

Report

Firearms, knives and other weapons offences

MAY 2024

NSW
Sentencing
Council

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Contact details

NSW Sentencing Council

Email: sentencingcouncil@dcj.nsw.gov.au

Website: www.sentencingcouncil.nsw.gov.au

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Participants

The Council

The Hon Peter McClellan AM KC (Chairperson)

Professor John Anderson

Ms Melissa Burgess

Ms Christina Choi

Assistant Commissioner Scott Cook APM

Ms Thea Deakin-Greenwood

Ms Sally Dowling SC

Mr Mark Follett

Mr Adam Hennessy

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 Julia Brieger, Policy Officer

Dr Nikki Edwards, Policy Officer

Dr Jackie Hartley, Policy Manager

Ms Alexandra Hammond, Senior Policy Officer

Ms Carol Hoang, Policy Officer

Ms Sophie Sauerman, Senior Policy Officer

Ms Tanya Railton, Policy Manager

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

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NSW Bureau of Crime Statistics and Research

NSW Advocate for Children and Young People

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.

[Dated 4 November 2022]

Executive summary

Introduction (Chapter 1)

- 0.1 The Attorney General asked us to review the sentencing of firearms, knives and other weapons offences, through terms of reference received in November 2022.
- 0.2 This report presents our recommendations for reform. It follows preliminary submissions, preliminary consultations, a consultation paper and an issues paper released in September and October 2023, and submissions received in response.
- 0.3 We focus on offences that relate to the use or possession of firearms, knives and other weapons, and offences involving weapons as an essential element that have standard non-parole periods.

Firearms other than gel blasters (Chapter 2)

- 0.4 The current offences and maximum penalties for unauthorised use or possession of firearms are appropriate. NSW has among the highest maximum penalties for unauthorised use or possession of firearms in Australia. Most of these matters are heard by the Local Court and do not result in sentences of imprisonment. The reoffending rates for these offences are low.
- 0.5 We discuss imitation firearms, which are subject to the same maximum penalties as genuine firearms. Imitation firearms are not capable of causing physical harm but, when presented as genuine firearms, may be used to facilitate crime and can have a significant psychological impact on victims. We consider that the maximum penalties for imitation firearms are appropriate.
- 0.6 However, the strictly indictable nature of the offence of possessing three or more firearms (including a pistol or prohibited firearm) is not always appropriate for matters involving imitation firearms. We recommend that this offence be made a Table 1 offence where all the firearms possessed are imitation firearms. This would allow the Local Court to deal with less serious matters while also allowing the prosecutor or the accused person to elect for the matter to be heard in a higher court where appropriate.

Gel blasters (Chapter 3)

- 0.7 Gel blasters are devices that propel gel pellets. They can be used for recreation or as toys. Some gel blasters look like genuine firearms and therefore pose a risk to public safety. There is currently no consistent treatment of gel blasters in Australia. In NSW, gel blasters are considered firearms and are unlawful.

- 0.8 We recommend that warnings under the *Young Offenders Act 1997* (NSW) (*Young Offenders Act*) be made available for possession of a gel blaster by a child. Children may use gel blasters as toys and may not be aware that they are unlawful in NSW.
- 0.9 To better inform the public that gel blasters are unlawful, we recommend that the NSW Government establish education initiatives. We make suggestions about what these initiatives should feature.
- 0.10 While we do not recommend any changes to the legal status of gel blasters as firearms in NSW, we outline two options that the NSW Government could consider if it wishes to explore reform in this area. These are to criminalise only gel blasters that are imitation firearms, or to introduce a new regulatory scheme for gel blasters.

Prohibited weapons (Chapter 4)

- 0.11 We recommend a two-tiered offence structure for the offence of unauthorised possession or use of a prohibited weapon. This offence structure currently applies to the unauthorised possession or use of firearms.
- 0.12 Currently, the same maximum penalty applies to all prohibited weapons, which range from laser pointers to military-style weapons. Most unauthorised possession or use of prohibited weapons matters do not involve military-style weapons. The most common penalty imposed for this offence between 2013 and 2022 was a fine.
- 0.13 We recommend that the NSW Government consult with experts to determine the appropriate tier for all prohibited weapons. A relevant factor to determine the categorisation of a prohibited weapon into the two tiers is the extent to which the prohibited weapon is capable of inflicting serious injury or harm.
- 0.14 We recommend that prohibited weapons in the lower tier have a maximum penalty of either 5 years' or 7 years' imprisonment. The appropriate maximum penalty will depend on the type of weapons included in this lower tier. The current maximum penalty of 14 years' imprisonment should continue to apply to the most serious prohibited weapons. This responds to the seriousness of the weapons while allowing courts to deal with low level offending appropriately.
- 0.15 We consider but do not recommend an alternative option, to create a new summary offence for the unauthorised possession or use of less serious prohibited weapons. This option would not adequately reflect the seriousness of the offence. We also do not recommend any change to the maximum penalty for contravening a weapons prohibition order (WPO).
- 0.16 We recommend that penalty notices be made available for more minor prohibited weapons offences relating to permits and other administrative matters. These offences are currently punishable by fine only. Introducing penalty notices would

allow these cases to be finalised by police issuing an on-the-spot fine instead of the matter proceeding to court.

Knife offences (Chapter 5)

- 0.17 The maximum penalty for possessing, or using or visibly carrying, a knife in a public place or school recently increased from 2 years' imprisonment to 4 years' imprisonment. These offences were also made Table 1 offences, meaning they may be tried on indictment in a higher court if the prosecutor or accused elects. Another consequence of making the offences Table 1 offences is that children who commit these knife offences cannot receive official warnings under the *Young Offenders Act*. We recommend restoring the option to give official warnings to children for these offences.
- 0.18 Prior to this reform, Aboriginal and Torres Strait Islander people, children and young people, and people experiencing socioeconomic disadvantage were over-represented for these offences. We recommend that the reforms be monitored, with particular regard to any disproportionate impacts on vulnerable groups.
- 0.19 We are not convinced that the increase in maximum penalties for these offences will deter people who carry knives out of fear. Research from the United Kingdom found that it is unclear whether increasing maximum penalties would reduce knife carrying among children and young people. Further, research indicates that increasing maximum penalties generally does not have a corresponding deterrent effect. We recommend that the reforms should be monitored to assess the deterrent impact and to ensure there are no unintended impacts on disadvantaged people.
- 0.20 We recommend that a reasonable excuse for carrying a knife in a public place should include using the knife for its normal utility purposes. This could address concerns about the use of Swiss army knives and scissors by people experiencing homelessness. We consider but do not recommend an alternative option to exempt particular items from the definition of "knife". This option could lead to greater use of these items by people who do not intend to use them lawfully.
- 0.21 We recommend restoring penalty notices as an option for people unlawfully possessing a knife in public or in a school who have previously committed a non-violent knife related offence. This is intended to ensure that less serious incidents of this offence do not proceed to court, which could promote offender rehabilitation and reduce court workload. The recent reforms restricted the option of penalty notices to where a person has not previously committed any knife related offence. Penalty notices were widely used for unlawful possession of a knife in public prior to the reforms.
- 0.22 We also recommend restoring penalty notices as an option for people aged under 18 for possession of a knife in a public place or school. We consider this could

minimise children and young people's interaction with the criminal justice system, in appropriate circumstances. We suggest that the Commissioner of the NSW Police Force consider aligning NSW Police Force Standard Operating Procedures for Criminal Infringement Notices with the Attorney General's guidelines on cautions under the *Fines Act 1996* (NSW).

- 0.23 We consider but do not recommend increasing maximum penalties for existing summary knife related offences. These offences are not prevalent and increasing penalties may disproportionately impact vulnerable groups.
- 0.24 We recommend further community education to better inform the public about the new maximum penalties for unlawfully possessing, using or visibly carrying, a knife.
- 0.25 We consider there is a strong need for programs and initiatives that address the underlying causes of knife crime.
- 0.26 We discuss but do not recommend other proposals that were raised with us during the review, including the introduction of knife crime prevention orders and police powers to conduct random searches.

Standard non-parole periods (Chapter 6)

- 0.27 We outline concerns about the standard non-parole period (SNPP) scheme. It was suggested that the scheme conflicts with sentencing principles, is not meeting its objectives and has internal inconsistencies. These concerns are not within the scope of our terms of reference, which ask us to consider whether the current SNPPs for weapons offences are appropriate. We recommend that the NSW Government consider referring a separate review of the SNPP scheme.
- 0.28 If the recommendation for a separate review is not adopted by the NSW Government, we make recommendations relating to the SNPPs for weapons offences. We recommend against adding or removing any weapons offences from the SNPP scheme. We recommend adjusting the SNPPs for several offences under the *Firearms Act 1996* (NSW), applying the current guidelines on setting SNPPs. We also recommend monitoring any new lower tier offences under the *Weapons Prohibition Act 1998* (NSW), to assess whether it is appropriate to have an SNPP.

Other issues (Chapter 7)

- 0.29 We discuss issues that arose in the review that are relevant to all weapons offences. These issues are mandatory minimum penalties, sentencing principles and factors, and the WPO and firearms prohibition order (FPO) schemes.
- 0.30 We do not recommend the introduction of mandatory minimum penalties for weapons offences. This would be an ineffective deterrent that is likely to produce unjust outcomes.

- 0.31 We consider that the current sentencing principles and factors operate appropriately for weapons offences.
- 0.32 We outline concerns we heard about WPO and FPO schemes, which are outside the scope of our review.

Recommendations

2. Firearms other than gel blasters

Recommendation 2.1: Section 51D(2) should be a Table 1 offence where the firearms are imitations

The offence of s 51D(2) of the *Firearms Act 1996* (NSW) (unauthorised possession of more than three firearms, any one of which is a pistol or prohibited firearm) should be made a Table 1 offence, in the circumstance where all the firearms are imitation firearms.

3. Gel blasters

Recommendation 3.1: Warnings for gel blaster unauthorised possession or use offences

The *Young Offenders Act 1997* (NSW) should be amended to make warnings available for the unauthorised possession or use of gel blasters.

Recommendation 3.2: Public education on the legality of gel blasters

The NSW Government, including relevant agencies such as the Department of Education and the NSW Police Force, should educate the community and raise awareness about the legality of gel blasters in NSW and other Australian jurisdictions.

4. Prohibited weapons

Recommendation 4.1: Introduce tiered offences, carry out consultations and monitoring

- (1) The *Weapons Prohibition Act 1998* (NSW) should be amended to introduce two tiers of offences for the possession or use of a prohibited weapon.
- (2) Consultation with subject matter experts should be undertaken to determine the appropriate weapons for each tier.
- (3) The first offence tier should have a maximum penalty of 14 years' imprisonment. The second offence tier should have a maximum penalty of 5 years or 7 years' imprisonment. The maximum penalty for the second tier is to be determined according to the types of weapons that fall into each tier.
- (4) The NSW Government should monitor and review sentencing outcomes and patterns to determine whether the offence tiers are appropriate.

Recommendation 4.2: Introduction of penalty notices for fine-only offences

- (1) Penalty notices should be made available for the following fine-only offences: *Weapons Prohibition Act 1998* (NSW) s 12, s 13(3), s 20A, s 21(1), s 22(1)–(2), s 24(1)–(3), s 25, s 30; *Weapons Prohibition Regulation 2017* (NSW) cl 8, cl 9, cl 19(6).
- (2) The NSW Government should monitor the impact of this recommendation, including sentencing outcomes and trends for these offences.

5. Knife offences

Recommendation 5.1: Monitor recent reforms to summary knife offences

The NSW Government should monitor the impact of the recent reforms increasing the maximum penalties for the offences of custody and using or carrying knives in public places or schools (now *Crimes Act 1900* (NSW) s 93IB, s 93IC; formerly *Summary Offences Act 1988* (NSW) s 11C, s 11E).

In particular, the Government should consider the impact on Aboriginal people, children and young people and other people facing disadvantage (including people experiencing homelessness). The monitoring should cover:

- (a) sentencing and other court outcomes for these offences
- (b) diversions under the *Young Offenders Act 1997* (NSW), and
- (c) the issuing of penalty notices.

Recommendation 5.2: Reasonable excuse for custody of knife in public

The *Crimes Regulation 2020* (NSW) should be amended so that carrying bladed articles or knives in public places for their normal utility purposes are circumstances prescribed for s 93IB(3)(c) of the *Crimes Act 1900* (NSW).

This exception should not be available for the knife-custody offence as it applies to schools.

Recommendation 5.3: Warnings under the *Young Offenders Act 1997* (NSW)

The *Young Offenders Act 1997* (NSW) should be amended to make warnings available under s 93IB and s 93IC of the *Crimes Act 1900* (NSW).

Recommendation 5.4: Penalty notices for subsequent knife-custody offences

Sch 4 cl 2 of the *Criminal Procedure Regulation 2017* (NSW) should be amended so that a penalty notice may be issued for an offence under s 93IB of the *Crimes Act 1900* (NSW), even if the person receiving the penalty notice has previously received:

- (a) a conviction
- (b) an order under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), or
- (c) a penalty notice,

for an offence under s 93IB(1) of the *Crimes Act 1900* (NSW) or s 11B of the *Summary Offences Act 1988* (NSW).

Recommendation 5.5: Extend availability of penalty notices to young people

- (1) Section 335 of the *Criminal Procedure Act 1986* (NSW) should be amended to allow penalty notices to be issued to people aged under 18 for offences under s 93IB(1) of the *Crimes Act 1900* (NSW).
- (2) The penalty notice amount for an offence under s 93IB(1) for people under 18 at the time of the alleged offence, should be \$125.
- (3) Clause 14 of the *Young Offenders Regulation 2016* (NSW) should be amended to include s 93IB(1) of the *Crimes Act 1900* (NSW) so that a police officer must first consider diversions under the *Young Offenders Act 1997* (NSW) before issuing a penalty notice for an offence under s 93IB(1).

Recommendation 5.6: Maximum penalties for other summary knife offences

Pending the monitoring and review of the recent amendments to knife crime (see Recommendation 5.1), we do not recommend making any other summary knife offences indictable or increasing their maximum penalties. These include:

- (1) Custody of an offensive implement in public/school: maximum penalty \$5500 (50 penalty units) or 2 years' imprisonment (*Summary Offences Act 1988* (NSW) s 11B)
- (2) Parents who knowingly authorise or permit a child under the age of 18 to commit an offence under s 93IB of the *Crimes Act 1900* (NSW): maximum penalty \$550 (5 penalty units) (*Summary Offences Act 1988* (NSW) s 11D), and
- (3) Selling a knife to a child under the age of 16 years: maximum penalty \$5500 (50 penalty units) (*Summary Offences Act 1988* (NSW) s 11F).

Recommendation 5.7: Community awareness of available penalties

The NSW Government should develop a campaign, or add to an existing campaign, to draw attention to the fact those who carry knives may be subject to a maximum penalty of 4 years' imprisonment (or as much as 14 years for certain prohibited weapons).

6. Standard non-parole periods

Recommendation 6.1: A separate review of the SNPP scheme

The NSW Government should consider referring a review of the SNPP scheme to the NSW Sentencing Council. The review could consider:

- (a) whether the SNPP scheme is consistent with established sentencing principles and whether it is achieving its purpose
- (b) the existing guidelines for determining which offences should be included in the scheme, and the length of SNPPs.

Recommendation 6.2: No weapons offence should be added

No weapons offence should be added to the SNPP scheme.

Recommendation 6.3: No weapons offence should be removed

No weapons offence should be removed from the SNPP scheme.

Recommendation 6.4: Unauthorised possession or use of pistols or prohibited firearms

The SNPP for unauthorised possession or use of a pistol or prohibited firearm (*Firearms Act 1996* (NSW) s 7) should be increased from 4 years (28.57% of the maximum penalty) to 5 years (35.71% of the maximum penalty).

Recommendation 6.5: Adjust SNPPs for supply and possession of firearms

Reduce the SNPPs for the following offences from 10 years (50% of the maximum penalty) to either 8 years (40% of the maximum penalty) or 9 years (45% of the maximum penalty):

- (a) possession of more than 3 firearms, any one of which is a pistol or prohibited firearm (*Firearms Act 1996* (NSW) s 51D(2))
- (b) supply of firearms (*Firearms Act 1996* (NSW) s 51(1A), s 51(2A))
- (c) repeat supply of firearms (*Firearms Act 1996* (NSW) s 51B(1)).

Recommendation 6.6: Monitor any new tiered prohibited weapons offence

If a new lower-tier offence, with a lower maximum penalty, is introduced for the offence of unauthorised possession or use of prohibited weapons (*Weapons Prohibition Act 1998* (NSW) s 7):

- (a) the new lower-tier offence should not be included in the SNPP scheme, and
- (b) the NSW Government should monitor sentencing outcomes to assess whether the new lower-tier offence should be included in the SNPP scheme.

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Terms of reference

- 1.1 On 4 November 2022, the then Attorney General, the Hon Mark Speakman SC, asked us to review sentencing for firearms, knives and other weapons offences.
- 1.2 The terms of reference for this review state:

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.

The need for the review

- 1.3 Violent crime, including crimes involving weapons, has a significant impact on individual victims, their friends and families, and the community.
- 1.4 Prior to the issuing of the terms of reference for this review, and throughout the review, there have been a number of high-profile incidents involving weapons.
- 1.5 These include a school stabbing involving a religious knife, known as a kirpan, in 2021, a stabbing incident at the 2022 Sydney Royal Easter show that resulted in the death of a young person, and a fatal stabbing in Campbelltown involving a paramedic victim in April 2023. There have also been several shooting incidents, including three fatal incidents between June and July 2023 in Bondi Junction, Canterbury and Greenacre.
- 1.6 More recently, a stabbing incident at Bondi Junction in April 2024 resulted in the deaths of six people and injuries to others. Two days later, a stabbing at a church in Wakeley resulted in injuries to several people.
- 1.7 These and other weapons-related incidents have prompted outrage, fear and grief from the community. In 2023, the NSW Government introduced legislative reform to increase penalties for some knife offences. We discuss how we have approached these 2023 reforms below and in chapter 5.

Proposed further amendments

- 1.8 During the preparation of this report, several knife killings occurred in NSW. The tragic knife crime at Bondi Junction was unprecedented in NSW. On the 15 May 2024, the NSW Government introduced the Law Enforcement (Powers and Responsibilities) and Other Legislation (Knife Crime) Bill 2024 to:
 - trial new police powers to use electronic wands to determine whether a person may be carrying a knife or other weapons
 - increase the penalties for selling knives to children under 16 and
 - create a new offence of selling a knife to a child aged 16 or 17 years old without a reasonable excuse.

- 1.9 The Bill is based on Queensland’s *Police Powers and Responsibilities (Jack’s Law) Amendment Act 2023 (Jack’s Law)*. As we indicate in this report, consideration of issues of enforcement of the law are outside the remit of the Sentencing Council. We comment on the matter in chapter 5.

Weapons offences in NSW

- 1.10 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 other 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.

Our focus offences

- 1.11 Consistent with the emphasis of the terms of reference, this review has focused on offences that relate to the use or possession of firearms, knives and other weapons, as well as all offences with weapons as an essential element that have standard non-parole periods (SNPPs).
- 1.12 We commenced the review by looking at the legislative framework holistically. In our consultation paper, we asked if there were any issues with the legislative framework for weapons offences. None were identified in submissions or in our consultations. Instead, issues were raised with particular weapons offences. We have therefore structured this report by weapon type.
- 1.13 We have not heard or identified any issues with the majority of offences within the scope of the review. This includes offences relating to offensive implements in the *Summary Offences Act*, and offensive or dangerous weapons or instruments in the *Crimes Act*.
- 1.14 Given this, we have focused on specific weapons offences, and have structured the report accordingly.

Offences excluded from this review

- 1.15 We asked in our consultation paper for views on excluding other categories of weapons offences from consideration in the review, specifically:
- 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.
- 1.16 With one exception, noted below, none of the submissions raised issue with the proposed exceptions. As such these offences are excluded from consideration in the report.
- 1.17 Only one submission raised issue with the proposed exclusions. The NSW Police Force (NSWPF) proposed that offences relating to the manufacture of firearms should be considered in the review.¹ There is one specific manufacture of firearms offence under the *Firearms Act*. The NSWPF consider that this offence should have an SNPP. We consider this offence in chapter 6.

2023 amendments

- 1.18 On 20 June 2023, the Attorney General Michael Daley MP introduced the Criminal Legislation Amendment (Knife Crimes) Bill 2023. The Bill passed on 29 June 2023 and the Act was assented to on 13 July 2023. It came into force on 23 October 2023. The reforms repealed the offences in s 11C and s 11E of the *Summary Offences Act* – custody of a knife and using or carrying a knife in a public place or school – and replaced them with indictable offences with increased penalties.²
- 1.19 We heard concerns from stakeholders about these reforms. Given we have not been asked to review these reforms and they were only recently enacted, we cannot comment on their effectiveness. However, we make recommendations in chapter 5 to monitor and review the new offences, and to make further refinements to those offences.

1. NSW Police Force, *Submission WE16*, 1.

2. *Criminal Legislation Amendment (Knife Crimes) Act 2023* (NSW) sch 2.2[1], repealing *Summary Offences Act 1988* (NSW) s 11C, s 11E; *Criminal Legislation Amendment (Knife Crimes) Act 2023* (NSW) sch 1, inserting *Crimes Act 1900* (NSW) s 931A–s 931C.

Conduct of the review

Preliminary submissions and consultations

- 1.20 We received 13 preliminary submissions to the review between January and March 2023. These are listed in Appendix A. Most of the submissions can be viewed on our website.
- 1.21 We conducted consultations, specifically on knife offences, from June to September 2023. The consultations were targeted at prosecutors, defence, stakeholders with expertise in children and young people, and young people with lived experience of weapons crime. Appendix B contains a list of our consultations.

Consultation paper and issues paper

- 1.22 In September and October 2023, we released a consultation paper and an issues paper.³ The consultation paper focused on weapons related offending by adults. The issues paper focused on young offenders and weapons related crime.
- 1.23 We received 19 submissions to the consultation paper and the issues paper between December 2023 and February 2024. These are listed in Appendix C. Some of the submissions may be viewed on our website.

Data and data terms used in this review

- 1.24 The report includes criminal courts data provided by the NSW Bureau of Crime Statistics and Research (BOCSAR). The dataset provided by BOCSAR covers a 10-year period from 2013 to 2022. Data from 2023 became available in mid-March 2024, and therefore could not be included in this review.
- 1.25 Throughout the report, we refer to Socio-Economic Indexes for Areas (SEIFA), a data product of the Australian Bureau of Statistics. SEIFA data ranks 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.⁴
- 1.26 Where we refer to “finalised charges” in the report, we are referring to a charge which has been fully determined by the court and for which no further court proceedings are required.

3. NSW Sentencing Council, *Weapons-Related Offences: Sentencing Adult Offenders*, Consultation Paper (2023); NSW Sentencing Council, *Weapons-Related Offences: Sentencing Young Offenders*, Issues Paper (2023).

4. Australian Bureau of Statistics, “Using and Interpreting SEIFA” (27 April 2023) <<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 24 May 2024).

