a).

The largest proportion of occasions (approximately one-third) had defendants from the most disadvantaged SEIFA category.¹⁵⁵

Armed robbery

- 6.125 Of the 121 occasions of armed robbery, 94% were male defendants, 45% were Aboriginal defendants, and 43% were Aboriginal male defendants. In terms of age, 42% were aged 18–25 years old at the charge date. The largest proportion of occasions (36%) had defendants in the most disadvantaged SEIFA category.¹⁵⁶

Other weapons

- 6.126 Regarding other weapons, one confidential submission stated that 20% of individuals charged under s 7 of the *Firearms Act* (possess unauthorised prohibited firearm) were unaware that possessing a gel blaster was an offence in NSW.¹⁵⁷ This submission noted that these offenders had no prior criminal history.¹⁵⁸ During the Defence Consultation, another stakeholder also noted that gel blaster offenders often state that they were unaware of the item's illegality.¹⁵⁹
- 6.127 There is no available data specific to the possession of gel blasters or the characteristics of offenders guilty of gel blaster possession.
- 6.128 In 2022 there were 618 occasions when the Local Court and higher courts sentenced certain firearm possession/use offences where they were the principal (most serious) offences (adult defendants only).¹⁶⁰ Of these, most were male defendants (92%), non-Aboriginal defendants (76%), and defendants aged 26 years or over (82%). The largest proportion of total occasions had defendants from the most disadvantaged SEIFA category (36%).¹⁶¹
- 6.129 In 2022 there were 717 occasions when the Local Court and higher courts sentenced possession/use of prohibited weapons where it was the principal (most serious) offence being sentenced (adult defendants only). Of these, most were male defendants (82%), non-Aboriginal defendants (71%), and defendants aged 26 years or over (79%).¹⁶² The largest proportion of occasions had defendants from the most disadvantaged SEIFA category (36%).¹⁶³

155. NSW Bureau of Crime Statistics and Research, ab23-22643, table 2, 7, 8

156. NSW Bureau of Crime Statistics and Research, ab23-22643, table 2, 7, 8.

157. Confidential, *Preliminary Submission PWE11*, 2.

158. Confidential, *Preliminary Submission PWE11*, 2.

159. Defence Roundtable, *Preliminary Consultation PWEC02*.

160. *Firearms Act 1996* (NSW) ss 7(1), 7A and 36(1), 51D(1)-(2), 51H(1), 58(1)-(2), 62(1)(b), 65(3), 66(1)(b).

161. NSW Bureau of Crime Statistics and Research, ab23-22643, table 2, 7, 8.

162. *Weapons Prohibition Act 1998* (NSW) ss 7, 34.

163. NSW Bureau of Crime Statistics and Research, ab23-22643, table 2, 7, 8.

Question 6.7: Characteristics of weapons offenders

Is there anything we should specifically consider when it comes to characteristics of weapons offenders?

Victims' experiences

- 6.130 The terms of reference do not specifically require us to consider victims' experiences of sentencing for firearms, knives and other weapons offences. However, we received submissions relating to victims' experiences of weapons offending.
- 6.131 One confidential submission was critical of the sentencing process for a weapons offence and the treatment of the victim during that process. The submission said that the sentencing process had been unduly deferential to the offender and had not adequately appreciated the victim's perspective and the seriousness of the impact of the offence on the victim. The submission was also critical of a perceived lack of support provided to victims and their families post-sentencing and called for Victims Services NSW to develop a victim triage kit for this stage.¹⁶⁴
- 6.132 Another confidential submission talked about the fear after a weapon-related incident and the continuing impact of the incident on their everyday life. This submission called for greater deterrence of violent crime and greater accountability for those who commit these types of offences.¹⁶⁵
- 6.133 The *Victims Rights and Support Act 2013* (NSW) (*Victims Rights Act*) regulates victims' rights in NSW. The Act includes the Charter of Victims Rights (the Charter), which is a list of principles that govern, as far as practicable and appropriate, the treatment of victims of crime in the administration of government affairs (including the administration of justice and police services).¹⁶⁶ Victims of crime are defined as those who suffer physical, psychological or psychiatric harm as a direct result of an offence.¹⁶⁷ If a person dies as a result of the criminal act, then a member of the victim's immediate family is also considered to be a victim of crime.¹⁶⁸

164. Confidential, *Preliminary Submission*, PWE02, 1-2.

165. Confidential, *Preliminary Submission*, PWE03, 2.

166. *Victims Rights and Support Act 2013* (NSW) pt 2 div 2.