- 1.27 Where we refer to “principal offence” in the report, we are referring to either the sole offence charged, or where multiple offences are charged, the offence which received the most serious penalty.
- 1.28 Where we refer to “proven matters” in the report, we are referring to an outcome of criminal proceedings in which a court accepts that a charge is proven either because the defendant has entered a guilty plea or the court has found the defendant guilty. For cases in the District Court and Supreme Court, proven matters also include where the court has found the act proven but the defendant is not held criminally responsible due to mental health or cognitive impairment.

Other key terms

- 1.29 Various statutes use “children”, “young people” or “people under 18” in different ways and with different definitions. Where we summarise the provisions of a statute, we use the terms and definitions used in that statute.
- 1.30 The *Young Offenders Act 1997 (NSW)* (*Young Offenders Act*) uses the term child or children to apply to a person who was a child (aged 10 years or over but under the age of 18 years) when an offence was committed or alleged to have been committed, and who is under 21 when being dealt with under the legislation.⁵ Throughout the report, where we outline the *Young Offenders Act* provisions, we will use the term child or children to refer to this cohort.
- 1.31 When we refer to “children and young people” in this report, we are referring generally to people who are under 21 years old.

Outline of this report

- 1.32 This report has six other chapters:
- **Chapter 2: Firearms (other than gel blasters)** considers the current maximum penalties for firearms offences and concludes they are appropriate. We recommend that the unauthorised possession of more than three imitation firearms where any one is an imitation pistol or prohibited firearm should be a Table 1 offence.
 - **Chapter 3: Gel blasters** outlines the legal status of gel blasters (a type of firearm) in NSW and recommends that the NSW Government initiate a public education campaign to better inform the public that gel blasters are unlawful in NSW. We also recommend that warnings for the unauthorised possession of a gel blaster by a child should be made available, given the common use of gel blasters as toys.

5. *Young Offenders Act 1997 (NSW)* s 4 definition of “child”, s 7A(1).

- **Chapter 4: Prohibited weapons** recommends a two-tiered offence structure based on weapon type for the unauthorised possession or use of a prohibited weapon. We also recommend that penalty notices be made available for fine-only prohibited weapons offences.
- **Chapter 5: Knife offences** discusses the recent knife offence reforms and recommends that the NSW Government monitor and review the impact of these reforms. We also recommend amendments to the reforms to guard against unintended impacts on vulnerable groups, and further community education about the increased penalties for knife offences.
- **Chapter 6: Standard Non-Parole Periods** sets out the concerns we heard about the SNPP scheme that are outside the scope of this review. We recommend that the NSW Government consider a separate review of the scheme to examine these concerns. If the NSW Government does not accept this recommendation, we make recommendations to adjust the SNPPs for several weapons offences, and to monitor a further weapons offence.
- **Chapter 7: Other issues** discusses broader issues that relate to all weapon types and explains why we are not making recommendations on these issues. It includes sentencing principles and factors, mandatory minimum penalties, and weapons and firearms prohibition order schemes.

2. Firearms (other than gel blasters)

In brief

We recommend that the offence of unauthorised possession of more than three firearms where at least one firearm is a pistol or prohibited firearm (*Firearms Act 1996* (NSW) s 51D(2)) and all firearms are imitation firearms, should be a Table 1 offence.

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No decrease to maximum penalties for possession or use of imitation firearms	23
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- 2.1 In this chapter, we focus on offences relating to the unauthorised possession or use of firearms as these are the most prevalent offences under the *Firearms Act 1996* (NSW) (*Firearms Act*) and submissions raised issues with these offences.
- 2.2 We recommend that the offence of unauthorised possession of more than three firearms where at least one firearm is a pistol or prohibited firearm (aggravated possession of three or more firearms) and all are imitation firearms, should be a Table 1 offence.
- 2.3 We do not recommend any changes to the maximum penalties for any firearms offences. We also do not recommend any changes to serious children’s indictable offences (SCIOs) that involve imitation firearms.

Overview of the focus offences

- 2.4 This chapter examines the offences of unauthorised possession or use of a firearm, prohibited firearm and pistol under the *Firearms Act*.¹ We examine these offences

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

because they have some of the highest numbers of proven matters out of all the offences under the *Firearms Act* in 2013 to 2022.²

- 2.5 Unauthorised possession or use of a pistol or prohibited firearm carries a maximum penalty of 14 years' imprisonment.³ For other firearms, the maximum penalty is 5 years' imprisonment.⁴
- 2.6 A "pistol" is defined as a firearm that is "reasonably capable of being raised and fired by one hand" and complies with any dimensions contained in the regulations.⁵ A "prohibited firearm" is a firearm that is prescribed under the *Firearms Act* and includes a machine gun, self-loading rifle and firearms that are concealed as a different object (for example, a walking stick).⁶
- 2.7 As mentioned above, unauthorised possession or use of a firearm, prohibited firearm and pistol are relatively common offences in this review, which can be seen over a 10-year period. From 2013 to 2022, there were 4,143 proven matters in total for unauthorised possession or use of a prohibited firearm or pistol and 4,385 proven matters for unauthorised possession or use of firearm.⁷
- 2.8 The offences remain relatively prevalent even where they are the principal offence for adults. From 2013 to 2022, there were 1,564 proven matters across the Local and Higher Courts where the offence of unauthorised possession or use of a pistol or prohibited firearm was the principal offence (for adult offenders only).⁸ For the principal offence of unauthorised possession or use of a firearm, there were 1,359 relevant proven matters involving adult offenders.⁹
- 2.9 The Local Court dealt with the overwhelming majority of these proven matters: 76% of matters (1,186) where the principal offence involved a pistol or prohibited firearm, and 99% of matters (1,339) where the principal offence involved other types of firearms.¹⁰

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

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

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

5. *Firearms Act 1996* (NSW) s 4(1) definition of "pistol".

6. *Firearms Act 1996* (NSW) s 4(1) definition of "prohibited firearm", sch 1.

7. *Firearms Act 1996* (NSW) s 7(1), s 7A(1); NSW Bureau of Crime Statistics and Research, ab23-22460, table 1.

8. *Firearms Act 1996* (NSW) s 7(1); NSW Bureau of Crime Statistics and Research, ab23-22643, table 2.

9. *Firearms Act 1996* (NSW) s 7A(1); NSW Bureau of Crime Statistics and Research, ab23-22643, table 2.

10. *Firearms Act 1996* (NSW) s 7(1), s 7A(1); NSW Bureau of Crime Statistics and Research, ab23-22643, table 2.

- 2.10 Most of the proven matters where these offences were the principal offence did not result in imprisonment: 52% (816) for unauthorised possession or use of a prohibited firearm or pistol, and 91% (1232) for unauthorised possession or use of a firearm did not result in imprisonment.¹¹
- 2.11 These conclusions from the 2013 to 2022 data are also reflected in the annual data for 2022. There were 210 proven matters where the principal offence was the unauthorised possession or use of a prohibited firearm or pistol (adult offenders only), and 154 relevant proven matters for the unauthorised possession or use of a firearm.¹² Similarly, most of these offences were prosecuted in the Local Court (88% or 184 for prohibited firearm or pistol; 153 or 99% for firearm).¹³
- 2.12 In addition, most of these offences did not receive a sentence of imprisonment (73% or 154 for prohibited firearm or pistol and 90% or 138 for firearm, did not receive imprisonment).¹⁴
- 2.13 Out of the proven matters for unauthorised possession of a pistol or prohibited firearm that did receive imprisonment (56), most head sentences were well below the maximum penalty - 59% (33) had head sentences that were 22 months or less.¹⁵ In the District Court, the average non-parole period for possession of a pistol was 1 year and 7 months, and the average non-parole period for possession of a prohibited firearm was 2 years and 1 month.¹⁶
- 2.14 Most sentences for unauthorised possession of a firearm were also well below the maximum penalty. Out of the matters for unauthorised possession of a firearm that did receive imprisonment (16), only one had a head sentence greater than 22 months (but it was less than 24 months).¹⁷
- 2.15 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

11. *Firearms Act 1996* (NSW) s 7(1), s 7A(1); NSW Bureau of Crime Statistics and Research, ab23-22643, table 3.

12. *Firearms Act 1996* (NSW) s 7(1), s 7A(1); NSW Bureau of Crime Statistics and Research, ab23-22643, table 2.

13. *Firearms Act 1996* (NSW) s 7(1), s 7A(1); NSW Bureau of Crime Statistics and Research, ab23-22643, table 2.

14. *Firearms Act 1996* (NSW) s 7(1), s 7A(1); NSW Bureau of Crime Statistics and Research, ab23-22643, table 3.

15. *Firearms Act 1996* (NSW) s 7(1); NSW Bureau of Crime Statistics and Research, ab23-22643, table 6.

16. *Firearms Act 1996* (NSW) s 7(1) NSW Bureau of Crime Statistics and Research, ab23-22643, table 5.

17. *Firearms Act 1996* (NSW) s 7A(1); NSW Bureau of Crime Statistics and Research, ab23-22643, table 6.

offences being sentenced at the same time, the offender's criminal record, and other sentencing considerations such as discounts.¹⁸

- 2.16 For the unauthorised possession or use of any firearm, it does not appear that reoffending of the same offence is common.¹⁹ This offence was the principal offence in just over half of second or subsequent offences.²⁰ For example, from 2013 to 2017, there were 1,228 proven matters where unauthorised possession or use of a prohibited firearm or pistol was the first time that offence was proven for the offender.²¹ Only 4% (47) reoffended with the same offence in the following five years and the reoffence happened once.²²
- 2.17 While there was a higher proportion of reoffending for the unauthorised possession or use of a firearm (other than a prohibited firearm or pistol), the reoffending was still low. Out of 1,424 relevant proven matters over 2013 to 2017 where it was the first time that offence was proven for the offender, 1% (18) reoffended with the same offence in the following five years.²³
- 2.18 We also examine the offence of contravening a firearms prohibition order (FPO) by acquisition, possession or use of a firearm (FPO offence).²⁴ This offence is not nearly as common as the above unauthorised possession or use offences. There was a total of 382 proven matters from 2013 to 2022 and 97 proven matters where it was the principal offence (for adult offenders in the Local and higher courts) over the same period.²⁵ Out of these 97 proven matters, most were heard in the Local Court (79% or 77) and most (79% or 77) received a sentence of imprisonment.²⁶
- 2.19 Data shows that offenders do not reoffend with the same FPO offence. From 2013 to 2017, there were 18 proven matters where it was the first time that offence was proven for the offender.²⁷ Only 11% (2) of offenders reoffended with the same offence in the following five years.²⁸

18. NSW Sentencing Council, *Weapons-Related Offences: Sentencing Adult Offenders*, Consultation Paper (2023) [3.25].

19. *Firearms Act 1996* (NSW) s 7(1), s 7A(1).

20. NSW Bureau of Crime Statistics and Research, 24-23186.

21. *Firearms Act 1996* (NSW) s 7(1), s 7A(1); NSW Bureau of Crime Statistics and Research, 24-23186.

22. *Firearms Act 1996* (NSW) s 7(1), s 7A(1); NSW Bureau of Crime Statistics and Research, 24-23186.

23. *Firearms Act 1996* (NSW) s 7(1), s 7A(1); NSW Bureau of Crime Statistics and Research, 24-23186.

24. *Firearms Act 1996* (NSW) s 74(1).

25. NSW Bureau of Crime Statistics and Research, ab23-22640, table 1; NSW Bureau of Crime Statistics and Research, ab23-22643, table 2.

26. NSW Bureau of Crime Statistics and Research, ab23-22643, table 2, table 3.

27. *Firearms Act 1996* (NSW) s 7(1), s 7A(1); NSW Bureau of Crime Statistics and Research, 24-23186.

28. *Firearms Act 1996* (NSW) s 7(1), s 7A(1); NSW Bureau of Crime Statistics and Research, 24-23186.

- 2.20 We also consider the offence of aggravated unauthorised possession of three or more firearms, as we heard about issues with the maximum penalty and strictly indictable nature of this offence.²⁹ The offence is a strictly indictable offence which means it must be heard in the District or Supreme Court. It carries a maximum penalty of 20 years' imprisonment and a standard non-parole period of 10 years.³⁰
- 2.21 The offence is relatively uncommon, with 181 proven matters from 2013 to 2022.³¹
- 2.22 It appears that the length of sentences of imprisonment for this offence are much lower than the maximum penalty. From 2013 to 2022, there were 139 proven matters where the offence was the principal offence (for adult offenders only).³² Imprisonment was the most common penalty (64% or 89).³³ The highest average non-parole period was 3 years and 4 months where the offence was the principal offence (for adult offenders only) in 2017.³⁴ In 2022, the average non-parole period was much lower at 1 year and 6 months.³⁵
- 2.23 In 2022, there were 14 proven matters where this offence was the principal offence (for adult offenders only). The most common penalty was an intensive correction order (ICO) (7 or 50%), followed by imprisonment (5 or 36%).³⁶ The average non-parole period was 18 months (or 1 year and 6 months).³⁷
- 2.24 We also examine offences relating to imitation firearms. An "imitation firearm" is defined as an object that substantially duplicates in appearance a firearm, is not a firearm, and is not produced and identified as a children's toy.³⁸
- 2.25 Apart from limited exceptions, imitation firearms are treated in the same way as firearms.³⁹ There are no separate offences or different maximum penalties for imitation firearms. An imitation firearm that imitates a pistol is considered a "pistol", and an imitation firearm that imitates a prohibited firearm is considered a "prohibited firearm".⁴⁰

29. *Firearms Act 1996* (NSW) s 51D(2); Legal Aid NSW, *Submission WE11*, 14, 16.

30. *Firearms Act 1996* (NSW) s 51D(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A item 23.

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

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

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

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

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

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

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

38. *Firearms Act 1996* (NSW) s 4D(3)–(4) definition of "imitation firearm".

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

40. *Firearms Act 1996* (NSW) s 4D(2).

- 2.26 It is not possible to obtain data on sentencing outcomes as to the unauthorised possession or use of imitation firearms specifically.
- 2.27 In the context of offending by children and young people, we consider SCIOs involving imitation firearms. SCIOs include homicide, an offence punishable by life or 25 years' imprisonment (for example, robbery while armed with a dangerous weapon, and wounding with intent to cause grievous bodily harm),⁴¹ aggravated sexual assault without consent (or attempt), assault with intent to have sexual intercourse (or attempt), offences related to the manufacture or sale of firearms under the *Firearms Act* that are liable to 20 years' imprisonment, and sexual assault by forced self-manipulation when the victim is under 10 years old.⁴²

Section 51D(2) should be a Table 1 offence for imitation firearms

Recommendation 2.1: Section 51D(2) should be a Table 1 offence where the firearms are imitations

The offence of s 51D(2) of the *Firearms Act 1996* (NSW) (unauthorised possession of more than three firearms, any one of which is a pistol or prohibited firearm) should be made a Table 1 offence, in the circumstance where all the firearms are imitation firearms.

- 2.28 This recommendation would allow s 51D(2) to be dealt with summarily unless the prosecutor (or accused person) elected for the matter to be heard in a higher court. Currently, the offence is strictly indictable which means it must be heard in a higher court.
- 2.29 The recommendation is limited to circumstances where all firearms possessed are imitation firearms. This would mean unauthorised possession of three or more firearms, one of which is a pistol or prohibited firearm, and where any one of the firearms is genuine, would remain a strictly indictable offence. We do not recommend any changes to the offence in these circumstances.
- 2.30 The recommendation seeks to allow the Local Court to deal with the offence where it involves only imitation firearms and may be of lower seriousness. In these circumstances, a prosecutor may consider it appropriate for the offence to be dealt with summarily and within the Local Court's jurisdictional limit of two years' imprisonment. If the offending involves imitation firearms but is serious, a prosecutor could elect for the matter to be dealt with on indictment in a higher court where a sentence up to the maximum penalty can be imposed.

41. *Crimes Act 1900* (NSW) s 33(1)(a), s 97(2).

42. *Children (Criminal Proceedings) Act 1987* (NSW) s 3(1) definition of "serious children's indictable offence"; *Children (Criminal Proceedings) Regulation 2021* (NSW) cl 4.

- 2.31 The recommendation responds to the inability of the Local Court to deal with less serious offending due to the strictly indictable nature of the offence. One District Court case raised this issue.⁴³ The case involved the possession of 15 gel blasters, some of which were prohibited firearms or pistols, of which one was an “imitation firearm” as defined. The offender was charged with multiple counts of aggravated possession of three or more firearms. The judge commented that a custodial sentence was not appropriate, and that the Local Court had sufficient sentencing scope to finalise the matter.⁴⁴
- 2.32 The sentencing outcomes for this offence suggest that the Local Court’s sentencing scope could adequately deal with the offence in a significant number of cases. While imprisonment was the most common penalty imposed from 2013 to 2022 (where the offence was the principal offence for adult offenders only), penalties other than imprisonment were imposed in 36% cases, and in 2022, ICOs were the most common penalty imposed.⁴⁵ This is significant given the offence is a strictly indictable offence that carries a maximum penalty of 20 years’ imprisonment. Another significant statistical finding is that sentences of imprisonment from 2013 to 2022 appear to be well below the maximum penalty, and in 2022 the average non-parole period was below the Local Court’s jurisdictional maximum of 2 years’ imprisonment.⁴⁶
- 2.33 Our recommendation is similar to a proposal in the Legal Aid submission that the aggravated possession of three or more firearms should be made a Table 1 offence for any circumstances and not just where all the firearms are imitation firearms.⁴⁷ Legal Aid said it would allow differentiation between serious examples of the stockpiling of dangerous firearms and the possession of imitation firearms where there is no evidence that the offence is associated with greater criminality.⁴⁸
- 2.34 We prefer our recommendation over this proposal because, where any of the firearms are genuine firearms, it is appropriate for the offence to remain a strictly indictable offence due to the seriousness of possessing real firearms.
- 2.35 Legal Aid also suggested a proposal to address the jurisdictional limitations posed by the strictly indictable nature of offence. It suggested removing the distinction between pistols or prohibited firearms and other firearms for imitation firearms. Removing the distinction would mean that a person possessing more than three firearms, where any one is a prohibited firearm or pistol and an imitation firearm,

43. *R v Smith* [2023] NSWDC 88.

44. *R v Smith* [2023] NSWDC 88 [71]–[72].

45. NSW Bureau of Crime Statistics and Research, ab23-22643, table 3, table 4.

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

47. Legal Aid NSW, *Submission WE11*, 16.

48. Legal Aid NSW, *Submission WE11*, 16.

could be charged with an offence against s 51D(1) of the *Firearms Act*, instead of aggravated possession of three or more firearms.⁴⁹

- 2.36 Under s 51D(1), it is an offence to possess more than three firearms but there is no requirement that any of them be prohibited firearms or pistols. The offence carries a lower maximum penalty of 10 years' imprisonment and is a Table 2 offence.⁵⁰ This means that the offence is dealt with summarily, unless the prosecutor (but not the accused) elects for it to be dealt with on indictment.
- 2.37 Legal Aid stated that a charge under s 51D(1) would be more appropriate where multiple imitation firearms are possessed (regardless of whether they meet the definition of a prohibited firearm or pistol) as they can be of lower objective seriousness and be appropriately dealt with summarily.⁵¹
- 2.38 While we acknowledge the issues arising from the strictly indictable nature of the aggravated possession of three or more firearms, in our view, the distinction between pistols or prohibited firearms and other firearms, for imitation firearms should remain.
- 2.39 A flow-on effect of removing the distinction for imitation firearms is that the unauthorised possession of any imitation firearm would carry a maximum penalty of 5 years' imprisonment. This would mean that the maximum penalty for unauthorised possession of an imitation firearm that is also a pistol or prohibited firearm would be reduced from 14 years to 5 years' imprisonment.⁵²
- 2.40 Unauthorised possession or use of pistols or prohibited firearms carries a higher penalty than unauthorised possession or use of firearms generally. This is because there is a "considerable difference in the degree of criminality" between the offences.⁵³ As noted above, pistols are defined as a firearm that "is reasonably capable of being raised and fired by one hand", and prohibited firearms include machine guns, self-loading rifles and firearms that are concealed as a different object (for example, a walking stick).⁵⁴
- 2.41 It is apparent that pistols and prohibited firearms can be significantly more dangerous, and are capable of being concealed and causing more widespread harm than other types of firearms. The dangerousness of pistols and prohibited firearms

49. Legal Aid NSW, *Submission WE11*, 14–16.

50. *Firearms Act 1996* (NSW) s 51D(1); *Criminal Procedure Act 1986* (NSW) sch 1 table 2; Legal Aid NSW, *Submission WE11*, 16.

51. Legal Aid NSW, *Submission WE11*, 14–16.

52. *Firearms Act 1996* (NSW) s 7(1), s 7A(1).

53. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 20 November 2003, 5640.

54. *Firearms Act 1996* (NSW) s 4(1) definition of "pistol", definition of "prohibited firearm", sch 1.

is also demonstrated by the fact that unless for a limited purpose, it is not possible to obtain a licence for a pistol or prohibited firearm.⁵⁵

2.42 However, we recognise that imitation firearms are not capable of causing physical harm. Arguably, the different levels of harm between the categories of firearms would not apply to imitation firearms. The danger of imitation firearms is the realistic appearance of the weapon which generates fear and psychological harm. We explain this further below.

2.43 Even so we do not recommend the removal of the distinction for imitation firearms. We consider that imitation firearms should be treated in the same way as the firearms they imitate, given they can be presented in a similar way as their genuine counterparts and can be used in serious criminal offending.

The maximum penalties are appropriate

2.44 In our view, the current maximum penalties for the unauthorised possession or use of a firearm, prohibited firearm or pistol are adequate and do not need to change. Many submissions shared this view.⁵⁶

2.45 As the Local Court finalises most matters and most offences do not result in a sentence of imprisonment, the sentencing outcomes do not indicate a need for the maximum penalty to be increased.⁵⁷ Some submissions agreed that there was insufficient evidence to increase the maximum penalties.⁵⁸

2.46 We also consider that the current maximum penalties adequately reflect the objective seriousness of the most serious types of offending. Similarly, Legal Aid stated that the current maximum penalties are “more than adequate” and that the data shows that prosecution and sentencing discretion is being appropriately exercised in lower-level offences.⁵⁹

2.47 In addition, NSW already has some of the highest maximum penalties for firearms use or possession in Australia. Several jurisdictions have lower penalties, including

55. *Firearms Act 1996* (NSW) s 8(1).

56. NSW Bar Association, *Submission WE12* [5]–[6]; Legal Aid NSW, *Submission WE11*, 9; Confidential, *Submission WE13*, 3–4; NSW, Public Defenders, *Submission WE19* [13]–[14].

57. *Firearms Act 1996* (NSW) s 7(1), s 7A(1); *Firearms Act 1996* (NSW) s 7(1), s 7A(1); NSW Bureau of Crime Statistics and Research, ab23-22643, table 2, table 3.

58. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 8; Law Society of NSW, *Submission WE08*, 5; Legal Aid NSW, *Submission WE11*, 9–10.

59. Legal Aid NSW, *Submission WE11*, 9–10.

the Northern Territory (3 years), Queensland (7 years), Australian Capital Territory and South Australia (both 10 years).⁶⁰

- 2.48 The NSW Police Force (NSWPF) submitted that the low numbers of custodial sentences and the sentence lengths handed down suggests that “sentencing practices may not be reflecting the seriousness of these offences”.⁶¹ Rather than increasing the maximum penalty, in our view, the Director of Public Prosecutions’ right of appeal may provide a solution where the sentence imposed is not adequate.⁶²

No increased maximum penalties for “prohibited persons”

- 2.49 In our view, maximum penalties should not be increased for “prohibited persons” and subsequent offending of firearms offences. As stated above, we consider that the current maximum penalties are adequate.
- 2.50 Further, NSW’s current laws offer adequate protections against individuals at higher risk of offending. Increased maximum penalties for firearms offences committed by a “prohibited person” exist in Victoria. NSW’s current restrictions on the issuance of firearms licences and permits and the broad discretion to issue FPOs have significant overlap with Victoria’s criteria of “prohibited person”. These NSW laws make increased maximum penalties for such persons unnecessary. Four submissions also expressed this view.⁶³
- 2.51 The following restrictions exist in NSW for firearms authorisation:
- statutory conditions that restrict the issue of a licence or permit to certain individuals⁶⁴
 - automatic suspension or revocation of firearms licences where there is an interim or final apprehended violence order (AVO) or FPO⁶⁵

60. *Firearms Act 1997* (NT) s 58(6); *Weapons Act 1990* (Qld) s 50(1)(c)(i); *Firearms Act 1996* (ACT) s 42(1); *Firearms Act 2015* (SA) s 9(1), s 9(4)(a).

61. NSW Police Force, *Submission WE16*, 2.

62. *Crimes (Appeal and Review) Act 2001* (NSW) s 23(1); *Criminal Appeal Act 1912* (NSW) s 5D(1). The Attorney General also has a right of appeal under this provision.

63. Legal Aid NSW, *Submission WE11*, 10; NSW Bar Association, *Submission WE12* [15]; Confidential, *Submission WE13*, 3-4; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 8.

64. *Firearms Act 1996* (NSW) s 11-16, s 28- 29.

65. *Firearms Act 1996* (NSW) s 23(1), s 24(1).

- licence or permit may be revoked or suspended on certain grounds,⁶⁶ and
 - FPO scheme.⁶⁷
- 2.52 These protections are broadly similar to Victoria’s criteria of a “prohibited person”. In Victoria, it is an offence for a “prohibited person” to possess any firearm, and the maximum penalty is 1200 penalty units (PU) or 10 years’ imprisonment.⁶⁸ A person automatically becomes a “prohibited person” if they:
- are serving a term of imprisonment for certain offences
 - have served a term of 5 years’ imprisonment or more in the last 15 years
 - have served a term of less than 5 years’ imprisonment in the last 5 years
 - are subject to a final domestic violence order, community-based order or mental health supervision order, or
 - are a certain individual under the *Criminal Organisations Control Act 2012 (Vic)*.⁶⁹
- 2.53 For some offences, a prohibited person includes someone who is subject to an FPO.⁷⁰
- 2.54 We acknowledge that, unlike Victoria, the NSW restrictions do not specifically consider mental health orders. However, a person’s mental health may be relevant to the Police Commissioner’s (the Commissioner’s) assessment of whether an applicant for a firearms licence or permit is a “fit and proper person and can be trusted to have possession of firearms without danger to public safety or to the peace”.⁷¹ A licence or a permit cannot be issued if the Commissioner has reasonable cause to believe that the applicant cannot “exercise continuous and responsible control over firearms” because of any previous attempts to commit suicide or cause self-inflicted injury or “the applicant’s intemperate habits or being of unsound mind”.⁷²
- 2.55 Health professionals can also inform the Commissioner if they believe a person is a threat to public safety or their own safety if they were to possess a firearm.⁷³

66. *Firearms Act 1996 (NSW)* s 22(1), s 22(2), s 30(4), s 24(2); Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 8.

67. *Firearms Act 1996 (NSW)* s 73(1); Legal Aid NSW, *Submission WE11*, 10; NSW Bar Association, *Submission WE12* [15]; Confidential, *Submission WE13*, 3–4.

68. *Firearms Act 1996 (Vic)* s 5(1).

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

70. *Firearms Act 1996 (Vic)* s 112U.

71. *Firearms Act 1996 (NSW)* s 11(3)(a), s 29(1); Legal Aid NSW, *Submission WE11*, 10.

72. *Firearms Act 1996 (NSW)* s 11(4)(b)–(c), s 29(2)(b)–(c); NSW Police Force, *Firearms Registry Decision Making Guidelines* (2019, reviewed 2023) 26, 29.

73. *Firearms Act 1996 (NSW)* s 79(1).

- 2.56 The Commissioner may suspend or revoke a licence or permit if they are of the view that the person is no longer fit and proper to hold a licence or permit or that it is not in the public interest for the person to continue holding a licence or permit.⁷⁴ This can include any reason for which the person would be refused a licence or permit in the first place, such as mental health concerns.⁷⁵
- 2.57 Further, the Commissioner may issue an FPO if they are of the view that the person “is not fit, in the public interest, to have possession of a firearm”.⁷⁶ There is no other legislative criteria.
- 2.58 Most submissions opposed introducing a “prohibited persons” regime due to the need for courts to retain sentencing discretion, the lack of evidence showing the effectiveness of increased maximum penalties for prohibited persons and the risk of overcriminalisation of classes of people.⁷⁷
- 2.59 One submission proposed introducing a “prohibited persons” regime on the basis that it would provide greater deterrence against repeat offending.⁷⁸ It suggested that the criteria for a “prohibited person” should be the same as the statutory conditions that prohibit a person from being issued a licence.⁷⁹ For example, the conditions range from being subject to an AVO within the last 10 years to being under the age of 18 or being subject to a conditional release order.⁸⁰
- 2.60 The NSWPF also proposed the creation of new offences committed by prohibited persons with increased maximum penalties: 20 years’ imprisonment for offences involving a pistol or prohibited firearm, and 10 years’ imprisonment for other firearms.⁸¹
- 2.61 We consider that the introduction of increased maximum penalties or new offences for “prohibited persons” in NSW is unnecessary. As stated above, there are adequate existing restrictions for firearms possession or use that apply to people who are considered a risk to the community. These restrictions already provide protections that significantly overlap with Victoria’s prohibited persons scheme.
- 2.62 In addition, NSW’s maximum penalty for unauthorised possession or use of a pistol or prohibited firearm is currently higher than Victoria’s maximum penalty for

74. *Firearms Act 1996* (NSW) s 22(1), s 24(2)(c), *Firearms Regulation 2017* (NSW) cl 20, cl 21(1)(a).

75. *Firearms Act 1996* (NSW) s 22(1), s 24(2)(a); *Firearms Regulation 2017* (NSW) cl 21(2).

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

77. See, eg, Law Society of NSW, *Submission WE08*, 2; Legal Aid NSW, *Submission WE11*, 10; NSW Bar Association, *Submission WE12* [15]; Confidential, *Submission WE13*, 3–4; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 8–9; NSW, Public Defenders, *Submission WE19* [15].

78. NSW Police Force, *Submission WE16*, 3.

79. NSW Police Force, *Submission WE16*, 3; *Firearms Act 1996* (NSW) s 11(5).

80. *Firearms Act 1996* (NSW) s 11(5)(a), s 11(5)(c), s 11(5)(d)(iii).

81. NSW Police Force, *Submission WE16*, 3.

possession or use of a firearm by a prohibited person. One submission stated that NSW's maximum penalty already provides adequate scope for appropriate sentences and it is likely that an offender who falls into any of the "prohibited persons" categories may already receive a longer sentence.⁸²

No increased maximum penalties for subsequent offending

- 2.63 We do not recommend increased penalties for subsequent offending of firearms offences. A court can take into account a person's criminal record, including previous convictions for firearms offences, as an aggravating factor on sentence.⁸³ This means that currently courts can consider prior offending when they sentence a person where appropriate. The existing maximum penalties for firearms possession or use also allow a court adequate sentencing scope to reflect the seriousness of the offending, including any relevant criminal history. Various submissions agreed with this.⁸⁴
- 2.64 There is also limited evidence that indicates increased maximum penalties for repeat offending have a deterrent effect.⁸⁵
- 2.65 In addition, increased maximum penalties for subsequent offending may pose issues for sentencing principles. The Sentencing Advisory Council in Victoria has previously cautioned that "[s]etting higher maximum penalties for repeat offences may contravene the principle of proportionality".⁸⁶ Setting a high maximum penalty (rather than increased maximum penalties for repeat offending) allows the worst kinds of offending to be captured within the sentencing range, including where specific deterrence may be a relevant consideration for repeat offenders.⁸⁷
- 2.66 The data shows that the maximum penalty could be high enough to capture repeat offending, with most sentences falling well below the maximum penalty.⁸⁸ Similarly, a Sentencing Taskforce in Victoria "strongly opposed" increased penalties for repeat indictable offences. It said that these types of penalties would

82. NSW, Public Defenders, *Submission WE19* [15].

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

84. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 8–9; NSW Bar Association, *Submission WE12* [16]–[17]; Confidential, *Submission WE13*, 4; Law Society of NSW, *Submission WE08*, 6; NSW, Public Defenders, *Submission WE19* [16].

85. Legal Aid NSW, *Submission WE11*, 10; NSW Bar Association, *Submission WE12* [16]; NSW, Public Defenders, *Submission WE19* [16]; Victoria, Sentencing Advisory Council, *Maximum Penalties: Principles and Purposes*, Preliminary Issues Paper (2010) [5.59].

86. Victoria, Sentencing Advisory Council, *Maximum Penalties: Principles and Purposes*, Preliminary Issues Paper (2010) [5.59].

87. Victoria, Sentencing Advisory Council, *Maximum Penalties: Principles and Purposes*, Preliminary Issues Paper (2010) [5.59].

88. *Firearms Act 1996* (NSW) s 7(1), s 7A(1); NSW Bureau of Crime Statistics and Research, ab23-22643, table 3.

be mostly applicable to summary offences in which the sentencing scope, to take into account repeat offending, is limited by the relatively low sentencing range.⁸⁹

- 2.67 A possible way of implementing a subsequent offence structure for firearms possession or use is to reduce the maximum penalty for a first offence. One submission proposed this, stating that NSW should reduce the maximum penalty for a first offence to be more in line with other jurisdictions, and reserve the current maximum penalty for subsequent offences.⁹⁰
- 2.68 While sentencing outcomes demonstrate that courts are generally sentencing offenders significantly below the maximum penalty, we do not think a reduction in the maximum penalty would adequately reflect the seriousness of firearms use or possession and the risk posed by such offending. One submission cautioned against the reduction of maximum penalties due to impacts on public safety.⁹¹
- 2.69 The NSWPF submitted that there should be increased maximum penalties for repeat offending because such offending presents a higher level of danger.⁹² They suggested that repeat offences involving a firearm (other than a pistol or prohibited firearm) should have a maximum penalty of 10 years' imprisonment, while subsequent offences involving a pistol or prohibited firearm should have a maximum penalty of 20 years' imprisonment.⁹³ The NSWPF also suggested that repeat breaches of FPOs should have increased maximum penalties.⁹⁴
- 2.70 There does not appear to be a need for increased maximum penalties for repeat offending for the offence of unauthorised possession or use of any firearm and the FPO offence. The data indicates that a small proportion of offenders who committed a relevant possession or use offence or the FPO offence from 2013 to 2017 reoffended within the next five years.⁹⁵ As reoffending for these offences is not prevalent, our view is that there is insufficient evidence to support increasing the maximum penalties for subsequent offending. Having regard to this and our reasons above, we do not recommend introducing increased maximum penalties for subsequent offending.

89. Victoria, Sentencing Advisory Council, *Maximum Penalties: Principles and Purposes*, Preliminary Issues Paper (2010) [5.58].

90. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 8.

91. NSW Police Force, *Submission WE16*, 1.

92. NSW Police Force, *Submission WE16*, 2.

93. NSW Police Force, *Submission WE16*, 3–4.

94. NSW Police Force, *Submission WE16*, 4.

95. *Firearms Act 1996* (NSW) s 7(1), s 7A(1), s 74(1); NSW Bureau of Crime Statistics and Research, 24-23186.

No decrease to maximum penalties for possession or use of imitation firearms

- 2.71 We do not recommend decreased maximum penalties for offences involving imitation firearms. In our view, the treatment of imitation weapons in the same way as real firearms is justified because of the psychological impact they have on victims and their use in carrying out robberies and other serious offences.
- 2.72 Even though imitation firearms are not capable of causing physical injury, members of the public or police officers can mistake them for real firearms.⁹⁶ Imitation firearms can also be used in connection with criminal activities and can be presented in the same manner as genuine firearms. Therefore, they pose a real risk to public safety. The psychological impact and public safety risk of imitation firearms have been raised in case law and by some submissions and stakeholders.⁹⁷
- 2.73 The courts have commented that the misuse of firearms, even without discharge, can significantly impact other people's rights.⁹⁸ We consider that these concerns are relevant to imitation firearms which are not capable of discharge.
- 2.74 Some submissions disagreed. Legal Aid and the Aboriginal Legal Service suggested that imitation firearms should be treated differently from genuine firearms. They proposed the creation of a new summary offence with a lower maximum penalty of 2 years' imprisonment and/or a fine for possession of an imitation firearm.⁹⁹ Legal Aid also proposed the creation of a new offence of possessing an imitation firearm in a public place, which would attract a slightly higher penalty of 3 years' imprisonment and/or a fine.¹⁰⁰
- 2.75 For example, in the Northern Territory, possession of an imitation firearm carries a maximum penalty of 400 PU or 2 years' imprisonment.¹⁰¹ In Queensland, the current maximum penalty for possessing a "restricted item" (such as a replica firearm) without a reasonable excuse is 10 PU.¹⁰² Queensland also has a separate offence of

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

97. NSW Police Force, *Submission WE16*, 4; Confidential, *Submission WE13*, 5; Prosecutors' Roundtable, *Preliminary Consultation PWEC01*; *R v JW* [2022] NSWDC 169 [73]–[74]; *R v Andrew (No 2)* [2018] NSWDC 382 [19]; *R v Mansaray* [2020] NSWDC 114 [49].

98. *R v Najem* [2008] NSWCCA 32 [40]; *KC v R* [2009] NSWCCA 110 [11].

99. Legal Aid NSW, *Submission WE11*, 13; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 10–11.

100. Legal Aid NSW, *Submission WE11*, 14.

101. *Weapons Control Act 2001* (NT) s 3 definition of "prohibited weapon", s 6; *Weapons Control Regulations 2001* (NT) reg 3 sch 2 cl 30.

102. *Weapons Act 1990* (Qld) s 67(1), s 67 definition of "restricted item"; *Weapons Categories Regulation 1997* (Qld) cl 9(f).

carrying a replica firearm exposed in a public place, without reasonable excuse, which carries a maximum penalty of 40 PU or 6 months' imprisonment.¹⁰³

- 2.76 One submission said that imitation firearms should be legalised to allow for firearms training to teach firearms safety, respect and responsibility.¹⁰⁴
- 2.77 We acknowledge that there may be some issues with equating the seriousness of imitation firearms with real firearms especially in circumstances where imitation firearms cannot inflict any physical harm and there is no evidence that the imitation firearm would be used or is intended to be used in a criminal way.
- 2.78 These issues have been raised in some cases. In one case involving unauthorised possession of multiple imitation firearms that were gel blasters, the court expressed concern about the charge of imitation firearm possession being laid, absent any evidence concerning the use or intended use of the imitation firearms:
- Clearly such items [imitation firearms] are capable of being used in the commission of criminal activity and should be subject to a charge under the *Firearms* legislation. However, if one was to look at a scenario where an “*imitation*” firearm was found in a child’s bedroom in the course of a search, it is difficult to imagine that Parliament had ever intended such an item be subject to a charge under the *Firearms Act*, absent any evidence in respect of illegal use. In my view the use of an “*imitation*” firearm whether the use be actual or intended, should be a critical factor in deciding whether a charge should flow.¹⁰⁵
- 2.79 In another case, the court considered that a replica pistol was the “least serious” prohibited weapon. At the time of this case, imitation firearms were considered prohibited weapons. The court stated that as a replica, the pistol could not have been used as a genuine firearm, but could only be used to frighten a person.¹⁰⁶
- 2.80 In our view, the different levels of risk between imitation and genuine firearms can be accounted for in the sentencing process when a court considers the individual circumstances of offending.¹⁰⁷
- 2.81 We consider that the current maximum penalties allow adequate sentencing scope in circumstances where a court finds the offending is more serious due to intended or actual use of an imitation firearm. Courts have recognised that possession of firearms can be more serious if the possession is part of an offender’s involvement

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

104. J Maloney, *Submission WE02*, 21.

105. *R v Smith* [2023] NSWDC 88 [22] (emphasis in original).

106. *R v Williams* [2005] NSWCCA 355 [37].

107. See also G Betts, “Robbery and the Principle of Fair Labelling” (2019) 83 *Journal of Criminal Law* 205, 214–215.

in other crimes in which they were prepared to use the firearm.¹⁰⁸ In the same way, there is sufficient sentencing scope for less serious circumstances of possession.¹⁰⁹

- 2.82 For these reasons, we do not support any differentiated treatment between imitation firearms and genuine firearms. We discuss gel blasters, which can meet the definition of imitation firearms, further in chapter 3.

No change to serious children’s indictable offences involving imitation firearms

- 2.83 We do not recommend any changes to SCIOs involving imitation firearms. Where a SCIO involves an imitation firearm, we are of the view that such offending is already significantly serious due to the nature of the offence itself. We listed above the kinds of offences that are SCIOs, including, for example, aggravated sexual assault without consent and robbery armed with a dangerous weapon. The use of imitation firearms in robberies can be strategic and aimed at instilling fear in victims so that they give in to an offender’s demands.
- 2.84 Specific sentencing laws and procedures apply to children and young people. The Children’s Court deals with most summary and indictable offences where the person is under the age of 18 at the time of the offence and under 21 when charged.¹¹⁰ Specific penalties are available under part 3, division 4 of the *Children (Criminal Proceedings) Act 1987 (NSW) (Children (Criminal Proceedings) Act)*.
- 2.85 Sentencing options under the *Children (Criminal Proceedings) Act* include a control order, which is full-time detention served in a youth detention centre. A control order may only be imposed for up to 2 years. There is also a range of community-based orders, such as community service orders and probation orders.¹¹¹
- 2.86 If a higher court is dealing with a young person or child for an indictable offence, it can impose a penalty available under the *Children (Criminal Proceedings) Act* or sentence them “according to law”.¹¹² A sentence imposed “according to law” means that adult sentencing options such as imprisonment or community corrections orders, but not ICOs, are available to the sentencing court.¹¹³ A decision to sentence according to law reflects the seriousness of the offence, the age and maturity of

108. *Lamis v R* [2016] NSWCCA 274 [52]. See also *R v Shinner* [2024] NSWDC 62 [35].

109. See, eg, *R v Foster* [2020] NSWDC 660 [12]–[13].

110. *Children (Criminal Proceedings) Act 1987 (NSW)* s 28(1).

111. *Children (Criminal Proceedings) Act 1987 (NSW)* s 33(1).

112. *Children (Criminal Proceedings) Act 1987 (NSW)* s 16, s 18(1).

113. *R v WKR* (1993) 32 NSWLR 447, 449; *Crimes (Sentencing Procedure) Act 1999 (NSW)* s 7(3).

the young person, the young person's criminal history and its seriousness, and any other matters the court considers relevant.¹¹⁴

- 2.87 However, only higher courts have jurisdiction to finalise SCIOs and they must be sentenced "according to law".¹¹⁵
- 2.88 Nonetheless, the court must still have regard to common law principles regarding youth and certain statutory principles that apply to the sentencing of children and young people for any offence, including SCIOs. These principles include recognition of a child or young person's state of dependency and immaturity, the role of rehabilitation and general deterrence for children and young people (where relevant) and that no penalty imposed on a child should be greater than the penalty that would be imposed on an adult for the same offence.¹¹⁶
- 2.89 The Law Society raised a concern that any child or young person who is charged with the SCIO offence of armed robbery while armed with a dangerous weapon, in which an imitation weapon is used, must be sentenced "according to law".¹¹⁷ The submission asked whether it would be more appropriate for courts sentencing children and young people for SCIOs involving imitation weapons to access penalties under the *Children (Criminal Proceedings) Act*.¹¹⁸
- 2.90 Our view is that penalties under *Children (Criminal Proceedings) Act* should not be available to SCIOs involving imitation firearms. While we acknowledge the concern that adult sentencing options may be too rigid where a non-lethal weapon is used, the nature of SCIOs is extremely serious. Regardless of whether an offence is an SCIO or not, a court is required to consider the statutory principles mentioned above, as well as common law sentencing principles regarding youth where relevant, when sentencing a child or young person.¹¹⁹

Objective seriousness and serviceability of firearms

- 2.91 Legal Aid submitted that the degree of serviceability of a firearm, and the offender's belief in a firearm's capability, are relevant considerations of objective seriousness.¹²⁰ These considerations were not mentioned in our consultation paper and we do not make any recommendations about them.

114. *Children (Criminal Proceedings) Act 1987* (NSW) s 18(1A).

115. *R v WKR* (1993) 32 NSWLR 447, 449.

116. *Children (Criminal Proceedings) Act 1987* (NSW) s 6; *SS v R* [2009] NSWCCA 114 [61], [65].

117. Law Society of NSW, *Submission WE08*, 2–3; *Crimes Act 1900* (NSW) s 97(2).

118. Law Society of NSW, *Submission WE08*, 2–3.

119. *R v WKR* (1993) 32 NSWLR 447, 449.

120. Legal Aid NSW, *Submission WE11*, 17.

- 2.92 The circumstances of firearms offending, especially possession, are very broad. Legal Aid’s submission highlighted issues with the definition of firearm which expansively captures homemade devices that can be made capable of (with external assistance) propelling a projectile.¹²¹
- 2.93 Legal Aid drew attention to a recent case in which a homemade gun made of a “brass threaded section of pipe fixed to a timber frame by a hose clamp” could become capable of firing a projectile only through the external aid of a vice and hammer.¹²² The court found in that matter that the item came under the definition of “firearm”.¹²³
- 2.94 Even though guns that can be made capable of firing a projectile fall under the definition of “firearm”, the possession of unserviceable weapons is less objectively serious than serviceable weapons. In addition, an offender’s belief that a firearm is not serviceable (together with the lack of intention to repair, use or dispose of it) may place a possession offence towards the lower end of objective seriousness.¹²⁴

121. Legal Aid NSW, *Submission WE11*, 17–18.

122. Legal Aid NSW, *Submission WE11*, 17–18; *R v Johnson* [2023] NSWDC 428 [10]–[13].

123. *R v Johnson* [2023] NSWDC 428 [10], [13], [34]–[35].

124. *R v Mezzadri* [2011] NSWCCA 125 [19].

3. Gel blasters

In brief

Warnings under the *Young Offenders Act 1997* (NSW) should be available for the unauthorised possession or use of gel blasters by children. The NSW Government should start a public education and awareness campaign about the legal status of gel blasters in NSW. The NSW Government may also consider addressing concerns raised about the legal status of gel blasters.