167. *Victims Rights and Support Act 2013* (NSW) s 5(1) definition of "victim of crime", s 5(2) definition of "harm".

168. *Victims Rights and Support Act 2013* (NSW) s 5(3).

- 6.134 Rights in the Charter include that victims be treated with courtesy, compassion and respect, and be informed about key prosecution decisions and the investigation of the crime on request (unless this would jeopardise the investigation).¹⁶⁹
- 6.135 Support for victims of violent crime is provided by the Victims Support Scheme (VSS), established by the *Victims Rights Act*.¹⁷⁰ The support available through the VSS depends on the type of crime and how a person has been affected by the crime. Under the VSS, the primary victim of the crime and family members of a victim who has died as a result of the crime¹⁷¹ can access financial assistance and counselling services.¹⁷²
- 6.136 The issues raised by the submissions do not appear to be particular to violent crimes involving weapons, but may instead be seen as part of victims' experiences of violent crime generally. This does not diminish the importance of these issues in any way, but it may impact their relevance to the review, given we have not been asked to consider victims' experiences of firearms, knives or other weapons crime.

Question 6.8: Experiences of victims of weapon-related crime

- (1) Are there any other issues we should consider relating to victims' experiences of crime involving a weapon?
- (2) Are there any specific concerns about the operation of the VSS or Charter of Victims Rights when it comes to victims (and their families) of violent crime involving a weapon?

169. *Victims Rights and Support Act 2013* (NSW) s 6.

170. *Victims Rights and Support Act 2013* (NSW) s 17.

171. *Victims Rights and Support Act 2013* (NSW) s 22 definition of "family victim", definition of "member of the immediate family".

172. *Victims Rights and Support Act 2013* (NSW) s 22 definition of "family victim", definition of "member of the immediate family", s 26, s 29.

Appendix A: Questions

2. The offences

Question 2.1: Legislative framework and focus offences

- (1) Are there any broad issues of consistency (not addressed in the chapters that follow) across the legislative framework that you think should be addressed?
- (2) Are there any Acts or provisions that you think should be included in the focus offences?

Question 2.2: Offences excluded from scope

Are there any offences we propose to exclude from scope that you think should be included, and why?

3. Maximum penalties

Question 3.1: Maximum penalties for possession of prohibited weapon

- (1) Is the maximum penalty for possessing a prohibited weapon in NSW adequate?
- (2) Should maximum penalties depend on the type of prohibited weapon possessed? If yes, what categories should be used and what maximum penalty would be appropriate for each category of prohibited weapon?

Question 3.2: Possession contrary to a weapons prohibition order

Is the maximum penalty for possession contrary to a weapons prohibition order appropriate? If not, why, and what should be the maximum penalty?

Question 3.3: Maximum penalties for firearm possession

- (1) Are the maximum penalties for possessing a firearm, prohibited firearm or pistol adequate?
- (2) Should increased maximum penalties for “prohibited persons” be introduced? If yes, why and what criteria should be used for a “prohibited person”, and what should the maximum penalties be?
- (3) Should the maximum penalties for subsequent offences of firearm possession be increased? If yes, why, and what should the maximum penalties be?

Question 3.4: Minimum or mandatory sentences for firearm offences

Should mandatory or minimum sentences be introduced for certain firearms offences? If so, what kind of minimum penalties should be introduced and for which offences?

Question 3.5: Maximum penalties for gel blasters and imitation firearms

- (1) Are the maximum penalties for gel blaster use or possession in NSW appropriate?
- (2) If gel blasters should be dealt with separately from firearms and imitation firearms, what would be the appropriate way to do so and what would be the appropriate maximum penalties?
- (3) Are the maximum penalties for imitation firearm use/possession in NSW appropriate?
- (4) If imitation firearms should be dealt with separately from firearms, what would be the appropriate way to do so and what would be the appropriate maximum penalties?