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- 3.1 A gel blaster is a device that propels hydrated gel pellets through a mechanism involving compressed air.¹ They can be used for recreational purposes or as toys, but some gel blasters can look like real firearms.² It is illegal to possess or use them without the proper authorisation.³
- 3.2 Throughout this review, we heard significant concerns about the current legal status of gel blasters in NSW. We acknowledge those concerns in this chapter.

1. *R v Smith* [2023] NSWDC 88 [10].
2. *R v Smith* [2023] NSWDC 88 [10], [74]; *R v Andrew (No 2)* [2018] NSWDC 382 [4], [6].
3. *R v Lucas* [2023] NSWSC 1357 [1]–[2]; *Firearms Act 1996* (NSW) s 7, s 7A.

Although we do not recommend a particular reform option, we suggest the NSW Government consider reviewing the legal status of gel blasters to address these concerns. We describe two potential reform options the NSW Government could consider.

- 3.3 In addition, we recommend that warnings are made available for children for the unauthorised possession or use of gel blasters. We also recommend that the NSW Government undertake education and awareness campaigns on the legal status of gel blasters to better inform the public.

Gel blasters are illegal in NSW

- 3.4 Unlike some other Australian states, it is illegal to use or possess a gel blaster in NSW.⁴ This is because gel blasters can meet the definition of “firearm” and “imitation firearm” under the *Firearms Act 1996* (NSW) (*Firearms Act*).⁵ They also fall within the definitions of “dangerous weapon” and “offensive weapon or instrument” under the *Crimes Act 1900* (NSW).⁶

Gel blasters meet the definition of “firearms”

- 3.5 As we explain in chapter 2, it is a criminal offence in NSW to possess or use any firearm without a licence or permit.⁷ This includes a gel blaster, because they come within the definition of “firearm”.⁸
- 3.6 Gel blasters can fall within the definition of an “air gun” or a “pistol”, both of which are considered “firearms” under the *Firearms Act*.⁹ An “air gun” is a gun that can propel, or is designed to propel, a projectile by gas or a spring mechanism and is operated or designed to operate by a trigger or similar device.¹⁰ A “pistol” is a firearm that is reasonably capable of being raised and fired by one hand and complies with any dimensions provided in the regulations.¹¹
- 3.7 As gel blasters meet the definition of “firearm” the maximum penalties for unauthorised possession or use of a gel blaster are the same as the maximum penalties for unauthorised possession or use of a firearm, prohibited firearm or

4. *R v Lucas* [2023] NSWSC 1357 [4].

5. *Firearms Act 1996* (NSW) s 4(1) definition of “firearm”, definition of “imitation firearm”, s 4D(3).

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

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

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

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

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

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

pistol. The maximum penalties range from 5 years to 14 years' imprisonment, depending on the type of firearm.¹²

A gel blaster can be an “imitation firearm”, as defined

- 3.8 A gel blaster may also be considered an “imitation firearm” in some circumstances.¹³ An “imitation firearm” is defined as an object that:
- substantially duplicates a firearm in appearance but is not a firearm, and
 - is not produced and identified as a children’s toy.¹⁴
- 3.9 For instance, a gel blaster might not be a “firearm” if it does not have the internal working mechanism that allows it to be used as a gel blaster. As discussed in chapter 2, it may be considered an “imitation firearm” if it substantially duplicates a firearm in appearance, and it is not produced and identified as a children’s toy.¹⁵
- 3.10 Whether an object is “produced” as a children’s toy involves consideration of whether the item was manufactured as a toy, including how the item was packaged and labelled.¹⁶ Whether the object is “identified” as a children’s toy involves consideration of “matters intrinsic to the object” and “the use of the object and the intention of the person using it”.¹⁷
- 3.11 Even if an object is “produced” as a children’s toy, it might not be regarded as a children’s toy if someone presents it as a firearm. For example, a plastic rifle would normally be regarded as a children’s toy. However, it would no longer be considered as such if someone pressed it against another person and made threats to shoot. The use, and intention behind the use, of the plastic rifle would mean it is not identified as a children’s toy.¹⁸
- 3.12 We heard that courts have rejected the argument that gel blasters are children’s toys.¹⁹
- 3.13 As mentioned in chapter 2, the unauthorised possession or use of imitation firearms is subject to the same maximum penalties as the unauthorised possession or use of genuine firearms. Apart from the limited exceptions, the *Firearms Act* applies to an imitation firearm in the same way as it applies to a firearm.²⁰ An imitation firearm

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

13. *Firearms Act 1996* (NSW) s 4D.

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

15. *R v Smith* [2023] NSWDC 88 [21].

16. *Commissioner of Police v Howard Silvers and Sons Pty Ltd* [2017] NSWSC 981 [45]–[46].

17. *Darestani v R* [2019] NSWCCA 248, 100 NSWLR 461 [61].

18. *Darestani v R* [2019] NSWCCA 248, 100 NSWLR 461 [62].

19. Defence Roundtable, *Preliminary Consultation PWEC02*.

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

that imitates a pistol is considered a “pistol”, and an imitation firearm that imitates a prohibited firearm is considered a “prohibited firearm”.²¹

- 3.14 The maximum penalties for unauthorised possession or use of imitation firearms ranges from 5 years to 14 years’ imprisonment, depending on the type of firearm it imitates.²² As stated in chapter 2, we consider that the maximum penalties for imitation firearms are appropriate given their ability to cause psychological harm and to be used in other offending.
- 3.15 For reasons discussed below, we do not recommend any changes to the maximum penalties that apply when gel blasters are imitation firearms (as defined).

Gel blasters may also be captured by other laws

- 3.16 Gel blasters can also be considered an “offensive weapon or instrument” or “dangerous weapon” under the *Crimes Act 1900* (NSW) (*Crimes Act*).²³ Where an offensive weapon, instrument, or dangerous weapon is used during the commission of an offence, maximum penalties of up to 25 years’ imprisonment can apply.²⁴
- 3.17 A court may also consider the actual or threatened use of a gel blaster during an offence as an aggravating factor. This is because it involves actual or threatened use of violence or a weapon.²⁵

Concerns about the legal status of gel blasters

- 3.18 Throughout this review, we heard concerns about the classification of gel blasters, as “firearms” and “imitation firearms”. Many submissions argued that the law should distinguish between genuine firearms and gel blasters.²⁶

Gel blasters are different to other types of firearms

- 3.19 One perspective is that all gel blasters should continue to be treated as a “firearms” due to the public safety risks arising from their realistic appearance.²⁷

21. *Firearms Act 1996* (NSW) s 4D(2).

22. *Firearms Act 1996* (NSW) s 7(1), s 7A(1).

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

24. *Crimes Act 1900* (NSW) s 97(1)–(2).

25. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(b)–(c).

26. Law Society of NSW, *Submission WE08*, 3–4, 6–7; Legal Aid NSW, *Submission WE11*, 12–13; NSW Police Force, *Submission WE16*, 4–5; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 4, 10; NSW Bar Association, *Submission WE12* [6], [27]–[28]; NSW Young Lawyers Criminal Law Committee, *Submission WE15* [12]; Confidential, *Submission WE13*, 4–5; NSW, Public Defenders, *Submission WE19* [25]–[28].

27. See, eg, Prosecutors’ Roundtable, *Preliminary Consultation PWEC01*.

3.20 However, some submissions considered it generally inappropriate to classify gel blasters in the same category as other “firearms”.²⁸ We heard that gel blasters are often intended to be used as toys or are marketed and purchased as toys.²⁹ The Local Court of NSW observed that:

it is becoming increasingly apparent that many published judgments urge caution in too quickly placing these types of firearms in the same category as traditional firearms, especially since they are, in the main, toys.³⁰

3.21 While courts have accepted gel blasters are “firearms”, as defined, some sentencing outcomes reflect judicial concern about this classification.

3.22 In one case, the court concluded that the offence did not “differentiate between a firearm capable of firing bullets” and a gel blaster.³¹ The case involved the use of a gel blaster for a “childish and immature photo opportunity” and the gel blaster was “evidently [a] plastic toy that has the capacity to fire water infused coloured balls”.³²

3.23 In sentencing the offender, the court emphasised the following factors:

- the gel blaster was purchased from a state where it was legal to own gel blasters
- authorities had not taken any steps to “even out” the inconsistencies between laws across states, and
- the offender purchased the gel blaster for “outdoor fun and games”.³³

3.24 The court found the offender guilty of unauthorised possession of a firearm but dismissed the charge without a conviction being recorded.³⁴ The court imposed the penalty having regard to statutory factors for the imposition of this penalty, including the offender’s age (21 years), his immaturity, and the trivial nature of the offending.³⁵

28. Law Society of NSW, *Submission WE08*, 3–4, 6–7; Legal Aid NSW, *Submission WE11*, 12–13; NSW Bar Association, *Submission WE12* [27]–[28]; Confidential, *Submission WE13*, 4–5; NSW Young Lawyers Criminal Law Committee, *Submission WE15* [12]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 4, 10; NSW, Public Defenders, *Submission WE19* [27].

29. Law Society of NSW, *Submission WE08*, 3–4; Legal Aid NSW, *Submission WE11*, 13, 14; NSW Bar Association, *Submission WE12* [24], [26], [54]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 10; NSW, Public Defenders, *Submission WE19* [26]; *R v Andrew (No 2)* [2018] NSWDC 382 [32]; *R v Lucas* [2023] NSWSC 1357 [4]; *R v Smith* [2023] NSWDC 88 [72], [74].

30. Local Court of NSW, *Submission WE10*, 3.

31. *R v Lucas* [2023] NSWSC 1357 [2].

32. *R v Lucas* [2023] NSWSC 1357 [3], [4].

33. *R v Lucas* [2023] NSWSC 1357 [10]–[11].

34. *R v Lucas* [2023] NSWSC 1357 [20]; *Firearms Act 1995* (NSW) s 7A; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(a).

35. *R v Lucas* [2023] NSWSC 1357 [9]–[20]; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(3).

Gel blasters cause less physical harm than firearms

- 3.25 Another submission we received is that it is inappropriate for gel blasters to be classified alongside firearms that carry much greater potential for serious harm. The NSW Police Force (NSWPF) submitted that reform is required for the recreational use of gel blasters to address concerns about the “severity of consequences for possession and use, given the lower level of risk ... [gel blasters] present”.³⁶ Other submissions said that gel blasters are not lethal or capable of causing serious harm.³⁷
- 3.26 The relative risk profile of gel blasters was explained in a recent case that involved the unauthorised possession of 15 gel blasters.³⁸ Even though gel blasters can fall into the same category as air guns, expert evidence in that case found that air guns have an impact force that is 665 times higher than a gel blaster.³⁹ While gel blasters and paintball guns operate similarly, the court heard that the impact force of a paintball marker is 14 times higher than a gel blaster.⁴⁰ In addition, the impact force of a nerf gun was found to be only slightly lower than a gel blaster.⁴¹ Neither a paintball marker nor a nerf gun is considered a “firearm”.⁴²
- 3.27 In that case, the court assessed the offender’s culpability as falling “at the absolute bottom of the range for offences of their type” and found the offender guilty of unauthorised possession of multiple firearms but dismissed the charges without recording a conviction.⁴³ The court called for an urgent review of the legality of gel blasters. In the court’s view, if gel blasters are to remain illegal, they should be regulated in their own category with appropriate penalties, including fines.⁴⁴

Warnings should be available for children

Recommendation 3.1: Warnings for gel blaster unauthorised possession or use offences

The *Young Offenders Act 1997* (NSW) should be amended to make warnings available for the unauthorised possession or use of gel blasters.

36. NSW Police Force, *Submission WE16*, 5.

37. Law Society of NSW, *Submission WE08*, 4; Legal Aid NSW, *Preliminary Submission PWE12*, 3.

38. *R v Smith* [2023] NSWDC 88 [3], [71]; *Firearms Act 1996* (NSW) s 51D(2).

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

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

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

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

43. *R v Smith* [2023] NSWDC 88 [19], [79]; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(a).

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

- 3.28 Warnings under the *Young Offenders Act 1997 (NSW)* (*Young Offenders Act*) should be made available for the unauthorised possession and use of gel blasters by children.
- 3.29 Some submissions observed that it is mostly children who are dealt with for gel blaster offences.⁴⁵ We cannot verify this, as there is no available data on offences that specifically involve gel blasters and children. Nevertheless, it is reasonable to be concerned about the potential for the current law to affect children disproportionately, given the sale or purchase of gel blasters as toys.⁴⁶
- 3.30 The *Young Offenders Act* has three kinds of diversionary options: warnings, cautions and youth justice conferences. Generally, a police officer or a court can give a caution or refer a child to a youth justice conference for any summary or indictable offence covered by the *Young Offenders Act*.⁴⁷ However, warnings may only be given for summary offences covered by the *Young Offenders Act*.⁴⁸ As firearms offences are not summary offences, warnings are not available for any offences involving gel blasters.
- 3.31 A police officer must not issue a warning if the offending involves violence or if it is more appropriate to deal with the matter in other ways.⁴⁹
- 3.32 The NSWPF considers that the existing exceptions in the *Young Offenders Act* should remain because of the gravity and public safety risks of the excluded offences.⁵⁰
- 3.33 However, we consider that warnings would be appropriate for children for the unauthorised possession and use of gel blasters. This is because:
- gel blasters pose a limited risk of physical harm
 - children primarily use gel blasters as toys
 - children may not be aware that gel blasters are illegal, and
 - prosecution for a gel blaster offence can unnecessarily expose children to the criminal justice system.
- 3.34 We limit this recommendation to gel blasters only, not to other types of imitation firearms. This is because of the specific issue of gel blasters being marketed to children and the lack of knowledge about the legal status of gel blasters, further

45. Law Society of NSW, *Submission WE08*, 4; Youth Justice NSW, *Submission WE09*, 10.

46. NSW Bar Association, *Submission WE12* [26], [54]; Legal Aid NSW, *Submission WE11*, 12, 46–48; *R v Lucas* [2023] NSWSC 1357 [11]; *R v Smith* [2023] NSWDC 88 [18], [72], [74].

47. *Young Offenders Act 1997 (NSW)* s 8, s 18.

48. *Young Offenders Act 1997 (NSW)* s 13.

49. *Young Offenders Act 1997 (NSW)* s 14(1)–(2).

50. NSW Police Force, *Submission WE17*, 1.

explained below. We also limit the recommendation to gel blasters due to the danger posed by imitation firearms generally, as explained in chapter 2.

- 3.35 The Bar Association and Youth Justice NSW proposed that diversion should be available to children and young people for unauthorised possession or use of gel blasters and imitation firearms.⁵¹
- 3.36 Our view is that this recommendation could be adopted regardless of whether our other recommendations on gel blasters are adopted.

Education on the legal status of gel blasters is required

Recommendation 3.2: Public education on the legality of gel blasters

The NSW Government, including relevant agencies such as the Department of Education and the NSW Police Force, should educate the community and raise awareness about the legality of gel blasters in NSW and other Australian jurisdictions.

- 3.37 The public should be educated about the legal status of gel blasters in NSW and elsewhere in Australia.

The NSW public may mistakenly believe gel blasters are legal

- 3.38 We heard that adults and children who possess gel blasters may assume they are legal in NSW.⁵²
- 3.39 Several submissions observed that gel blasters are deliberately marketed as toys and are easily purchased online.⁵³
- 3.40 Differences in the legal regimes across Australian states and territories can also cause confusion.⁵⁴ Gel blasters can be imported legally into Australia. This is because they are not considered firearms under the *Customs (Prohibited Imports)*

51. NSW Bar Association, *Submission WE12* [54]–[56]; Youth Justice NSW, *Submission WE09*, 10.

52. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 10; Confidential, *Preliminary Submission PWE11*, 2; Defence Roundtable, *Preliminary Consultation PWEC02*; Legal Aid NSW, *Submission WE11*, 12; J Maloney, *Submission WE02*, 2.

53. NSW Bar Association, *Submission WE12* [26], [54]; Law Society of NSW, *Submission WE08*, 3–4; Legal Aid NSW, *Submission WE11*, 12; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 10.

54. Legal Aid NSW, *Submission WE11*, 11–12; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 10; NSW Police Force, *Submission WE16*, 4–5; Legal Aid NSW, *Preliminary Submission PWE12*, 3; Law Society of NSW, *Preliminary Submission PWE05*, 2.

Regulations 1956 (Cth).⁵⁵ In South Australia, gel blasters are considered paintball guns (which are also categorised as firearms).⁵⁶ In Victoria, gel blasters are not classified as firearms, but they can be an imitation firearm if they look like an operable firearm.⁵⁷

- 3.41 In Queensland, gel blasters can be legally purchased and possessed.⁵⁸ However, some of its laws concerning replica weapons extend to include gel blasters that replicate a weapon. For example, it is an offence to possess, without reasonable excuse, a “restricted item”, which includes a replica of a firearm (such as a gel blaster that replicates a firearm).⁵⁹ It is an offence to carry a replica weapon (such as a gel blaster that replicates a firearm) exposed in public without a reasonable excuse.⁶⁰ Queensland is also introducing a new law that makes it an offence for children under the age of 18 to purchase a replica weapon.⁶¹
- 3.42 The adverse consequences arising from different laws may be especially significant in rural and regional NSW communities near the border.⁶²
- 3.43 Any recommendation we propose cannot address these issues without national coordination or uniform laws. However, the practical effects of the jurisdictional differences on people in NSW is an important consideration when reviewing NSW law.
- 3.44 A public education campaign on the legal status of gel blasters could be effective in promoting the correct information about the law.

Suggested features of an education campaign

- 3.45 Any education initiative should reflect the current state of the law in other jurisdictions, especially Queensland, and should be regularly reviewed and updated to ensure accuracy.

55. Australia, Department of Home Affairs, *Revised Treatment of Gel Ball Blasters and Similar Low Powered Devices*, Notice 2017/43 (2017) 1; Legal Aid NSW, *Submission WE11*, 11.

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

57. *Police v Eliassides* [2020] VMC 15 [37]; Victoria Police, “Firearms Industry News” (20 March 2024) <<https://www.police.vic.gov.au/firearms-industry-news>> (retrieved 23 May 2024); *Control of Weapons Act 1990* (Vic) s 3(1) definition of “imitation firearm”.

58. Queensland Police, “Gel Blasters” (15 August 2019) <<https://www.police.qld.gov.au/weapon-licensing/Gel-Blasters>> (retrieved 23 May 2024); *R v Smith* [2023] NSWDC 88 [10].

59. *Weapons Act 1990* (Qld) s 67(8) definition of “restricted item”; *Weapons Categories Regulation 1997* (Qld) cl 9(f)(i).

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

61. *Summary Offences Act 2005* (Qld) s 19G–19I, inserted by *Summary Offences (Prevention of Knife Crime) and Other Legislation Amendment Act 2024* (Qld) s 6 (not yet commenced).

62. Law Society of NSW, *Submission WE08*, 4; NSW Police Force, *Submission WE16*, 4–5.

- 3.46 The NSW Government could consider the creation of plain English printed and online material for members of the public. These should contain descriptions and images of what types of gel blasters are legal and illegal. For example, Victorian police have issued a “quick guide” to assist the public to identify whether a gel blaster is an imitation firearm or a toy.⁶³
- 3.47 It may also be necessary to target specific audiences, such as businesses. The Bar Association observed that retailers in regional NSW, the Far North Coast and Queensland play an important role in preventing the unnecessary criminalisation of children, young people and their parents.⁶⁴
- 3.48 Education initiatives should also be aimed at children, young people and parents (for example, through schools). Legal Aid’s submission included a letter issued to parents from the NSWPF that explains the illegality of gel blasters.⁶⁵ This is an example of a targeted, education initiative that could be included alongside other measures such as state-wide campaigns (including on social media) and workshops in schools.
- 3.49 The education campaign could also include information about the National Firearms Amnesty. This allows people to surrender firearms at a police station without prosecution.⁶⁶

Potential options for addressing concerns about legal status

- 3.50 We make no recommendation to change the legal status of gel blasters. As this is not a sentencing issue, it falls outside our terms of reference.
- 3.51 However, the concerns outlined above suggest that the legal status of gel blasters may require further review. Below we set out some options for consideration by the NSW Government.

Only criminalise gel blasters that are “imitation firearms”

- 3.52 The NSW Government could consider amending the *Firearms Act* to provide that gel blasters are illegal only when they meet the existing definition of “imitation firearm”.

63. Victoria Police, Licensing and Regulation Division, *Quick Guide: Imitation Firearms: Distinguishing Imitation Firearms from Toys and Other Firearm Themed Paraphernalia* (C2022).

64. NSW Bar Association, *Submission WE12* [31].

65. Legal Aid NSW, *Submission WE11*, 53.

66. NSW Police Force, “Amnesty” <https://www.police.nsw.gov.au/online_services/firearms/amnesty> (retrieved 23 May 2024); Legal Aid NSW, *Submission WE11*, 53.

- 3.53 This approach would decriminalise gel blasters that do not meet the definition of “imitation firearm”. This includes gel blasters that meet the definition of “children’s toys”.
- 3.54 Whether or not this reform option is pursued, there should be no change to the existing maximum penalties for offences involving gel blasters that fit the definition of imitation firearm.

Gel blasters could be excluded from the definition of “firearm”

- 3.55 If the NSW Government sought to only criminalise gel blasters that are “imitation firearms”, gel blasters could be excluded from the definition of firearm by either:
- including gel blasters in clause 4 of the *Firearms Regulation 2017*, which is a list of things declared not to be firearms,⁶⁷ or
 - excluding gel blasters expressly from the definition of “firearm”, in the same way paintball markers are excluded from this definition.⁶⁸
- 3.56 Both options would achieve the result of removing gel blasters from the definition of “firearm” under the *Firearms Act*. The second option may provide greater clarity in the law as the exclusion would appear in the *Firearms Act*, while the first option relies on a cross-reference to the regulation.
- 3.57 To implement either option, “gel blaster” would need to be defined in the *Firearms Act*. Firearms experts and prosecutorial agencies should be consulted on an appropriate statutory definition of “gel blaster”. We are aware of the following descriptions that may provide guidance:
- an object capable of propelling hydrated gel pellets and foam pellets through a mechanism involving compressed air,⁶⁹ and
 - “devices that discharge soft and non-dangerous items such as soft darts and hydrolysed super-absorbent polymers (gel balls)”.⁷⁰

Gel blasters that are “imitation firearms” could continue to be criminalised

- 3.58 Gel blasters that are “imitation firearms” should continue to be criminalised.⁷¹ This would include, for instance, a gel blaster that substantially looks like a firearm and does not meet the definition of a “children’s toy”.⁷²

67. Legal Aid NSW, *Submission WE11*, 13.

68. *Firearms Act 1996* (NSW) s 4(1) definition of “firearm”. See [3.74].

69. *R v Smith* [2023] NSWDC 88 [10]; *R v Andrew (No 2)* [2018] NSWDC 382 [9].

70. Australia, Department of Home Affairs, *Revised Treatment of Gel Ball Blasters and Similar Low Powered Devices*, Notice 2017/43 (2017).

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

72. *Darestani v R* [2019] NSWCCA 248, 100 NSWLR 461 [62]; *Firearms Act 1996* (NSW) s 4D(4).

- 3.59 Criminal regulation is still appropriate for gel blasters that appear to be realistic firearms. This would make NSW more consistent with the Queensland approach where gel blasters are legal, but ones that are replica weapons cannot be possessed in public without a reasonable excuse.⁷³
- 3.60 As mentioned in chapter 2, imitation firearms can have a profound psychological impact on victims even if they are not capable of being discharged. Ordinary people and police officers can mistake them for actual firearms. Imitation firearms can also be used to carry out robberies and other serious offences. While imitation firearms cannot cause the same level of physical harm as actual firearms, they can be presented in the same manner as genuine firearms. Therefore, they pose a real risk to public safety.
- 3.61 Under this approach, permit requirements that apply to all imitation firearms would continue to apply to gel blasters that are “imitation firearms”, as defined.⁷⁴ It does not appear that the NSWPF currently issues any permits for gel blasters as there is no “genuine reason” to possess or use a gel blaster.⁷⁵ Similarly, in Victoria, authorities consider there is no lawful reason to possess or use gel blasters that imitate firearms, and so approvals are not granted.⁷⁶
- 3.62 The approach would mean that gel blasters that are “imitation firearms” would also continue to fall within the *Crimes Act* definitions of “offensive weapon” and “dangerous weapon”,⁷⁷ where the maximum penalties can be higher than the maximum penalties for unauthorised possession or use of a firearm.⁷⁸

The current maximum penalties should continue to apply

- 3.63 As we said above, offences involving imitation firearms carry the same maximum penalty as offences involving genuine firearms. This approach would also mean that a gel blaster that is an “imitation firearm” would continue to attract the same maximum penalties as the firearm it imitates.

73. See [3.41].

74. *Firearms Act 1996* (NSW) s 4D(1)(a), s 4D(3).

75. NSW Police Force, “Frequently Asked Questions: Firearms and Ammunition” <https://www.police.nsw.gov.au/online_services/firearms/firearms_and_ammunition/frequently_asked_questions> (retrieved 23 May 2024).

76. Victoria Police, “Firearms Licensing” (19 April 2024) <<https://www.police.vic.gov.au/firearms-licensing>> (retrieved 23 May 2024).

77. *Crimes Act 1900* (NSW) s 4(1) definition of “offensive weapon or instrument”, definition of “dangerous weapon”; NSW Bar Association, *Submission WE12* [30]; NSW, Public Defenders, *Submission WE19* [28]; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PWE08*, 3.

78. See e.g. *Crimes Act 1900* (NSW) s 33B(1)(a), s 97(1)–(2).

- 3.64 We received submissions that suggested a new summary offence with a lower maximum penalty could be available for mere unauthorised possession of gel blasters and imitation firearms. Submissions proposed this due to the lower level of seriousness for offences of mere possession, especially where there is no evidence of criminal intent or use.⁷⁹ We also discuss this proposal in chapter 2.
- 3.65 However, we do not recommend changes to the maximum penalties. In our view, the current maximum penalties for unauthorised possession or use of a firearm allow sufficient scope for the imposition of an appropriate sentence for gel blasters that are “imitation firearms”.
- 3.66 We agree with the NSWPF submission that the appearance or use of a gel blaster in the commission of an offence should be treated in line with the current sentencing approach.⁸⁰ In sentencing an offender, a court will exercise broad sentencing discretion to ensure that it considers all the relevant circumstances of a case.⁸¹ Relevant circumstances can include whether a weapon can ever cause actual harm and the ability of the weapon’s projectile to cause any serious harm (for example gel pellets).⁸²
- 3.67 Recent cases indicate that discretion is being used appropriately in cases involving objects that look like realistic firearms. The cases consider the objective seriousness of possession, the offender’s intention for possessing the weapon and the offender’s subjective circumstances.
- 3.68 For example, one matter concerned a person charged with unauthorised possession of more than three firearms, an offence that carries a maximum penalty of 20 years’ imprisonment.⁸³ The offender had five gel blaster firearms “with authentic surface finishes” and one gel blaster that was a replica pistol.⁸⁴
- 3.69 In assessing the objective seriousness of the offending, the court said that the offender did not possess the gel blasters for “nefarious purposes” and there was no relationship between the gel blasters and the drug industry.⁸⁵ However, the court also took into account the location and lack of security in which the gel blasters were kept. The court said that while the gel blasters were not modified to be made

79. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 10–11; Legal Aid NSW, *Submission WE11*, 13.

80. NSW Police Force, *Submission WE16*, 5.

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

82. *R v Andrew (No. 2)* [2018] NSWDC 382 [21].

83. *Firearms Act 1996* (NSW) s 51D(2); *R v Yalim* [2023] NSWDC 111 [2].

84. *R v Yalim* [2023] NSWDC 111 [2], [15].

85. *R v Yalim* [2023] NSWDC 111 [30], [59].

more dangerous, they already “presented a measure of risk and could be dangerous in the wrong hands.”⁸⁶

- 3.70 After considering the offender’s subjective case (including a guilty plea and finding of special circumstances), the court imposed a head sentence of 3 years, and a non-parole period of 1 year and 6 months.
- 3.71 In another matter, an offender was charged with unauthorised possession of seven air guns that were capable of firing gel pellets or foam projectiles. They appeared to be realistic firearms. The court took into account the offender’s exceptional subjective circumstances (including intellectual disability) and the fact that the weapons and projectile could not cause actual harm or serious harm.⁸⁷ It found that a custodial penalty was not justified, and the offender received a non-conviction and a conditional release order.⁸⁸
- 3.72 The above cases demonstrate the court’s ability to consider all the relevant circumstances of a case and impose an appropriate sentence within the scope of the current maximum penalties.

A new regulatory scheme for gel blasters

- 3.73 Another reform option to address concerns about the legal status of gel blasters is to introduce a new regulatory scheme.
- 3.74 For example in NSW, paintball markers are excluded from the definition of “firearm” and are regulated in their own legislation.⁸⁹ Paintball markers can only be used at an authorised venue.⁹⁰ They can be possessed outside of an authorised venue only with a permit.⁹¹ Where a paintball marker meets the definition of an “imitation firearm” an additional permit for imitation firearms is required.⁹²
- 3.75 Some submissions proposed a new regulatory model to deal with gel blasters if they are excluded from the definition of firearms.⁹³ Three submissions

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

87. *R v Andrew (No 2)* [2018] NSWDC 382 [21], [22].

88. *R v Andrew (No 2)* [2018] NSWDC 382 [22], [47]–[49].

89. *Firearms Act 1996* (NSW) s 4(1) definition of “firearm”; *Paintball Act 2018* (NSW).

90. *Paintball Act 2018* (NSW) s 5.

91. *Paintball Act 2018* (NSW) s 6.

92. *NSW, Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 13 September 2023, 6–7.

93. J Maloney, *Submission WE02*, 9, 19; Confidential, *Submission WE13*, 5; NSW Young Lawyers Criminal Law Committee, *Submission WE15*, 3, 9; Law Society of NSW, *Submission WE08*, 6; NSW Police Force, *Submission WE16*, 4–5.

recommended the approach in South Australia.⁹⁴ In South Australia, gel blasters are placed in the same category as paintball guns.⁹⁵ The unauthorised possession of a paintball gun carries a maximum penalty of 4 years' imprisonment or \$20,000.⁹⁶ One submission stated that a separate regulatory system with lower maximum penalties than firearms would be appropriate to regulate gel blasters that are not presented as ordinary firearms.⁹⁷

- 3.76 However, other submissions opposed or cautioned against regulating gel blasters that do not imitate firearms. The Bar Association submitted that if gel blasters are excluded from the definition of "firearm", it should not be assumed that gel blasters should be regulated alongside paintball markers or require any regulation at all, noting that paintball markers have a higher impact force than gel blasters.⁹⁸ Similarly, the Public Defenders considered that regulation of gel blasters under the *Paintball Act 2018* (NSW) would be unnecessary and disproportionate to the harm they pose.⁹⁹

94. Confidential, *Submission WE13*, 5; NSW Young Lawyers Criminal Law Committee, *Submission WE15*, 9; Law Society of NSW, *Submission WE08*, 6.

95. *Firearms Regulations 2017* (SA) reg 8A; *Firearms Act 2015* (SA) s 5(2).

96. *Firearms Act 2015* (SA) s 5(1)(a)(ii), s 9(4)(c).

97. Confidential, *Submission WE13*, 5.

98. NSW Bar Association, *Submission WE12* [28].

99. NSW, Public Defenders, *Submission WE19* [27].

4. Prohibited weapons

In brief

The offence of possessing or using a prohibited weapon should be separated into two tiers of offences, with maximum penalties of 14 years' imprisonment for the higher tier and 5 or 7 years' imprisonment for the lower tier. Penalty notices should be available for fine-only offences under the relevant prohibited weapons laws.

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- 4.1 In this chapter, we consider weapons that are prohibited under the *Weapons Prohibition Act 1998* (NSW) (*Weapons Prohibition Act*).
- 4.2 We recommend that there should be two tiers of offences for the unauthorised possession or use of a prohibited weapon. As part of this recommendation, we propose that consultation with experts should occur to determine the types of weapons for each tier and we propose the monitoring of offence trends. We also recommend that penalty notices should be introduced for fine-only offences relating to prohibited weapons.
- 4.3 We do not recommend creating a new summary offence for possession or use. Nor do we recommend changing the maximum penalties for this offence.

- 4.4 We also do not recommend changing the maximum penalty for the offence of possession or use in contravention of a weapons prohibition order (WPO). We explain why a tiered offence structure should not be introduced for this offence.
- 4.5 This chapter outlines the offences we focus on, including some key data about these offences. It explains our recommendation to introduce offence tiers for the possession or use offence. It discusses the proposal for a new summary offence for possession or use. It then addresses the offence of possession or use in contravention of a WPO, and finally, it explains why penalty notices for fine-only offences should be introduced.

Overview of the focus offences

- 4.6 The *Weapons Prohibition Act* prohibits specific weapons other than firearms.¹ Prohibited weapons are divided into the following categories, not necessarily in order of seriousness:
- 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 etc, and
 - miscellaneous articles (including body armour vests, handcuffs and silencers).
- 4.7 This chapter focuses on two broad categories of prohibited weapons offences:
- offences relating to possession or use of prohibited weapons and possession or use in contravention of a WPO, and
 - fine-only offences under the *Weapons Prohibition Act* and the *Weapons Prohibition Regulation 2017 (NSW) (Weapons Prohibition Regulation)*.²
- 4.8 We focus on these offences because they are some of the most common offences within the scope of our review and/or we heard through stakeholders and submissions that there are issues with these offences.
- 4.9 In this section, we provide an overview of these offences and sentencing statistics relating to them. The available data on prohibited weapons offences does not identify what type of prohibited weapon was used in each case.³ For example, it is

1. *Weapons Prohibition Act 1998* (NSW) sch 1.

2. *Weapons Prohibition Act 1998* (NSW) s 7(1), s 12, s 20A, s 21(1), s 22(1), s 22(2), s 24(1)–(3), s 30, s 34(1); *Weapons Prohibition Regulation 2017* (NSW) cl 8, cl 9.

3. See, eg, *R v Irwin* [2019] NSWCCA 133 [79].

not known whether a case involved a flick knife or a grenade. However, the data does show whether a matter involved a military-style weapon or a non-military-style weapon.

Offences concerning possession or use

- 4.10 The first category of offences we focus on concerns possession and use. These offences are:
- the unauthorised use or possession of a prohibited weapon,⁴ (the possession or use offence) and
 - the use or possession of a prohibited weapon in contravention of a WPO (the WPO offence).⁵
- 4.11 It is possible to obtain a permit to possess or use prohibited weapons.⁶ The Commissioner of Police must be satisfied of various conditions before issuing a permit, including that the applicant is a fit and proper person and can be trusted to have possession of prohibited weapons without endangering the public.⁷

Possession or use of any prohibited weapon

- 4.12 The possession or use offence has a maximum penalty of 14 years' imprisonment and a standard non-parole period (SNPP) of five years.⁸
- 4.13 The maximum penalty for the possession or use offence does not vary depending on the type of weapon or seriousness of the weapon. This means that possessing or using a military-style weapon has the same maximum penalty as possessing or using a body armour vest.
- 4.14 The possession or use offence is one of the most common offences in the scope of this review, with 12,103 proven charges from 2013 to 2022.⁹ Twenty-eight of these involved a military-style prohibited weapon.¹⁰

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

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

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

7. *Weapons Prohibition Act 1998* (NSW) s 10(2)–(5), s 11.

8. *Weapons Prohibition Act 1998* (NSW) s 7(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A item 24.

9. NSW Bureau of Crime Statistics and Research, ab23-22460, table 1; *Weapons Prohibition Act 1998* (NSW) s 7(1).

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

- 4.15 The possession or use offence is indictable but is tried summarily (before the Local Court) unless the prosecutor elects to try the matter on indictment (Table 2 offence).¹¹
- 4.16 Almost all proven instances of this offence are dealt with in the Local Court. For adult offenders from 2013 to 2022, the Local Court determined 99% of matters (5,368 of 5,418 matters) where the offence was the principal offence proven.¹²
- 4.17 The most common penalty imposed was a fine (1,984 or 37%), followed by an unsupervised community sentence (1,769 or 33%).¹³
- 4.18 The possession or use offence is not commonly prosecuted in the District Court. In 2022 the District Court sentenced the offence of possession or use of a prohibited weapon where it was the principal offence (adult offenders only) on one occasion.¹⁴ That matter received a sentence of imprisonment with a head sentence greater than 24 months.¹⁵
- 4.19 The data reveals that not many possession or use offences involve military-style weapons. From 2013 to 2022, there were 28 out of 12,103 proven matters that involved a military-style weapon.¹⁶ In the same period, there were five proven matters where the principal offence was unauthorised possession or use of a military-style weapon (adult offenders only).¹⁷ Out of these five matters, only one offender received a sentence of imprisonment which had a non-parole period of 7 months.¹⁸
- 4.20 In 2022, there were 699 proven matters where the possession or use offence was the principal offence (adult offenders only).¹⁹ In relation to offender demographics, a significant percentage (28% or 193) involved Aboriginal offenders.²⁰ A significant proportion (21% or 147) involved defendants aged 18 to 25 years old, and the highest proportion of defendants (36% or 248) were from the most disadvantaged area, according to the Australian Bureau of Statistics' Socio-Economic Indexes for Areas (SEIFA) system.²¹

11. *Criminal Procedure Act 1986* (NSW) sch 1 table 2.

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

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

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

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

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

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

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

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

20. NSW Bureau of Crime Statistics and Research, ab23-22643, table 7.

21. NSW Bureau of Crime Statistics and Research, ab23-22643, table 8.

Possession or use in contravention of a WPO

- 4.21 The WPO offence has a maximum penalty of 10 years' imprisonment and does not have an SNPP.²²
- 4.22 The WPO offence was not proven as frequently as the possession or use offence, as detailed above. In relation to the WPO offence, from 2013 to 2022 the total number of proven matters was 334, which was significantly lower than the possession or use offence.²³ In 2022, there were only 80 proven matters for the WPO offence.²⁴
- 4.23 From 2013 to 2022, there were 84 matters where the offence was the principal offence involving adult offenders only, and all were finalised in the Local Court.²⁵ Compared with the possession or use offence, a much smaller proportion received fines (9 or 11%), and a larger proportion received a sentence of imprisonment (36 or 43%).²⁶
- 4.24 In 2022, the Local Court sentenced 18 matters involving adult defendants for possession or use of a prohibited weapon contrary to a WPO where it was the principal offence.²⁷ Of these, eight received a sentence of imprisonment, eight received a community corrections order and two received a fine.²⁸ Of the eight sentences of imprisonment, the average non-parole period was eight months. There was no head sentence greater than 22 months' imprisonment.²⁹
- 4.25 A significant proportion of matters involved Aboriginal defendants. Five (28%) out of the 18 sentenced matters in 2022 (where the offence was the principal offence for adult offenders only) involved Aboriginal defendants.³⁰ No proven matters from 2013 to 2022 involved defendants under the age of 18.³¹

Fine-only offences

- 4.26 We also considered offences under the *Weapons Prohibition Act* and the *Weapons Prohibition Regulation* where the maximum penalty is a fine, also known as "fine-only offences".

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

23. NSW Bureau of Crime Statistics and Research, ab23-22640, table 1; *Weapons Prohibition Act 1998* (NSW) s 34(1).

24. NSW Bureau of Crime Statistics and Research, ab23-22640, table 1.

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

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

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

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

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

30. NSW Bureau of Crime Statistics and Research, ab23-22643, table 7.

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

4.27 There are 14 fine-only offences, set out below. Most of them apply to permit-holders and relate to compliance with permit requirements.

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

4.28 These offences do not appear to be commonly prosecuted and proven. There was a very limited number of finalised and proven matters for the 14 identified fine-only offences from 2018 to 2022. In this period, there were 10 finalised charges and only three proven matters.³²

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

4.29 There was one sentenced matter in which one of the fine-only offences was the principal offence (adult offenders only).³³ The court imposed an unsupervised community sentence.³⁴

A new tiered structure for possession or use

Recommendation 4.1: Introduce tiered offences, carry out consultations and monitoring

- (1) The *Weapons Prohibition Act 1998* (NSW) should be amended to introduce two tiers of offences for the possession or use of a prohibited weapon.
- (2) Consultation with subject matter experts should be undertaken to determine the appropriate weapons for each tier.
- (3) The first offence tier should have a maximum penalty of 14 years' imprisonment. The second offence tier should have a maximum penalty of 5 years or 7 years' imprisonment. The maximum penalty for the second tier is to be determined according to the types of weapons that fall into each tier.
- (4) The NSW Government should monitor and review sentencing outcomes and patterns to determine whether the offence tiers are appropriate.

4.30 We recommend that section 7(1) of the *Weapons Prohibition Act* be amended to introduce two offence tiers for the possession or use of a prohibited weapon.

4.31 We recommend that the NSW Government consult with relevant experts to determine the appropriate weapons for each category. Some factors that may assist in determining the appropriate weapons for each tier are discussed below. Our recommendation for consultation is relevant to submissions that questioned whether particular weapons should be criminalised (such as weapons that are easily purchased online) and called for a comprehensive and holistic review of the schedule of prohibited weapons.³⁵

4.32 The higher tier should retain the current maximum penalty of 14 years' imprisonment, and the lower tier should have a maximum penalty of 5 years or 7 years' imprisonment. The appropriate maximum penalty for the lower tier will depend on the NSW Government's determination as to the kind of weapons that fall in the lower tier.

4.33 We recommend that the NSW Government monitor and review the operation of the new offence tiers. In recommending this, we acknowledge that it may affect a large

33. NSW Bureau of Crime Statistics and Research, ab23-22460, table 3; *Weapons Prohibition Act 1998* (NSW) s 24(3).

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

35. Legal Aid NSW, *Submission WE11*, 9; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 7. See also J Maloney, *Submission WE02*, 22, 24, 27, 34–37.

group of offenders, and therefore should be monitored to evaluate the appropriateness.

- 4.34 We do not make any recommendations regarding the types of prohibited weapons that should fall into each tier. Neither do we make any recommendations regarding a comprehensive review of the schedule of prohibited weapons, as proposed by some submissions.³⁶
- 4.35 The NSW Government could consider equivalent laws in other Australian states and territories. Different jurisdictions classify different weapons in diverse ways, and not all jurisdictions criminalise the same kinds of weapons.³⁷
- 4.36 We do not make a recommendation to introduce an SNPP to the lower tier offence. In chapter 6, we explain our recommendation regarding the monitoring of sentencing outcomes for the lower tier offence (should the NSW Government implement it) to determine whether the lower tier offence should have an SNPP.

The current maximum penalty covers a broad range of weapons

- 4.37 Many submissions supported introducing a tiered offence or offences that differentiate between different types of prohibited weapons.³⁸ A tiered offence structure would address a problem with the current offence. That is, a single, high maximum penalty applies to a broad range of weapon types of varying degrees of seriousness. A single maximum penalty is not appropriate for the range of offending covered by this offence.
- 4.38 The current maximum penalty may be too high for less serious weapons, especially non-military-style weapons. For example, possessing a slingshot is arguably less serious or dangerous than possessing a military-style weapon, such as a bomb.³⁹
- 4.39 The current maximum penalty may be disproportionately high and may not reflect the seriousness of many matters dealt with by the courts. Statistics show that most offences involve non-military-style weapons, and are dealt with in the Local Court by way of fines.⁴⁰

36. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 6; Legal Aid NSW, *Submission WE11*, 9.

37. See, eg, *Prohibited Weapons Act 1996* (ACT) s 5, sch 1; *Summary Offences Act 1953* (SA) s 21F; *Summary Offences Regulations 2016* (SA) reg 6.

38. NSW Council for Civil Liberties Inc, *Submission WE06*, 4; NSW, Public Defenders, *Submission WE19* [8], [10]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 6–7; Legal Aid NSW, *Submission WE11*, 8–9; NSW Bar Association, *Submission WE12* [10]–[12].

39. *Jacob v R* [2014] NSWCCA 65 [180].

40. NSW Bureau of Crime Statistics and Research, ab23-22643, table 2. See also NSW Bar Association, *Submission WE12* [9].

It may be difficult for courts to assess the objective seriousness

- 4.40 A tiered offence structure may also help courts to assess the objective seriousness of a possession or use offence, particularly in matters involving less serious weapons. Differentiated maximum penalties will provide a more appropriate reflection of the objective seriousness of offences committed with particular types of weapons. It would continue to allow courts adequate sentencing scope for consideration of the individual circumstances of each case.
- 4.41 The existing problem for courts in assessing the objective seriousness of an offence has been raised in case law and submissions. In a Court of Criminal Appeal decision, the majority stated that it might not be possible to identify a feature common to all non-military-style weapons, aside from their ability to cause serious injury and that many of these weapons can be concealed.⁴¹ The majority further found it is difficult to determine what kind of prohibited weapon would fall in the middle range of objective seriousness.⁴²
- 4.42 Some submissions said that the single maximum penalty posed issues when assessing objective seriousness on sentence, and argued that differentiated maximum penalties could promote better consistency in sentencing.⁴³ One submission stated that due to the large range of prohibited weapons covered by the offence, the utility of a single maximum penalty as a “yard stick” for sentencing might be reduced.⁴⁴ Courts may have to rely on extraneous information or take judicial notice to determine the impact of a specific weapon on objective seriousness.⁴⁵
- 4.43 One submission opposed the creation of tiers because courts are able to impose sentences that accord with the objective seriousness of the offending (which includes consideration of the nature of the weapon) and the offender’s subjective case.⁴⁶ The submission also said that the sentencing outcomes for 2022 show that the Local Court is appropriately dealing with less serious offences.⁴⁷
- 4.44 We acknowledge that courts can assess the seriousness of offending as part of ordinary sentencing discretion, without the need to construct a hierarchy of

41. *Jacob v R* [2014] NSWCCA 65 [181].

42. *Jacob v R* [2014] NSWCCA 65 [184] (RS Hulme AJ, Ward JA agreeing). See also *R v Williams* [2005] NSWCCA 355 [37].