4. Standard non-parole periods

Question 4.1: SNPP offences to consider

- (1) Are there any issues with the SNPPs of the eight offences that may involve weapons that would justify considering them as part of the review?
- (2) Are there any other offences currently in the SNPP scheme, but not identified in the tables above, that we should consider? If so, why?
- (3) Are there any offences that do not currently have SNPPs that we should consider for inclusion (other than those we discuss from [4.51] onwards)? If so, why?

Question 4.2: Principles to be applied in determining SNPP offences

- (1) Are the principles set out at [4.9] appropriate for determining whether weapons offences should be included in, retained or removed from the SNPP scheme?
- (2) Are there any other principles that would be appropriate for determining whether a weapons offence should be included in, retained or removed from the SNPP scheme? If so, why?

Question 4.3: Process for setting SNPPs

- (1) Is the process set out at [1.8] appropriate for determining the length of an SNPP for a weapons offence? Why or why not?
- (2) Are there any principles that are particularly appropriate or inappropriate for weapons offences?

Question 4.4: Application of the principles and process

- (1) Do you have any feedback on the above application of the principles and process to a weapons offence?
- (2) Is there other relevant information (for example, cases or data) that we have not considered for s 36(1) or similar offences in our application of the principles and process?

Question 4.5: Similar firearms offences not all having an SNPP

- (1) Should the offences in s 36(1) and s 74(1) (as they relate to pistols and prohibited firearms) and s 62(1) of the *Firearms Act 1996* (NSW) have an SNPP?
- (2) If so, what principles or factors are relevant to their inclusion in the SNPP scheme, and what is an appropriate length of an SNPP for each?

Question 4.6: Inconsistent proportions of SNPPs to maximum penalties

Has the proportion of the SNPP to maximum penalty for s 7(1) of the *Firearms Act 1996* (NSW) (or any other offence) caused distortions or challenges in sentencing? If so, please provide examples.

Question 4.7: Difference in SNPP of similar offences

What is the appropriate SNPP for the offence in s 7(1) of the *Weapons Prohibition Act 1998* (NSW) offence. Why?

5. Sentencing principles and factors

Question 5.1: Purposes of sentencing

Are there any other cases or issues that should be considered in relation to the purposes of sentencing, specific to the offences within the scope of the review?

Question 5.2: Objective seriousness and knife offences

Are there any other cases or issues that should be considered in relation to assessing the objective seriousness of offences where a knife is involved in the commission of an offence?

Question 5.3: Objective seriousness and firearms offences

Are there any other cases or issues that should be considered in relation to assessing the objective seriousness of firearms offences?

Question 5.4: Objective seriousness and gel blasters

Are there any other cases or issues that should be considered in relation to assessing the objective seriousness of gel blaster-related offences?

Question 5.5: Objective seriousness and firearms offences

Are there any other cases or issues that should be considered in relation to assessing the objective seriousness of prohibited weapons offences?

Question 5.6: Aggravating factors and weapons offences

Are there any other cases or issues that should be considered in relation to aggravating factors and weapons offences?

Question 5.7: Mitigating factors and weapons offences

Are there any other cases or issues that should be considered in relation to mitigating factors and weapons offences?

Questions 5.8: Guideline judgments

- (1) Are there any concerns with the application of *R v Henry*?
- (2) Is there a need for any new guideline judgments in relation to weapons offences?

Questions 5.9: Sentencing principles and factors generally

Are there any other sentencing considerations, principles or factors specific to weapons offences that should be considered as part of the review?

6. Other issues

Question 6.1: Summary offences considered by the review

- (1) Do you agree with the list of summary offences to be excluded from consideration as to whether any should be made indictable?
- (2) Are there any other summary offences, not listed above, which should be considered suitable for indictment in some cases?

Question 6.2: Summary offences relating to knives

- (1) Should the offences in s 11D and s 11F of the *Summary Offences Act 1988* (NSW) be made indictable? Why or why not? And if so, should they be made table 1 or table 2 offences?
- (2) Should certain specified classes of knives or blades be excluded from the definitions in s 93IA of the *Crimes Act 1900* (NSW) (uncommenced)? If so, what should be excluded?
- (3) Should the reasonable excuse provisions in s 92IB of the *Crimes Act 1900* (NSW) (uncommenced) include an excuse that recognises circumstances of homelessness? Why or why not?
- (4) Should the excuse of self-defence, or defence of another person, be available as a reasonable excuse when mixed with other purposes?