43. NSW, Public Defenders, *Submission WE19* [7]–[10]. See also NSW Bar Association, *Submission WE12* [7], [11].

44. NSW, Public Defenders, *Submission WE19* [9].

45. NSW, Public Defenders, *Submission WE19* [9].

46. Confidential, *Submission WE13*, 2.

47. Confidential, *Submission WE13*, 2.

prohibited weapons.⁴⁸ However, legislative guidance in the form of offence tiers would provide a more accurate reflection of the seriousness of certain prohibited weapons in relation to others. In a two-tier offence structure, the respective maximum penalties would provide greater guidance for courts than the current single penalty.⁴⁹

A tiered approach is consistent with other offences

- 4.45 Our recommendation is consistent with the structure of other offences in the *Weapons Prohibition Act*, some of which have a higher maximum penalty where a military-style weapon is involved.⁵⁰ For example, the unauthorised sale of military-style weapons carries a maximum penalty of 20 years' imprisonment. The offence for non-military-style weapons carries a maximum penalty of 14 years' imprisonment.⁵¹ These existing tiered offences indicate that parliament considers some prohibited weapons are more serious than others.
- 4.46 Similarly, the *Firearms Act 1996* (NSW) also has a two-tiered approach. There is an offence for the possession or use of a firearm generally (with a maximum penalty of 5 years' imprisonment), and another offence for possession or use of a prohibited firearm or pistol (with a maximum penalty of 14 years' imprisonment).⁵² Some other offences in the *Firearms Act* are also structured in this way.⁵³

Maximum penalty for the higher tier, 14 years' imprisonment, and for the lower tier 5 or 7 years' imprisonment

- 4.47 We recommend a 14-year maximum penalty for the higher tier, and 5 years or 7 years for the lower tier, depending on the types of weapons in each tier.
- 4.48 Retaining a maximum penalty of 14 years' imprisonment for the higher tier would provide sufficient sentencing scope for the most serious of prohibited weapons, such as military-style weapons. Military-style weapons pose significantly greater risk of death or serious injury than other weapons and are capable of military application (for example, explosive devices and flamethrowers).⁵⁴
- 4.49 We do not recommend an increase to the maximum penalty for this offence. A 14-year maximum penalty is an appropriate sentencing "guidepost" and would be

48. *R v Irwin* [2019] NSWCCA 133 [76].

49. See NSW, Public Defenders, *Submission WE19* [9]–[10].

50. *Weapons Prohibition Act 1998* (NSW) s 23A, s 25A, s 25D.

51. *Weapons Prohibition Act 1998* (NSW) s 23A. See also NSW Bar Association, *Submission WE12* [12].

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

53. See, eg, *Firearms Act 1996* (NSW) s 50, s 50A(1)–(2), s 51(1)–(1A).

54. NSW, Ministry for Police, *Report on the Review of the Weapons Prohibition Act 1998 and Weapons Prohibition Regulation 1999* (2009) 28. See also NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 2 June 2010, 23522.

reserved for the “worst type of case”.⁵⁵ Many submissions agreed that the maximum penalty for possession or use is appropriate or more than adequate.⁵⁶

- 4.50 The introduction of a second lower tier is supported by the data that shows fines are the most common penalty for the offence.⁵⁷ The appropriate maximum penalty for the second tier will depend on the NSW Government’s assessment of the kind of weapons that should belong in the second tier.
- 4.51 Five years’ imprisonment as a maximum penalty for the second tier will provide the court with sufficient sentencing scope to deal with more serious circumstances of offending, even where less serious prohibited weapons are involved. One submission also proposed this maximum penalty amount for a category of prohibited weapons that have a miscellaneous nature.⁵⁸
- 4.52 Maximum penalties of 14 years and 5 years’ imprisonment for each tier are also consistent with the tiers for possession or use of a firearm, as explained above.⁵⁹ If the NSW Government considers that the most serious kind of prohibited weapons in the second tier are of similar seriousness to firearms (other than prohibited firearms and pistols), 5 years’ imprisonment may be an appropriate maximum penalty for the second tier.
- 4.53 If the second tier is to include prohibited weapons that are more serious than firearms other than prohibited firearms and pistols, a maximum penalty of 7 years’ imprisonment could be more appropriate to reflect this increased seriousness.
- 4.54 We do not recommend any change to the status of the offence as a Table 2 offence. Both tiers should retain this status. Table 2 offences are indictable offences that are dealt with summarily unless the prosecutor elects otherwise.⁶⁰ This is appropriate as 99% of all proven matters from 2013 to 2022 were dealt with in the Local Court.⁶¹
- 4.55 Some submissions suggested lowering the maximum penalties of the offences in the proposed tier structure.⁶² The Aboriginal Legal Service (ALS) proposed a tier for military-style weapons with a maximum penalty of 5 years’ imprisonment. The

55. *R v Way* [2004] NSWCCA 131, 60 NSWLR 168 [51].

56. Law Society of NSW, *Submission WE08*, 5; NSW Council for Civil Liberties Inc, *Submission WE06*, 4; NSW, Public Defenders, *Submission WE19* [6]; Confidential, *Submission WE13*, 2; NSW Police Force, *Submission WE16*, 2.

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

58. NSW Police Force, *Submission WE16*, 2.

59. See [4.466]. See also NSW Police Force, *Submission WE16*, 2–3.

60. *Criminal Procedure Act 1986* (NSW) sch 1 table 1.

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

62. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 7; Legal Aid NSW, *Submission WE11*, 8; NSW, Public Defenders, *Submission WE19* [11].

submission stated that the remaining prohibited weapons should have a separate tier with a maximum penalty of 2 years' imprisonment. It argued this would align NSW more with other Australian jurisdictions.⁶³ Two submissions considered that because the maximum penalty for the WPO offence is 10 years' imprisonment, compared to the maximum penalty of 14 years' imprisonment for possession or use, the maximum penalty for the latter offence should be reduced.⁶⁴

- 4.56 We acknowledge that the current maximum penalty does pose some jurisdictional inconsistencies and inconsistencies with the WPO offence. However, we do not consider the penalties of 2, 5 or 10 years' imprisonment to adequately reflect the seriousness of the offence, especially considering that maximum penalties represent the gravest kinds of offending.⁶⁵
- 4.57 One submission advised a cautious approach to the reduction of penalties.⁶⁶ We acknowledge concerns that a tiered approach may lead to lower sentences for the offences within the second tier. Maximum penalties reflect the public or parliament's assessment of the seriousness of an offence.⁶⁷ Where a maximum penalty has been lowered, a court can take this legislative change into account and set the sentence accordingly.⁶⁸ However, as fines are the most common penalty for this offence, it is likely that the practical effect of a lower maximum penalty will be minimal.

Relevant factors for tiers

- 4.58 We do not identify which weapons should be covered by each tier. However, we identify some factors which may be relevant when determining the types of weapons that could belong in each tier.
- 4.59 As mentioned above, we consider that a maximum penalty of 14 years' imprisonment is appropriate for military-style weapons. Some submissions proposed that the tiers could be divided into military-style and non-military-style weapons, with the higher tier reserved for military-style weapons.⁶⁹
- 4.60 Non-military-style weapons include imitations of military-style weapons. While these do not cause physical harm, they can cause psychological damage and can be presented in the same manner as a genuine weapon, as we mentioned in chapter 2.

63. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 7.

64. Legal Aid NSW, *Submission WE11*, 8; NSW, Public Defenders, *Submission WE19* [11]; *Weapons Prohibition Act 1998* (NSW) s 34(1)).

65. *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].

66. NSW Police Force, *Submission WE16*, 2.

67. *R v Way* [2004] NSWCCA 131, 60 NSWLR 168 [51]; *R v Ronen* [2006] NSWCCA 123 [73].

68. *R v Ronen* [2006] NSWCCA 123 [74].

69. NSW Bar Association, *Submission WE12* [11]; NSW, Public Defenders, *Submission WE19* [10].

This may be a relevant factor as to whether the higher tier should also include non-military-style weapons.

- 4.61 Some submissions considered that weapons could be differentiated based on their capability of inflicting serious injury and those of a more miscellaneous nature.⁷⁰ Another submission proposed detailed classification of weapons based on weapon type, size and calibre.⁷¹
- 4.62 Instead of providing a list of weapons for each tier, another option could be to define each tier in terms of relative capacity to cause harm, and allow prosecutorial and court discretion to determine which tier the offending falls into. Another suggestion could be to separate the tiers in terms of offensive or defensive weapons.

A new summary offence for possession or use should not be created

- 4.63 We do not support the introduction of a new summary offence for the possession or use of a prohibited weapon.
- 4.64 Legal Aid raised this option.⁷² It was submitted that a summary offence should be reserved for less serious prohibited weapons and should carry a maximum penalty of 2 years' imprisonment. In its view, this maximum penalty would be more consistent with other jurisdictions. Legal Aid stated that some prohibited weapons, such as knuckle-dusters, are widely available on Amazon and eBay.⁷³ The ALS also suggested the option of a new summary offence as an alternative to tiered offences.⁷⁴
- 4.65 In our view, the introduction of tiers is preferable as this would allow the offence to remain an indictable offence.
- 4.66 In addition, we do not consider that a summary offence would adequately reflect the seriousness of possessing or using any prohibited weapon due to the potential danger that all prohibited weapons pose.⁷⁵ Even prohibited weapons that are “less serious” can be used in a fatal way, for example, a slingshot that is used to fire a

70. NSW Council for Civil Liberties Inc, *Submission WE06*, 4; NSW Office of Director of Public Prosecutions, *Preliminary Submission PWE08*, 4; Legal Aid NSW, *Submission WE11*, 8–9.

71. NSW, Public Defenders, *Submission WE19* [8].

72. Legal Aid NSW, *Submission WE11*, 8–9.

73. Legal Aid NSW, *Submission WE11*, 8–9.

74. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 7.

75. See NSW Police Force, *Submission WE16*, 2.

ball.⁷⁶ Further, prohibited items of a “miscellaneous nature” such as handcuffs and silencers, can be used to aid or facilitate the commission of serious offences.

- 4.67 The possession or use of any prohibited weapon without the proper authorisation poses a significant risk to public safety. For less serious instances of possession, the data above shows that currently the Local Court can appropriately exercise sentencing discretion towards the lower end of the maximum penalty.

No change to maximum penalty for contravention of a weapons prohibition order

- 4.68 We heard competing views about whether the maximum penalty for the WPO offence should change. Some considered that the maximum penalty should be increased.⁷⁷
- 4.69 One suggestion was to raise the maximum penalty to 14 years’ imprisonment, so that it is consistent with the maximum penalty for possession or use of a prohibited weapon generally.⁷⁸ Submissions raised the following reasons:
- WPOs are intended to prohibit people with a known criminal history from possessing weapons, and those who are subject to a WPO pose a greater risk than those who are not.⁷⁹
 - the differences in maximum penalties between the WPO offence and the possession or use offence undermine the utility and deterrent effect of the WPO offence.⁸⁰
 - there is no rational basis for the difference in maximum penalties, as the WPO offence involves the same degree of criminality, if not more, than the possession or use offence.⁸¹
 - due to the lack of an SNPP for the WPO offence, the difference in maximum penalties between the WPO offence and the possession or use offence and potential issues with the De Simoni principle, prosecutors generally proceed with the possession or use offence alone.⁸² The De Simoni principle does not allow a court to take into account an aggravating circumstance if it would give rise to a more serious offence.⁸³

76. *Jacob v R* [2014] NSWCCA 65 [185].

77. Confidential, *Submission WE13*, 2–3; NSW Police Force, *Submission WE16*, 2–3.

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

79. NSW Police Force, *Submission WE16*, 3.

80. Confidential, *Submission WE13*, 2–3.

81. Confidential, *Submission WE13*, 2–3.

82. Confidential, *Submission WE13*, 2–3.

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

- 4.70 The ALS submitted that the maximum penalty should be decreased to 2 years' imprisonment as it is currently disproportionately high when compared with other jurisdictions.⁸⁴ The submission argued that the WPO offence and the possession or use offence are often charged together and that reducing the maximum penalty would appropriately reflect the different levels of criminality between failing to comply with a WPO and the actual possession or use of a prohibited weapon.⁸⁵
- 4.71 However, we consider that there is insufficient evidence to support an increase or decrease to the maximum penalty. One submission agreed that there is insufficient evidence to support an increase in the maximum penalty.⁸⁶ No submissions presented data that indicated a need to increase or decrease the maximum penalty. Indeed, data on the WPO offence is limited due to the small number of proven matters from 2013 to 2022.⁸⁷ This does not provide a sufficient basis for increasing or decreasing a maximum penalty.

No tiers for contravention of a weapons prohibition order

- 4.72 One submission proposed that if the possession or use offence is tiered, it follows that the WPO offence should also be tiered. The submission suggested that the higher maximum penalty should apply to offending involving more serious military-style weapons.⁸⁸
- 4.73 We do not consider the introduction of tiers for the WPO offence should necessarily follow our recommendation that tiers be introduced for the possession or use offence. There is insufficient data, and the lower maximum penalty for the WPO offence complicates this offence structure.
- 4.74 Our recommendation that tiered offences be introduced for the possession or use offence is supported by evidence that shows a significant number of proven matters from 2013 to 2022, and a high proportion of matters receiving fines (where the offence is the principal offence).⁸⁹ In contrast, for the same period the number of proven matters for the WPO offence is almost 36 times lower than the possession or use offence.⁹⁰

84. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 7.

85. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 7.

86. See also NSW, Public Defenders, *Submission WE19* [12].

87. NSW Bureau of Crime Statistics and Research, ab23-22640, table 1; NSW Bureau of Crime Statistics and Research, ab23-22643, table 2.

88. NSW Bar Association, *Submission WE12* [14].

89. NSW Bureau of Crime Statistics and Research, ab23-22460, table 1; NSW Bureau of Crime Statistics and Research, ab23-22643, table 3.

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

- 4.75 In addition, the lower maximum penalty for the WPO offence of 10 years' imprisonment may mean that tiers are not suitable for this offence. Low maximum penalties can pose difficulties in creating offence tiers as there is less sentencing range available for the tiers. The different maximum penalties of each tier may not provide much differentiation between the offences, and the tiers may be of less utility to a court when assessing the objective seriousness of an offence.

Penalty notices for certain fine-only offences

Recommendation 4.2: Introduction of penalty notices for fine-only offences

(1) Penalty notices should be made available for the following fine-only offences: *Weapons Prohibition Act 1998* (NSW) s 12, s 13(3), s 20A, s 21(1), s 22(1)–(2), s 24(1)–(3), s 25, s 30; *Weapons Prohibition Regulation 2017* (NSW) cl 8, cl 9, cl 19(6).

(2) The NSW Government should monitor the impact of this recommendation, including sentencing outcomes and trends for these offences.

- 4.76 Penalty notices should be made available for the following fine-only offences under the *Weapons Prohibition Act* and *Weapons Prohibition Regulation*:

Legislation	Offence	Penalty
<i>Weapons Prohibition Act</i> s 12	Requirement to notify Commissioner if genuine reason for possessing/using prohibited weapon ceases to exist	50 PU
<i>Weapons Prohibition Act</i> s 13(3)	Requirement that permit-holder must sign permit after issue	20 PU
<i>Weapons Prohibition Act</i> s 20A	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</i> s 21(1)	Authorised weapons dealer/theatrical weapons armourer not to take possession of prohibited weapon for repair/testing unless they have seen the person's permit	50 PU
<i>Weapons Prohibition Act</i> s 22(1)-(2)	Authorised weapons dealer/theatrical weapons armourer to ensure security of displayed weapons	50 PU
<i>Weapons Prohibition Act</i> s 24(1)-(3)	Restrictions on sending and receiving prohibited weapons	50 PU
<i>Weapons Prohibition Act</i> s 25	Requirements for advertising sale of prohibited weapons	50 PU

<i>Weapons Prohibition Act s 30</i>	Requirement for permit-holder to notify Commissioner of change in particulars	50 PU
<i>Weapons Prohibition Regulation cl 8</i>	Permit-holder to notify Commissioner of any change of premises where weapons are kept	50 PU
<i>Weapons Prohibition Regulation cl 9</i>	Permit-holder to notify Commissioner of lost, stolen or damaged permit	20 PU
<i>Weapons Prohibition Regulation cl 19(6)</i>	Record-keeping and safe-keeping requirements for a prohibited weapons – production permit	50 PU

- 4.77 The maximum fine that can be imposed for the offences ranges between 20 penalty units or \$2,200 and 50 penalty units or \$5,500, depending on the offence. Most of these offences have equivalent offences under the *Firearms Regulation 2017* (NSW) that are also offences for which penalty notices are available.⁹¹
- 4.78 Two submissions supported introducing penalty notices for all fine-only offences,⁹² and one did not oppose it.⁹³
- 4.79 The issuing of penalty notices for these fine-only offences would be appropriate due to the low seriousness of the offences and the unlikely consequence of “net widening”.
- 4.80 While all offences involving prohibited weapons are serious, the fine-only offences are of relatively low seriousness as indicated by the type of offence and their maximum penalties. The offences generally apply to people already authorised to possess or use prohibited weapons and mainly relate to compliance with permit requirements.⁹⁴ As explained above, there are existing restrictions on the issuing of permits.⁹⁵
- 4.81 Another submission offered conditional support for penalty notices for fine-only offences, stating that diversionary avenues should also be promoted. The submission recognised the impact penalty notices could have on vulnerable people.⁹⁶

91. *Weapons Prohibition Act 1998* (NSW) s 12, 20A, 21(1), 22(1), 22(2), s 24(1)–(3), s 30; *Weapons Prohibition Regulation 2017* (NSW) cl 8, cl 9; *Firearms Regulation 2017* (NSW) sch 1.

92. Confidential, *Submission WE13*, 11; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PWE08*, 2.

93. NSW Police Force, *Submission WE16*, 6.

94. *Weapons Prohibition Act 1998* (NSW) s 12, s 13(3), s 20A, s 21(1), s 22(1), s 22(2), s 24(1)–(3), s 25, s 30; *Weapons Prohibition Regulation 2017* (NSW) cl 8, cl 9, cl 19(6).

95. See [4.11].

96. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 14.

4.82 We recognised that penalty notices can have a “net widening” impact on vulnerable communities. Net widening is further discussed in chapter 5. In relation to the introduction of penalty notices for these fine-only offences, net widening is not likely to occur. The very low number of finalised and proven matters for these offences provides assurance against potential “net widening” effects following the introduction of penalty notices.⁹⁷

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

5. Knife offences

In brief

The new s 93IB and s 93IC of the *Crimes Act 1900* (NSW) should be monitored and reviewed. We recommend reforms to s 93IB and s 93IC, including changes to the reasonable excuse provisions and options for diversion and penalty notices for knife possession. Maximum penalties for other summary knife crime offences should not be increased. There should be further community education about the penalties for knife offences.

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- 5.1 In this chapter, we recommend the NSW Government monitor the impact of the introduction of the new offences of having custody of a knife and using or carrying a knife in a public place or school, which were introduced into the *Crimes Act 1900* (NSW) (*Crimes Act*) last year.
- 5.2 We focus particularly on the offence of having custody of a knife in a public place or school.¹ This offence was the most common of all offences in the scope of our review with the highest number of proven matters from 2013 to 2022.² We also recommend that carrying a bladed article or knife in a public place to for its normal utility purpose should be a reasonable excuse for the new knife-custody offence. Warnings should also be available for both new offences.
- 5.3 We recommend that penalty notices be available for subsequent knife-custody offences where a person’s previous knife-related offending was custody of a knife or offensive implement. Penalty notices should be made available to children and young people for the knife-custody offence. We do not recommend changes to other summary knife offences (such as custody of an offensive implement in public or in a school).
- 5.4 This chapter first considers the 2023 reforms to knife possession and use offences and outlines why we recommend these offences be monitored and reviewed. It then considers various reforms to the offences, including reasonable excuses for which a knife can be carried; diversion; and the availability of penalty notices for adults and young offenders. It then considers the maximum penalties available for other summary knife offences, before discussing alternative responses to knife crime.

Recent reforms should be monitored and reviewed

Recommendation 5.1: Monitor recent reforms to summary knife offences

The NSW Government should monitor the impact of the recent reforms increasing the maximum penalties for the offences of custody and using or carrying knives in public places or schools (now *Crimes Act 1900* (NSW) s 93IB, s 93IC; formerly *Summary Offences Act 1988* (NSW) s 11C, s 11E).

In particular, the Government should consider the impact on Aboriginal people, children and young people and other people facing disadvantage (including people experiencing homelessness). The monitoring should cover:

- (a) sentencing and other court outcomes for these offences
- (b) diversions under the *Young Offenders Act 1997* (NSW), and
- (c) the issuing of penalty notices.

1. *Crimes Act 1900* (NSW) s 93IB, previously *Summary Offences Act 1988* (NSW) s 11C.

2. See also NSW Sentencing Council, *Weapons-Related Offences: Sentencing Adult Offenders*, Consultation Paper (2023) [2.47].

- 5.5 We recommend the NSW Government monitor the impact of recent amendments introducing the offences of possessing and using or carrying a knife in a public place or school into the *Crimes Act*.³ These reforms changed the offences from summary to indictable and significantly increased their maximum penalties.⁴
- 5.6 We have not been asked to review these reforms. Our review covers data from 2013–2022, which does not include the time period in which the new offences have been in force. At this stage we cannot comment on their effectiveness.
- 5.7 We share stakeholder concerns that the reforms may disproportionately impact on Aboriginal people, children and young people and other people experiencing disadvantage.⁵ We are not convinced the reforms will achieve the intended deterrent effect.
- 5.8 Appendix D presents a picture of how the offence of custody of a knife in a public place or school operated prior to the 2023 reforms. This could be used to inform the monitoring and review of the reforms, as it provides a baseline.

Background to the offences and reforms

- 5.9 Under s 93IB of the *Crimes Act*, it is an offence for a person to have a knife in their custody in a public place or school.⁶
- 5.10 Under s 93IC of the *Crimes Act*, it is an offence to use or carry a knife that is visible:
- in the presence of a person, and
 - in a public place or school, and
 - in a way that is likely to cause a reasonable person to reasonably fear for their safety.⁷

3. *Crimes Act 1900* (NSW) s 93IB, s 93IC, inserted by *Criminal Legislation Amendment (Knife Crimes) Act 2023* (NSW) sch 1.

4. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 20 June 2023, 9165.

5. See, eg, Legal Aid NSW, *Preliminary Submission PWE12*, 1.

6. *Crimes Act 1900* (NSW) s 93IB(1).

7. *Crimes Act 1900* (NSW) s 93IC(1).

- 5.11 These offences were previously summary offences in s 11C and s 11E of the *Summary Offences Act 1988* (NSW) (*Summary Offences Act*). They were introduced into the *Crimes Act* on 23 October 2023⁸ (the 2023 reforms). The amending legislation replaced the former summary offences with new indictable offences. The new offences have increased penalties:
- having custody of a knife in a public place or school: new maximum penalty of 4 years' imprisonment and/or 40 penalty units,⁹ and
 - using or carrying a knife in a public place or school: new maximum penalty of 4 years' imprisonment and/or 100 penalty units.¹⁰
- 5.12 This doubled the previous maximum penalties. NSW now has the highest maximum penalties of any Australian jurisdiction for similar offences.¹¹
- 5.13 The NSW Government said that the 2023 reform was intended to:
- recognise the significant risks posed by knife crime, including knife possession
 - respond to the high rates of recidivism for people convicted of knife possession
 - provide an immediate response to serious incidents involving knives to better protect the safety of the community
 - address community concern about recent high-profile incidents of knife crime
 - introduce penalties that reflect the seriousness and gravity of the harm caused by knife crime and reflect community standards about these offences, and
 - provide a stronger deterrent against deliberate violent acts.¹²
- 5.14 The new offences were added to Table 1 of the *Criminal Procedure Act 1986* (NSW) (*Criminal Procedure Act*). This means they are to be dealt with summarily in the Local Court unless the prosecutor or the defendant elects for them to be tried on indictment in a higher court. Since these offences may be tried on indictment, the Children's Court has a discretion to refer them to be dealt with by the higher courts in certain circumstances.¹³

These reforms could have unintended impacts

- 5.15 We have two key concerns about the 2023 reforms. First, the new offences could disproportionately impact disadvantaged people. Secondly, they are unlikely to

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

9. *Crimes Act 1900* (NSW) s 93IB(1).

10. *Crimes Act 1900* (NSW) s 93IC(1).

11. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 20 June 2023, 9163–9164.

12. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 20 June 2023, 9164.

13. *Children (Criminal Proceedings) Act 1987* (NSW) s 31.

deter knife crime. Accordingly, we recommend that the new offences be monitored and reviewed.

The reforms could disproportionately impact disadvantaged people

- 5.16 We are concerned that the 2023 reforms could disproportionately impact disadvantaged people, including children and young people, Aboriginal people and people with disadvantage. These risks should be monitored and assessed carefully.
- 5.17 We expect that the reforms will result in harsher penalties for offenders, as courts generally interpret increases in maximum penalties as reflecting Parliament’s intention that sentences should also increase.¹⁴ Currently, most principal offences of custody of a knife in a public place result in a fine in the Local Court, or an “other penalty” in the Children’s Court. Relatively few offences result in sentences of imprisonment, even for second offences (see Appendix D). The significant increases in maximum penalties may result in more sentences of imprisonment.
- 5.18 Before the amendments, people experiencing socioeconomic disadvantage, Aboriginal and Torres Strait Islander people, and children and young people were disproportionately represented among offenders of custody of a knife in a public place or school (see Appendix D). This suggests that these cohorts will be particularly impacted by these reforms. They are likely to receive harsher penalties as a result of the significant increases in maximum penalties.
- 5.19 It is well recognised that being incarcerated leads to adverse social and welfare outcomes, including recidivism, deterioration of mental and physical health, loss of housing and barriers to employment.¹⁵ As custody of a knife in a public place is a high-volume offence, there is a risk these reforms could increase the prison population, which has resourcing implications for the State.
- 5.20 Given the over-representation of Aboriginal people among offenders, we are further concerned that these reforms may negatively impact progress towards Closing the Gap targets. The targets for reducing the youth and adult incarceration rates for Aboriginal people are not on track.¹⁶
- 5.21 We are particularly concerned about the potential impact of the reforms on youth diversion and penalty notices. One consequence of making the offences indictable, is that unless a specific regulation is made, they are not available for official

14. *Muldrock v R* [2011] HCA 39, 244 CLR 120 [31]; *R v Slattery* (1996) 90 A Crim R 519, 524.

15. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 3; NSW, Public Defenders, “Impacts of Imprisonment and Remand in Custody” in *The Bugmy Bar Book* (2022) [1].

16. Australia, Productivity Commission, “Dashboard”, *Closing the Gap* <<https://www.pc.gov.au/closing-the-gap-data/dashboard>> (retrieved 2 April 2024); NSW Bureau of Crime Statistics and Research, “Closing the Gap” (18 January 2024) https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Closing-the-Gap.aspx (retrieved 24 May 2024).

warnings under the *Young Offenders Act 1997 (NSW) (Young Offenders Act)*.¹⁷ There are also consequences for how penalty notices can be imposed. We consider these issues in more detail below.

- 5.22 Finally, we are concerned about the potential impact of these reforms on people experiencing homelessness. We heard in preliminary consultations that existing data systems (such as those operated by police and courts) do not reliably record the homeless status of offenders and other individuals with which police interact.¹⁸ The NSW Government should consider more effective ways of identifying people who are experiencing homelessness and are caught in the criminal system. One option would be to carry out retrospective cohort studies of people experiencing homelessness through, for example, homeless shelters.¹⁹ Another option would be for a relevant government agency to collect reliable data on homelessness.

The reforms may not improve deterrence

- 5.23 We are not convinced that the increase in maximum penalties will effectively deter these crimes. Research suggests that, generally, increasing maximum penalties does not have a corresponding deterrent effect.²⁰ Research from the United Kingdom (UK) has also found that it is unclear whether increasing maximum penalties would reduce knife carrying among children and young people.²¹ One submission questioned whether increases in maximum penalties would influence children and young people, given their lack of knowledge of specific penalties, their developing understanding of consequences and the reasons given for carrying knives.²²
- 5.24 The reasons people carry knives also suggest that the increase in maximum penalties may not have a deterrent effect. The most common reason people report carrying knives is to protect themselves or out of fear.²³ The Children's Court raised that a large number of children who possess knives have genuine concerns about their safety following experiences of homelessness, instability and abuse.²⁴ Others

17. *Young Offenders Act 1997 (NSW)* s 13.

18. Prosecutors' Roundtable, *Preliminary Consultation PWE01*.

19. See R J Mitchell and others, "Homelessness and Predictors of Criminal Reoffending: A Retrospective Cohort Study" (2023) 33 *Criminal Behaviour and Mental Health* 261.

20. D Ritchie, *Does Imprisonment Deter? A Review of the Evidence*, Sentencing Matters (Sentencing Advisory Council, 2011) 2.

21. C Eades and others, *"Knife Crime": A Review of Evidence and Policy* (Centre for Crime and Justice Studies, 2nd ed, 2007) 28–29. See NSW Sentencing Council, *Weapons-Related Offences: Sentencing Young Offenders*, Issues Paper (2023) [6.12].

22. Youth Justice NSW, *Submission WE09*, 3, 5.

23. Youth Justice NSW, *Preliminary Submission PWE07*, 2; Children's Court of NSW, *Submission WE03*, 4; Law Society of NSW, *Submission WE08*, 6.

24. Children's Court of NSW, *Submission WE03*, 4.

may have been a victim of weapons-related crime themselves.²⁵ If someone feels their life is in danger, it may override any concern they have about getting caught or receiving a criminal penalty.²⁶

- 5.25 In some communities, carrying a knife has become normalised, and people may carry knives because they assume everyone else is doing so.²⁷ Where this behaviour is engrained, increases in maximum penalties may be unlikely to reduce the rate of knife possession.

“Reasonable excuse” should be expanded

Recommendation 5.2: Reasonable excuse for custody of knife in public

The *Crimes Regulation 2020* (NSW) should be amended so that carrying bladed articles or knives in public places for their normal utility purposes are circumstances prescribed for s 93IB(3)(c) of the *Crimes Act 1900* (NSW).

This exception should not be available for the knife-custody offence as it applies to schools.

- 5.26 This recommendation relates only to the offence of custody of a knife in a public place. It addresses concerns about the use of items such as Swiss Army knives and scissors, particularly by people experiencing homelessness. The recommendation also responds to the need to better recognise the circumstances of homelessness.²⁸ These concerns arose in the context of the offence when it was included in the *Summary Offences Act*.
- 5.27 Under the *Crimes Act*, it is a defence to the offence of custody of knives in public places or schools if the accused person has a reasonable excuse. Currently, this includes having custody of a knife because it is reasonably necessary for various lawful pursuits. It includes, for example:
- occupation, education or training
 - preparing or consuming food or drink
 - participating in entertainment, recreation or sport
 - genuine religious purposes, and

25. Law Society of NSW, *Submission WE08*, 6.

26. British Youth Council, Youth Select Committee, *Our Generation’s Epidemic: Knife Crime* (2019) [167]; *Preliminary Consultation PWEC04*.

27. Youth Justice NSW, *Preliminary Submission PWE07*, 2.

28. NSW Council for Civil Liberties Inc., *Submission WE06* [1.21]; Law Society of NSW, *Submission WE08*, 5; Legal Aid NSW, *Submission WE11*, 20; NSW Bar Association, *Submission WE12* [42]; Defence Roundtable, *Preliminary Consultation PWEC02*.

- other circumstances prescribed by the regulations.²⁹
- 5.28 Not all purposes for which knives or scissors may be legitimately used are covered by the list of activities that amount to a reasonable excuse. For instance, it may not cover all activities for which a person experiencing homelessness may need a knife, such as preparing shelter. Some submissions raised concerns that people experiencing homelessness, who may use items like multi-tools and Swiss Army knives for practical purposes, are regularly caught by this offence.³⁰ For instance, 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 children and young people.³¹
- 5.29 These submissions, and some preliminary consultations, suggested that disadvantaged people:
- may have difficulty proving to police that they have a reasonable excuse for possessing a knife
 - 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
 - will often plead guilty to avoid the prospect of onerous bail conditions or being held in custody.³²
- 5.30 Even if a person does provide a valid reasonable excuse, police may consider it an issue for the courts to determine. Legal Aid submitted that police rarely accept excuses offered by its clients and a large proportion of adults charged with custody of a knife are convicted in their absence. In Legal Aid's view, a high proportion of disadvantaged people do not defend knife-custody charges for a variety of reasons, including lengthy court delays, onerous bail conditions, being on remand, and the belief that their explanation will not be accepted. Those who have a prior record for knife-custody are not eligible for penalty notices, meaning they will continue to be brought before the courts for knife-custody matters.³³
- 5.31 The wording of our recommendation draws on the list of reasonable excuses in the *Weapons Act 1990* (Qld). In Queensland, a reasonable excuse for physical possession of a knife is:
- (a) to perform a lawful activity, duty or employment; or

29. *Crimes Act 1900* (NSW) s 93IB(3).

30. NSW Council for Civil Liberties Inc., *Submission WE06* [1.17]; NSW Bar Association, *Submission WE12* [42]; Law Society of NSW, *Preliminary Submission PWE05*, 2; Legal Aid NSW, *Preliminary Submission PWE12*, 2; Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PWE13*, 1–3.

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

32. Defence Roundtable, *Preliminary Consultation PWEC02*.

33. Legal Aid NSW, *Submission WE11*, 20.

- (b) to participate in a lawful entertainment, recreation or sport; or
- (c) for lawfully exhibiting the knife; or
- (d) for use for a lawful purpose.³⁴

- 5.32 The Queensland Act provides examples. One lawful purpose is carrying “a pen knife or Swiss Army knife for its normal utility purposes”. The expression “normal utility purposes” should provide enough certainty to avoid making the list of reasonable excuses exhaustive, and some submissions emphasised the importance of ensuring that the list of reasonable excuses is non-exhaustive.³⁵
- 5.33 Our recommendation limits the exemption to public places. It would continue to be unlawful to have custody of such items in schools (unless the person has a reasonable excuse).
- 5.34 The offence of using or carrying a knife in a way that causes reasonable fear for safety under s 93IC(1) of the *Crimes Act 1900* (NSW) (the wielding offence) is still available for activities that have been exempted under s 93IB.
- 5.35 Some submissions proposed amending the *Crimes Regulation 2020* (NSW) so that items such as pen knives, cutlery scissors and Swiss Army knives are prescribed as classes of knife that fall outside the definition of knife for the purpose of s 93IB.³⁶
- 5.36 We do not prefer this option. We are concerned that focusing on particular items could lead to greater use of these items by people who do not intend to use them lawfully or who are seeking a lawful alternative to a knife.

The impact of narrowing “reasonable excuse” should be reviewed

- 5.37 We heard concerns that another effect of the 2023 reforms is that a person who carries a knife with a reasonable excuse as well as for self-defence or defence of another will be caught by the offence. We acknowledge this could affect vulnerable people. We suggest this issue could be reviewed following monitoring of the impact of the 2023 reforms (see Recommendation 5.1).
- 5.38 Under s 93IB(4) of the *Crimes Act*, it is not a reasonable excuse to have custody of a knife for self-defence or for the defence of another person. The previous *Summary Offences Act* version of the offence stated that it was not a reasonable to have

34. *Weapons Act 1990* (Qld) s 51(2).

35. Law Society of NSW, *Submission WE08*, 5; Legal Aid NSW, *Submission WE11*, 20–21.

36. *Crimes Act 1900* (NSW) s 93IA definition of “knife”; Legal Aid NSW, *Preliminary Submission PWE12*, 3; Law Society of NSW, *Submission WE08*, 4; Legal Aid NSW, *Submission WE11*, 20; NSW Council for Civil Liberties Inc., *Submission WE06* [1.20].

custody of a knife “solely” for one of these reasons.³⁷ In other words, someone could have custody of a knife for self-defence or the defence of another, if they also had another reasonable excuse.

- 5.39 We are concerned about the impact of this change on people experiencing homelessness, who may lawfully possess a knife to prepare food and for self-defence. The most common reason people carry knives is to protect themselves (as we discuss above).
- 5.40 Legal Aid and the Law Society raised these concerns, and submitted that “solely” should be included in s 93IB(4) of the *Crimes Act*.³⁸ Other submissions supported a broader change, of including self-defence as a reasonable excuse when it is not the sole purpose of possession.³⁹
- 5.41 We acknowledge that the law should generally not encourage the carriage of any weapons for the purpose of self-defence, given the more general threat to public safety that carrying weapons may pose.⁴⁰ Even so, considering the risks we outline above, we are of the view that the change should be monitored.

Increase diversion under the *Young Offenders Act*

Recommendation 5.3: Warnings under the *Young Offenders Act 1997 (NSW)*

The *Young Offenders Act 1997 (NSW)* should be amended to make warnings available for offences under s 93IB and s 93IC of the *Crimes Act 1900 (NSW)*.

- 5.42 It is desirable to continue to have all diversionary options available for children for the offences introduced by the 2023 reforms. The offences cover a wide range of conduct, some of which may be appropriately dealt with by way of a warning.
- 5.43 The lowest-level diversionary response police may take for these offences currently is a formal caution, which may only be issued on three occasions.⁴¹ Escalating police responses to children in this manner risks early criminalisation. It may have a downstream effect of increasing the burden on the court system.
- 5.44 This recommendation restores the position that applied when s 93IB and s 93IC were offences under the *Summary Offences Act*. Under the *Young Offenders Act*, a

37. *Summary Offences Act 1988 (NSW)* s 11C(3), repealed by *Criminal Legislation Amendment (Knife Crimes) Act 2023 (NSW)* sch 2.2[1].

38. Law Society of NSW, *Submission WE08*, 5; Legal Aid NSW, *Submission WE11*, 21.

39. Law Society of NSW, *Submission WE08*, 9; NSW Council for Civil Liberties Inc., *Submission WE06* [1.22].

40. Confidential, *Submission WE13* 10–11.

41. *Young Offenders Act 1997 (NSW)* s 20(7).

warning may be given for a summary offence covered by that Act.⁴² As a result, before the 2023 amendments, these offences could result in a warning. Most offences under the former s 11C of the *Summary Offences Act* were dealt with under the *Young Offenders Act*, with warnings used in a significant proportion of cases (see Appendix D).

- 5.45 As warnings cannot be given for indictable offences, formal warnings are now unavailable for s 93IB and s 93IC offences.⁴³ Several submissions expressed concern about the removal of warnings as an option for these offences, and supported restoring the availability of warnings for these offences.⁴⁴
- 5.46 We are concerned about the impact on Aboriginal children of removing the availability of warnings. Before the 2023 reforms, Aboriginal children were disproportionately represented among those dealt with by police for the offence of custody of a knife in a public place or school, for both first and subsequent offences.⁴⁵
- 5.47 While Aboriginal children were less likely to receive a warning or caution, and more likely to have the offence proceed to court, most were dealt with by way of a warning and caution for first offences (see Appendix D). Most second offences proceeded to court for both Aboriginal and non-Aboriginal children, in similar numbers.
- 5.48 We acknowledge that there is a risk that diversionary options will continue to be used less frequently with Aboriginal children, compared to non-Aboriginal children. Further investigations of the factors that contribute to this outcome may be warranted.⁴⁶

Increase the availability of penalty notices

Recommendation 5.4: Penalty notices for subsequent knife-custody offences

Sch 4 cl 2 of the *Criminal Procedure Regulation 2017* (NSW) should be amended so that a penalty notice may be issued for an offence under s 93IB(1) of the *Crimes Act 1900* (NSW), even if the person receiving the penalty notice has previously received:

- (a) a conviction
- (b) an order under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), or

42. *Young Offenders Act 1997* (NSW) s 8(1), s 13.

43. *Young Offenders Act 1997* (NSW) s 13.

44. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 20; NSW Young Lawyers Criminal Law Sub-Committee, *Submission WE15*, 7; Confidential, *Submission WE13*, 15.

45. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 17–18.

46. Law Society of NSW, *Submission WE08*, 2.

(d) a penalty notice,
for an offence under s 93IB(1) of the *Crimes Act 1900* (NSW) or s 11B of the *Summary Offences Act 1988* (NSW).

- 5.49 This recommendation would allow penalty notices to be issued only if the person's previous knife-related offending was custody of a knife or offensive implement. It would continue to exclude people who had committed knife offences that involved actual use of a knife, not just possession of a knife.
- 5.50 The recommendation is intended to ensure that less serious incidents of this offence do not proceed to court, while retaining the option of court for more serious incidents. This has two key benefits:
- imposing a penalty notice means that a conviction is not recorded for the offender, which may promote rehabilitation, and
 - reducing the number of charges that ultimately proceed to the courts, which will ease the resource burden on the courts.
- 5.51 Currently, a penalty notice may only be issued for custody of a knife in a public place or school if the person has not previously received a penalty notice for a knife-related offence or been convicted of a knife-related offence, or received a dismissal of charges under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).⁴⁷
- 5.52 A knife-related offence is currently defined as:
- an offence under s 93IC of the *Crimes Act 1900* (NSW) (wielding a knife in a public place or school), s 93IB of the *Crimes Act* (custody of a knife in a public place or school), or s 11B of the *Summary Offences Act* (custody of offensive implement in a public place or school), or
 - any other offence, whether in NSW or another Australian jurisdiction, punishable on conviction for 2 years or more if a knife was used.⁴⁸
- 5.53 Before the 2023 reforms, penalty notices were widely used for offences under s 11C of the *Summary Offences Act*. Revenue NSW's penalty notice dashboard indicates that 568 penalty notices were used for custody of knife in a public place (first offence) in the 2022–2023 financial year. This was even higher in the 2019–2020 financial year, where 1000 penalty notices were issued.⁴⁹

47. *Crimes Act 1900* (NSW) s 93IB(1); *Criminal Procedure Regulation 2017* (NSW) sch 4 cl 2. See also NSW Sentencing Council, *Weapons-Related Offences: Sentencing Adult Offenders*, Consultation Paper (2023) [6.45]–[6.58]; NSW Sentencing Council, *Weapons-Related Offences: Sentencing Young Offenders*, Issues Paper (2023) [2.55]–[2.67].

48. *Criminal Procedure Regulation 2017* (NSW) sch 4 cl 1.

49. Revenue NSW, "Penalty Notice Dashboard" <<https://www.revenue.nsw.gov.au/help-centre/resources-library/statistics/penalty-notice-dashboard>> (retrieved 24 May 2024).

- 5.54 Custody of a knife in a school resulted in far fewer penalty notices: a total of two penalty notices were issued for a first offence in 2022–2023.⁵⁰
- 5.55 Most submissions supported our recommendation. Some considered penalty notices to be an appropriate response only where the previous offence was not a violent knife crime.⁵¹ Others offered conditional support.⁵² They supported it only in conjunction with the expansion of options to divert people from the criminal justice system, while another stated it did not oppose our recommendation.⁵³
- 5.56 In some cases, penalty notices may be easier for disadvantaged people to navigate and move through compared to the criminal justice system. Revenue NSW has systems in place to assist people manage fines, including safety nets such as time to pay, write-offs and work development orders.⁵⁴
- 5.57 However, not all submissions supported this approach. The NSW Police Force (NSWPF) opposed making penalty notices available for second or subsequent custody of a knife offences, indicating that this penalty does not recognise the seriousness of knife offences.⁵⁵
- 5.58 While penalty notices are a practical way of keeping people out of court, there are concerns about their impact on disadvantaged groups.⁵⁶ One way this can happen is through “net widening”.
- 5.59 Net widening can occur if the police are more likely to take action and issue a penalty notice, where they may not have intervened or would have instead diverted the person (for example, by issuing a caution or warning).⁵⁷ Police officers have a very broad discretion to issue penalty notices. They may be issued if it appears to police officers that a person has committed a penalty notice offence.⁵⁸ Where disadvantaged groups may be more visible and likely to be the subject of proactive policing, they may be disproportionately impacted by net widening.

50. Revenue NSW, “Penalty Notice Dashboard” <<https://www.revenue.nsw.gov.au/help-centre/resources-library/statistics/penalty-notice-dashboard>> (retrieved 24 May 2024).

51. Confidential, *Submission WE13*, 11; NSW Bar Association, *Submission WE12* [43]–[44]; NSW Council for Civil Liberties Inc., *Submission WE06* [2.1]–[2.3].

52. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 14–15; Legal Aid NSW, *Submission WE11*, 21.

53. Law Society of NSW, *Submission WE08*, 5.

54. Legal Aid NSW, *Submission WE11*, 21.

55. NSW Police Force, *Submission WE16*, 6.

56. Defence Roundtable, *Preliminary Consultation PWEC02*; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 14.

57. NSW Ombudsman, *Put on the Spot: Criminal Infringement Notices Trial*, Discussion Paper (2003) 14.

58. *Criminal Procedure Act 1986* (NSW) s 333.

- 5.60 The issuing of penalty notices can also create more avenues for a person to enter the criminal and penalty system. If a person fails to pay a penalty notice, enforcement action can be taken (for example, via a fine enforcement order).⁵⁹ This is a particular concern for disadvantaged populations. One submission stated that the failure to pay a penalty notice can lead to “an increased risk of crime and longer term contact with the criminal justice system”.⁶⁰
- 5.61 Penalty notices also allow additional police powers, which can create more entry points into the system. If a police officer intends to issue a penalty notice, they can ask for the person’s name and address, and a failure to comply is an offence.⁶¹ Police can also require the collection of finger-prints and palm-prints.⁶²
- 5.62 Overall, we are of the view that the benefits of penalty notices outweigh these concerns.

Extend penalty notices to people under 18

Recommendation 5.5: Extend availability of penalty notices to young people

- (1) Section 335 of the *Criminal Procedure Act 1986* (NSW) should be amended to allow penalty notices to be issued to people aged under 18 for offences under s 93IB(1) of the *Crimes Act 1900* (NSW).
- (2) The penalty notice amount for an offence under s 93IB(1) for people under 18 at the time of the alleged offence, should be \$125.
- (3) Clause 14 of the *Young Offenders Regulation 2016* (NSW) should be amended to include s 93IB(1) of the *Crimes Act 1900* (NSW) so that a police officer must first consider diversions under the *Young Offenders Act 1997* (NSW) before issuing a penalty notice for an offence under s 93IB(1).