Question 6.3: Penalty notices for subsequent custody of knife offences

- (1) Should penalty notices be generally available for second or subsequent custody of knife offences? Why or why not?
- (2) Should penalty notices be available for second or subsequent custody of knife offences in circumstances where the person's only previous knife-related offence is custody of knife and/or offensive implement (current s 11B and s 11C), not a violent knife offence?

Question 6.4: Fine-only offences in the prohibited weapons Acts

Should the above fine-only offences be prescribed as penalty notice offences in the *Weapons Prohibition Regulation 2017* (NSW)?

Question 6.5: Other penalty notice offences relating to use or possession

Is there any reason why the review should consider penalty notice weapons offences other than s 11C of the *Summary Offences Act 1988* (NSW)?

Question 6.6: Alternative approaches to dealing with adult weapons offences

- (1) Are there examples of early intervention programs and education campaigns that we should consider in the context of adult weapon-related offending?
- (2) Are there any other examples of schemes relating to police powers to search for weapons that should be considered?
- (3) Are there any schemes that place conditions on adult weapon-related offenders that should be considered?
- (4) Are there any examples of rehabilitation programs that should be considered when dealing with adults who have been convicted of weapon-related offences?

Question 6.7: Characteristics of weapons offenders

Is there anything we should specifically consider when it comes to characteristics of weapons offenders?

Question 6.8: Experiences of victims of weapon-related crime

- (1) Are there any other issues we should consider relating to victims' experiences of crime involving a weapon?
- (2) Are there any specific concerns about the operation of the VSS or Charter of Victims Rights when it comes to victims (and their families) of violent crime involving a weapon?

Appendix B:

Preliminary submissions

- PWE01** P White, 17 January 2023
- PWE02** F Arakelian, 10 February 2023
- PWE03** V Evans, 14 February 2023
- PWE04** L Henderson-Lancett, 1 March 2023
- PWE05** Law Society of NSW, 1 March 2023
- PWE06** Youth Against Violence, 3 March 2023
- PWE07** Youth Justice NSW, 3 March 2023
- PWE08** NSW Office of the Director of Public Prosecutions, 3 March 2023
- PWE09** Local Court of NSW, 10 March 2023
- PWE10** NSW Advocate for Children and Young People, 11 March 2023
- PWE11** Confidential, 17 March 2023
- PWE12** Legal Aid NSW, 20 March 2023
- PWE13** Aboriginal Legal Service NSW/ACT Pty Ltd, 24 March 2023

Appendix C:

Preliminary consultations

Prosecutors' roundtable (PWEC01)

27 June 2023

Sonya Tabor, Acting Assistant Commissioner, NSW Police Force

Senior Sergeant Jason Murdoch, Operational Legal Advice Command, NSW Police Force

Duane Carey, Commander, Police Prosecutions Command, Police Prosecutions and Licensing Enforcement Command, NSW Police Force

Tatiana Barisa, Policy Manager, Legislation and Policy Branch, NSW Police Force

Ken McKay SC, Acting Deputy Director of Public Prosecutions Office of the Director of Public Prosecutions

Brett Hatfield, Acting Deputy Senior Crown Prosecutor, Office of the Director of Public Prosecutions

James Dorney, Principal Legal Adviser, Director's Chambers, Office of the Director of Public Prosecutions

Defence roundtable (PWEC02)

30 June 2023

Shaun Mortimer, Acting Principal Solicitor, Criminal Law, Aboriginal Legal Service NSW/ACT

Grace Worthington, Closing the Gap Policy Officer, Criminal Justice, Aboriginal Legal Service NSW/ACT

Robert Hoyles, Director, Crime, Legal Aid NSW

Rhiannon McMillan, Senior Legal Project Officer, Crime, Legal Aid NSW

Jonathon Paff, Criminal Lawyer and Summary Courts Manager, Legal Aid NSW

Belinda Rigg, Senior Public Defender

Children and young people roundtable (PWEC03)

4 July 2023

Zoe Robinson, Advocate for Children and Young People

Shannon Longhurst, Senior Policy Advisor, Office of the Advocate for Children and Young People

Kyzar Jing, Lived Experience Officer, Office of the Advocate for Children and Young People

Magistrate Paul Hayes, Children's Court of NSW

Jane Sanders, Principal Solicitor, Shopfront Youth Legal Centre

Annika Ross, Manager, Strategic Projects Unit, Youth Justice NSW

Natalie David, Senior Policy and Project Officer, Strategic Projects Unit, Youth Justice NSW

Young people with lived experience consultation (PWEC04)

1 September 2023 at Cobham Youth Justice Facility

Zoe Robinson, Advocate for Children and Young People

Kyzar Jing, Lived Experience Officer, Office of the Advocate for Children and Young People

Various young people with lived experience of weapon-related crime

Appendix D:

Glossary of penalties

Imprisonment: a custodial sentence to be served in a correctional centre, such as a prison, or, if the sentence is imposed in the Drug Court, a compulsory drug treatment centre.

Intensive correction order (ICO): a sentence of imprisonment that is served in the community for a period of up to 2 years for a single offence or up to 3 years for multiple offences. ICOs have two standard conditions requiring an offender:

- not to commit any offence and
- to submit to supervision by a community corrections officer.

An ICO also must, unless there are good reasons not to, include at least one of the following conditions:

- home detention
- electronic monitoring
- a curfew
- community service work of no more than 750 hours
- participation in rehabilitation or other treatment program
- alcohol and/or drug abstention
- a requirement not to associate with particular people
- a requirement not to go to a particular place or area.

If a person fails to comply with any conditions under an ICO, the State Parole Authority may record the breach, give a formal warning, impose conditions, vary or revoke conditions (other than the standard conditions) or revoke the ICO. If the ICO is revoked, the person must serve the balance of the sentence by full-time imprisonment.

ICOs are not available for certain serious offences including murder, offences involving discharge of a firearm, sexual assault, sexual offences against a child, terrorism offences and breaches of serious crime prevention orders or public safety orders.

The provisions relating to ICOs may be found in part 5 of the *Crimes (Sentencing Procedure Act) 1999 (NSW)*.

Community correction order (CCO): are served in the community for up to 3 years. CCOs can be used for an offence that does not warrant imprisonment or an ICO. CCOs have two standard conditions requiring an offender:

- not to commit any offence, and
- to appear before the court if called on to do so at any time during the term of the CCO.

A court may also impose any of the following conditions:

- a requirement to submit to supervision by a community corrections officer
- a curfew (not exceeding 12 hours a day)
- community service work of no more than 500 hours
- participation in rehabilitation or other treatment program
- alcohol and/or drug abstention
- a requirement not to associate with particular people
- a requirement not to go to a particular place or area.

A CCO cannot include a condition of home detention or electronic monitoring.

If a person fails to comply with any conditions of a CCO, a court may call on the offender to appear before it, and may take no action, impose conditions, vary or revoke conditions (other than the standard conditions) or revoke the CCO. If the court revokes a CCO, the court may re-sentence the person.

The provisions relating to CCOs may be found in part 7 of the *Crimes (Sentencing Procedure Act) 1999 (NSW)*.

Conditional release order (CRO): are served in the community for up to 2 years. CROs may be imposed with or without recording a conviction. CROs have two standard conditions requiring a person:

- not to commit any offence and
- to appear before the court if called on to do so at any time during the CRO's term.

A court may also impose any of the following conditions:

- a requirement to submit to supervision by a community corrections officer
- participation in rehabilitation or other treatment program
- alcohol and/or drug abstention
- a requirement not to associate with particular people
- a requirement not to go to a particular place or area.

A CRO cannot include a condition of home detention, electronic monitoring, a curfew, or community service work.

If a person fails to comply with any conditions of a CRO, a court may call on the offender to appear before it, and may take no action, impose conditions, vary or revoke conditions (other than the standard conditions) or revoke the CRO. If the court revokes a CRO, the court may re-sentence the person.

The provisions relating to CROs may be found in part 8 of the *Crimes (Sentencing Procedure Act) 1999 (NSW)*.

Fine: a monetary penalty, expressed as a number of ‘penalty units’. A penalty unit is currently equal to \$110.¹ A person may be fined in addition to receiving another type of penalty.

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.