- 5.63 This recommendation aims to promote the diversion of people under 18 from the criminal justice system. While not ideal, penalty notices provide an alternative to the court system and conviction, in appropriate cases.
- 5.64 If adopted, Recommendation 5.5(1) would restore the position that applied under the *Summary Offences Act* in allowing a penalty notice to be issued to people under

59. *Fines Act 1996* (NSW) pt 4 div 1–5; NSW Ombudsman, *Put on the Spot: Criminal Infringement Notices Trial*, Discussion Paper (2003) 14.

60. NSW Bar Association, *Submission WE12* [62].

61. *Criminal Procedure Act 1986* (NSW) s 341(1)–(4).

62. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 138A(1).

18 for the offence of custody of a knife in a public place or school.⁶³ As stated above, generally penalty notices may not be issued to a person who is under 18.⁶⁴

- 5.65 Recommendation 5.5(3) addresses concerns that penalty notices may reduce the use of diversionary options under the *Young Offenders Act*.⁶⁵ It also complements Recommendation 5.3 which seeks to restore the availability of warnings under the *Young Offenders Act*.
- 5.66 Recommendation 5.5(3) also addresses concerns that, in many instances penalty notices will not be appropriate for people under 18.

This seeks to address concerns about impacts on young people

- 5.67 In this instance, we support the use of penalty notices for people under 18. We agree with submissions that pointed out that penalty notices provide an alternative to charging, and prevent unnecessary interaction with the criminal justice system, including more “‘direct’ criminalisation of children”.⁶⁶ Recommendation 5.5 addresses concerns we have heard about the issuing of penalty notices to children and young people.
- 5.68 One concern is that children and young people have limited or no capacity to pay penalty notice fines.⁶⁷ To address this, we recommend that the penalty notice amount be set at a concessional amount of \$125 for people who were under 18 at the time of the alleged offence. This is slightly less than the NSW Law Reform Commission’s general recommendation of 25% of the adult penalty.⁶⁸ It is much lower than the cap placed on the amount of a fine that can be imposed on a person by the *Children (Criminal Proceedings) Act*, which is 10 penalty units (\$1100).⁶⁹
- 5.69 There are also concerns about the use of penalty notices by police. One submission argued that any expansion of penalty notices to people under 18 should be accompanied by education and training for the NSWPF about their impact on disadvantaged people, as well as Aboriginal cultural competency training.⁷⁰

63. *Summary Offences Act 1988* (NSW) s 11C(1), repealed by *Criminal Legislation Amendment (Knife Crimes) Act 2023* (NSW) sch 2.2[1].

64. *Criminal Procedure Act 1986* (NSW) s 335(1).

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

66. L Henderson-Lancett, *Submission WE05, 2*; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18, 21*.

67. NSW Law Reform Commission, *Penalty Notices*, Report 132 (2012) [12.9]–[12.12].

68. NSW Law Reform Commission, *Penalty Notices*, Report 132 (2012) [12.50]. See also NSW Bar Association, *Submission WE12* [64].

69. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(c).

70. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18, 21–22*.

- 5.70 Under the *Young Offenders Act* for certain prescribed offences, a police officer, before issuing a penalty notice, must first consider whether the child can be diverted through a caution, warning or youth justice conference.⁷¹ This requirement applied when s 11C of the *Summary Offences Act* was a penalty notice offence.
- 5.71 Since the 2023 reforms, this requirement now applies only to issuing a penalty notice to a child for failure to comply with a police direction, and to no other penalty notice offence.⁷²
- 5.72 We recommend that police officers be required to consider the use of diversionary options under the *Young Offenders Act* before issuing a penalty notice for an offence of custody of a knife in a public place or school. Given the possible impacts of penalty notices on children and young people stated above, it is desirable to have police consider all diversionary options available for people under 18 when deciding whether to impose a penalty notice. Below, we discuss a further measure that could be taken to address concerns about the use of penalty notices by police.
- 5.73 We agree with submissions that supported the use of penalty notices for children and young people only in conjunction with expanding diversionary options.⁷³ We recommend restoring the availability of warnings for these offences (Recommendation 5.3). We emphasise our view that where diversion is more appropriate for a child, a police officer should not issue a penalty notice.
- 5.74 Finally, we are aware that penalty notices may have a limited deterrent effect for children and young people.⁷⁴ In part, this is because of their lesser ability to plan ahead and understand the consequences of their actions.⁷⁵ Fines also may not be effective in preventing some children and young people from carrying knives when they do so to feel safe and protect themselves.⁷⁶ We discuss the need for alternative approaches to knife crime among children and young people further below.

Cautions as an alternative to penalty notices

- 5.75 We suggest that the Commissioner of the Police consider amending the NSWPF Standard Operating Procedures, so they align with the Attorney General's

71. *Young Offenders Act 1997* (NSW) s 9(2)-(2A); *Young Offenders Regulation 2016* (NSW) cl 14(a).

72. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 199; *Young Offenders Regulation 2016* (NSW) cl 14(b).

73. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 14; Legal Aid NSW, *Submission WE11*, 21.

74. Confidential, *Submission WE13*, 16.

75. NSW Law Reform Commission, *Penalty Notices*, Report 132 (2012) [12.14]-[12.18].

76. Youth Justice NSW, *Submission WE09*, 8-9.

guidelines about when it is appropriate to give a caution instead of a penalty notice.⁷⁷

- 5.76 The Attorney General’s guidelines include such factors as:
- the offending behaviour did not involve risks to the public, damage to property or financial loss
 - the person is experiencing homelessness
 - the person has a mental illness or intellectual disability
 - the person is under 18, and
 - the person is cooperative and/or complies with a request to stop the offending conduct.
- 5.77 These guidelines do not apply to police officers issuing penalty notices.⁷⁸ Rather, the NSWPF have their own internal Standard Operating Procedures, which include a list of circumstances where they cannot issue an infringement notice. These include, for example, domestic violence offences or when the offender is so intoxicated or drug affected that they cannot understand the procedure.⁷⁹ These guidelines do not address concerns about various disadvantaged groups, such as people experiencing homelessness and children and young people.
- 5.78 The *Fines Act* provides some scope for such concerns to be considered on review.⁸⁰ However, police officers are not required to consider the grounds for review when deciding whether to issue a penalty notice.
- 5.79 Some submissions argued that these guidelines should be amended so they apply to police officers issuing penalty notices.⁸¹ If this was limited to custody of a knife offences that are eligible for penalty notices, this could encourage police to issue cautions in cases where the *Young Offenders Act* does not apply. This could include, children and young people, people experiencing homelessness, and people with mental illness or intellectual disability.
- 5.80 However, we have concerns with this proposal. These include that there are different lines of ministerial responsibility for the NSWPF, and the guidelines may

77. NSW Police Force, Police Prosecutions Command, *Criminal Infringement Notice Standard Operating Procedures* (2024); NSW Department of Communities and Justice, *Caution Guidelines under the Fines Act 1996* (n.d.); *Fines Act 1996* (NSW) s 19A.

78. *Fines Act 1996* (NSW) s 19A(2).

79. NSW Police Force, Police Prosecutions Command, *Criminal Infringement Notice Standard Operating Procedures* (2024) [2.5].

80. *Fines Act 1996* (NSW) s 24E. See also NSW Police Force, *Internal Review Guidelines for Penalty Notices under the Fines Act 1996* (2014) 7–8.

81. *Fines Act 1996* (NSW) s 19A(2); Legal Aid NSW, *Submission WE11*, 23; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 22.

not be effective in influencing police discretion. For these reasons, we suggest the Commissioner of Police consider amending the Standard Operating Procedures instead.

No need for a change to penalties

Recommendation 5.6: Maximum penalties for other summary knife offences

Pending the monitoring and review of the recent amendments to knife crime (see Recommendation 5.1), we do not recommend making any other summary knife offences indictable or increasing their maximum penalties. These include:

- (1) Custody of an offensive implement in public/school: maximum penalty \$5500 (50 penalty units) or 2 years' imprisonment (*Summary Offences Act 1988* (NSW) s 11B)
- (2) Parents who knowingly authorise or permit a child under the age of 18 to commit an offence under s 93IB of the *Crimes Act 1900* (NSW): maximum penalty \$550 (5 penalty units) (*Summary Offences Act 1988* (NSW) s 11D), and
- (3) Selling a knife to a child under the age of 16 years: maximum penalty \$5500 (50 penalty units) (*Summary Offences Act 1988* (NSW) s 11F).

5.81 We do not recommend increasing the maximum penalties for the summary knife-crime offences considered in this review, or making them indictable offences. We also do not consider that there is a need for any new custody of a knife offences. There is no clear evidence to support any of these changes⁸² and they are opposed by a number of stakeholders.⁸³ There is also a risk of unintended consequences.

5.82 In May 2024, the NSW Government introduced the Law Enforcement (Powers and Responsibilities) and Other Legislation (Knife Crime) Bill 2024 into parliament. It has not yet been debated in the lower house.

5.83 The proposed laws will:

- trial new police powers to use electronic wands to determine whether a person may be carrying a knife or other weapons
- introduce a new offence of selling knives to a child aged 16 or 17 years, without a reasonable excuse, such as the lawful pursuit of work, study or training and
- increase the maximum penalty to 100 penalty units and/or 12 months' imprisonment for the offence of selling a knife to a child under the age of 16.⁸⁴

82. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 20.

83. Law Society of NSW, *Submission WE08*, 4; Confidential, *Submission WE13*, 10; NSW Bar Association, *Submission WE12* [42]; Legal Aid NSW, *Submission WE11*, 19.

84. Law Enforcement (Powers and Responsibilities) and Other Legislation Amendment (Knife Crime) Bill 2024 (NSW) sch 2, item 2, 4.

- 5.84 We consider that, if the government implements any changes to summary knife offences, the impact of any new offences or increased penalties should be carefully monitored by the NSW Government to ensure the reforms have the intended effect and do not disproportionately impact disadvantaged groups.
- 5.85 Increasing the maximum penalty for these offences may disproportionately impact disadvantaged groups. Legal Aid NSW (Legal Aid) and ALS raised that summary offences relating to knives already have a negative impact on people experiencing homelessness, children and other disadvantaged groups who may be more visible and more likely to be targeted by proactive policing.⁸⁵
- 5.86 Legal Aid data suggests that between 3% and 5% of its clients with summary knife offence matters were experiencing homelessness.⁸⁶ It also indicates that increasing the penalty for s 11D, which is currently a fine-only offence, may result in the targeting of parents in already disadvantaged and over policed communities.⁸⁷
- 5.87 We also doubt whether increasing the maximum penalties would have a deterrent effect on these offences, for the same reasons we outline above.
- 5.88 Sentencing outcomes suggest that current maximum penalties allow courts sufficient scope to deal with any serious versions of these offences. Between 2013 and 2022, there were 2842 proven matters of offences against s 11B (on average, slightly under 300 a year).⁸⁸ In 2022, there were only 91 cases where the offence was sentenced as a principal offence. Only 5 of these cases involved a sentence of imprisonment and one case involved an intensive correction order. A fine was imposed in 48 cases (53%).⁸⁹
- 5.89 The other summary offences have very low volumes. Over 2013–2022, there were no charges under s 11D and only one charge under s 11F.⁹⁰
- 5.90 We are also not persuaded that s 11D and s 11F of the *Summary Offences Act* should be included in Table 1 of the *Criminal Procedure Act*, as one submission suggested.⁹¹ The NSWPF considered these offences to potentially be the equivalent of aiding and abetting a minor indictable offence.⁹² In its view, these offences deserve the

85. Legal Aid NSW, *Preliminary Submission PWE12*, 1–3; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 17.

86. Legal Aid NSW, *Submission WE11*, 19.

87. Legal Aid NSW, *Submission WE11*, 19.

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

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

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

91. NSW Police Force, *Submission WE16*, 5–6.

92. NSW Police Force, *Submission WE16*, 5–6; *Crimes Act 1900* (NSW) s 351.

widest scope available for the sentencing of indictable offences.⁹³ However, we are not satisfied there is evidence to justify this change because these offences are rare, and the risk of unintended consequences discussed above.

- 5.91 The NSWPF also submitted that there should be a new offence of carrying a knife on public transport or at a public transport hub. This submission pointed to the risk of harm to large numbers of people and the potential vulnerability of many people who use public transport.⁹⁴ We do not recommend this proposal. Carrying a knife on public transport is already captured under s 93IB of the *Crimes Act* and punishable by up to 4 years' imprisonment. The maximum penalty for this offence was only recently increased. We are not aware of any evidence that suggests that the penalty is insufficient to deal with knife possession on public transport.

The need for alternative responses to knife crime

- 5.92 In this section, we discuss alternative responses to knife crime that we raised in our issues paper.⁹⁵

Community education

Recommendation 5.7: Community awareness of available penalties

The NSW Government should develop a campaign, or add to an existing campaign, to draw attention to the fact those who carry knives may be subject to a maximum penalty of 4 years' imprisonment (or as much as 14 years for certain prohibited weapons).

- 5.93 We recommend raising community awareness about the significant maximum penalties for offences of carrying knives or other weapons. The possibility of a lengthy sentence of imprisonment for knife-custody offences will not have the strong deterrent effect intended if people are not aware of it. For instance, in consultations some children in youth detention said they were not aware of the penalties or consequences for knife-custody offences until they were in the criminal legal system.⁹⁶
- 5.94 During our review, we heard about the need for public education around weapon offences, particularly in relation to children and young people and the possession of knives.

93. NSW Police Force, *Submission WE16*, 6.

94. NSW Police Force, *Submission WE16*, 2.

95. Sentencing Council of NSW, *Weapons-Related Offences: Sentencing Young Offenders*, Issues Paper (2023) [6.44]–[6.98].

96. Young People with Lived Experience, *Preliminary Consultation PWEC04*.

- 5.95 Various submissions raised the need for general public education about knife crime. For instance, one submission called for a public and proactive advertising campaign that encourages children and young people to stop carrying knives, including by reminding them of the consequences.⁹⁷ In 2021, Queensland police carried out a campaign called “I live my life ... without a knife”. It was designed to raise awareness of the risks and penalties of carrying knives through advertising, community events and engagement, as well as school presentations.⁹⁸
- 5.96 Other submissions supported increased education in schools about knife crime. One submission suggested education should focus on the impact on victims and families of weapons crimes.⁹⁹ Another thought students should be taught about the consequences of knife crime and deterrence.¹⁰⁰ The Children’s Court drew attention to research that shows that educational initiatives tailored to children and young people in high-risk areas are particularly effective in addressing knife carrying.¹⁰¹
- 5.97 There was also some support in consultations for community legal education about the extent of knife offences and the consequences of being detected, to reduce unnecessary interactions with police.¹⁰²

Targeted rehabilitation and diversion programs

- 5.98 We do not recommend targeted rehabilitation and diversion programs specifically for knife crime that sit within a sentencing regime (like traffic offenders’ intervention programs).¹⁰³ We are concerned that the development of such programs may not be an effective use of resources.
- 5.99 The prevalence of carrying knives means that any adjuncts to sentencing will only ever reach a small proportion of people who carry knives. We doubt whether targeted programs will be effective in deterring knife crime, in circumstances where people generally carry knives for protection. Targeted programs may represent a significant investment.¹⁰⁴ It may be better to have programs directed at more general cohorts to reach and impact a wider audience.

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

98. Queensland Police, “Make Stronger Choices, now and for Your Future”, 1 September 2021) *MyPolice Brisbane North* <<https://mypolice.qld.gov.au/brisbanenorth/2021/09/01/i-live-my-life-without-a-knife-campaign-launches-across-north-brisbane-district/>> (retrieved 24 May 2024).

99. P White, *Preliminary Submission PWE01*, 2.

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

101. Children’s Court of NSW, *Submission WE03*, 5. See also Australian Institute of Criminology, *The Carriage and Use of Knives by Young People*, AICrime Reduction Matters No 75 (2009).

102. Defence Roundtable, *Preliminary Consultation PWEC02*.

103. NSW Sentencing Council, *Weapons-Related Offences: Sentencing Young Offenders*, Issues Paper (2023) [6.44]–[6.49].

104. L Jessup-Little, *Submission WE14*, 5.

Education should be coupled with other support

- 5.100 While public education can be beneficial, it alone may not be effective in reducing knife crime. Because of the underlying social drivers of knife crime, education programs should be accompanied by social support, programs in the community and positive interactions with the police.¹⁰⁵ We explore integrated approaches to addressing knife crime below.

Integrated approaches that address the causes of knife crime

- 5.101 In our view, there is a strong need for programs and initiatives that address the underlying causes of knife crime, particularly for children and young people. There was broad support from stakeholders for holistic and integrated responses to address the root causes of knife crime amongst children and young people.¹⁰⁶
- 5.102 Submissions stated that initiatives such as support programs, access to housing and pathways to employment have been shown to be more effective in reducing crime than punitive approaches such as increased sentences.¹⁰⁷ These initiatives should be place-based, community designed, tailored to individual needs and culturally safe.¹⁰⁸
- 5.103 One submission also supported “increased investment in holistic, trauma-and disability-informed approaches” to address factors that lead to “contact with the criminal legal system” for Aboriginal children.¹⁰⁹
- 5.104 Submissions emphasised the importance of having a range of initiatives and services to address the factors underlying knife crime. Children and young people who commit knife crimes often have complex needs (such as experiences of

105. Defence Roundtable, *Preliminary Consultation PWEC02*.

106. P White, *Preliminary Submission PWE01*, 1; Youth Against Violence, *Preliminary Submission PWE06*, 6; Youth Justice NSW, *Preliminary Submission PWE07*, 2; NSW, 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*; Law Society of NSW, *Submission WE08*, 4; Youth Justice NSW, *Submission WE09*, 3–5, 10; Legal Aid NSW, *Submission WE11*, 44–45; NSW Bar Association, *Submission WE12* [48]–[50]; NSW Police Force, *Submission WE17*, 5; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 22; NSW Young Lawyers Criminal Law Sub-Committee, *Submission WE15*, 11.

107. Children’s Court of NSW, *Submission WE03*, 5; NSW, Advocate for Children and Young People, *Preliminary Submission PWE10*, 2; Youth Justice NSW, *Preliminary Submission PWE07*, 2; See also K D Browne and others, “Knife Crime Offender Characteristics and Interventions: A Systematic Review” (2022) 67 *Aggression and Violent Behavior* 1, 9.

108. Youth Justice NSW, *Preliminary Submission PWE07*, 2; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 22; J Phillips and others, *Promising Approaches to Knife Crime: An Exploratory Study*, Research and Analysis Bulletin 2022/03 (Her Majesty’s Inspectorate of Probation, 2022) 39.

109. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 22.

homelessness and mental illness), which need to be addressed in different ways.¹¹⁰ Research from the UK has found that programs that are effective for children and young people are generally tailored to individual needs and use multi-agency approaches.¹¹¹

- 5.105 NSW has several localised and integrated initiatives aimed at children and young people. For example, Youth Justice is currently piloting Violence reduction units in Wagga Wagga and Penrith that bring together agencies in the areas of health, housing, education, youth and mental health services to assist youth at risk. Other initiatives include the NSWPF Youth Action Meetings in Coffs Harbour and Bourke (soon to be expanded to a further nine police districts), various PCYC programs and the Youth on Track program delivered by Youth Justice.¹¹²
- 5.106 Violence reduction units in the UK have taken an integrated approach and since their establishment in 2005, the number of convictions for handling offensive weapons has decreased.¹¹³ One submission called for the introduction of similar units in NSW.¹¹⁴ The NSW Government may wish to monitor this scheme and consider whether it would be appropriate to introduce here.
- 5.107 However, an integrated, multi-agency approach can create challenges. One submission highlighted difficulties with coordinating early intervention, rehabilitation and reintegration of offenders because of siloed health, criminal justice and welfare systems. It supported “broader consultation about youth crime responses outside the narrow lens of sentencing”.¹¹⁵

Greater use of restorative justice

- 5.108 We are not convinced that a specific restorative justice program aimed at knife offences would be an effective use of resources.
- 5.109 The highest volume knife crime offence, custody of a knife in a public place or school, does not involve a victim. This may make restorative justice less effective. Although a victim is not required for participation in such a process, repairing the

110. UK, Government, *Serious Violence Strategy* (2018) 43.

111. UK, Government, *Serious Violence Strategy* (2018) 43.

112. NSW Premier’s Department, “NSW Government Takes Action to Make Communities Safer and Support Young People in Regions” (Media Release, 12 March 2024) <<https://www.nsw.gov.au/media-releases/nsw-government-takes-action-to-make-communities-safer-and-support-young-people-regions>> (retrieved 24 May 2024).

113. *Criminal Law (Consolidation) (Scotland) Act 1995* (UK) s 47, s 49; Scottish Government, *Violence Prevention Framework: Evidence Supplement* (2023) 11; Scottish Violence Reduction Unit, “Who are We?” (2022) <<https://www.svru.co.uk/about-us/>> (retrieved 24 May 2024).

114. Youth Against Violence, *Preliminary Submission PWE06*, 6, rec 7.

115. Legal Aid NSW, *Submission WE11*, 44.

relationship between victims and offenders is one of the main aims of restorative justice.¹¹⁶

- 5.110 We acknowledge that restorative justice processes have benefits.¹¹⁷ Several submissions raised it as a response to knife crime.¹¹⁸ For this reason, the NSW Government should investigate expanding the availability of restorative justice approaches in appropriate cases. However, questions about broader restorative justice programs, that might include knife crime offences among other offences, would need to be considered in a separate review.

Discussion of other non-sentencing options

- 5.111 We discuss below two other options raised in the review. We do not make recommendations on these options because they do not relate to sentencing and are therefore outside our expertise. We discuss these options primarily to acknowledge the concerns that have been raised about them.

Knife crime prevention orders

- 5.112 In this section, we consider whether NSW should adopt knife crime prevention orders (KCPOs) as used in the UK.¹¹⁹ KCPOs can be made against any person from the age of 12 and may contain conditions including a curfew, participation in a restorative justice activity or attendance at counselling.¹²⁰ KCPOs are enforceable orders outside of sentencing or diversion and therefore outside our expertise.
- 5.113 We heard a range of opinions on KCPOs. One view is that KCPOs might disproportionately affect disadvantaged people.¹²¹ We heard concerns that the use of KCPOs might lead to over-policing of some communities. Some submissions

116. See NSW Sentencing Council, *Weapons-Related Offences: Sentencing Young Offenders*, Issues Paper (2023) [6.50].

117. NSW Sentencing Council, *Weapons-Related Offences: Sentencing Young Offenders*, Issues Paper (2023) [6.50]–[6.54].

118. Law Society of NSW, *Submission WE08*, 1, 4; NSW Bar Association, *Submission WE12* [48]; Youth Justice NSW, *Submission WE09*, 9; NSW Young Lawyers Criminal Law Sub-Committee, *Submission WE15* [24]–[27]; NSW Police Force, *Submission WE17*, 1.

119. NSW Sentencing Council, *Weapons-Related Offences: Sentencing Young Offenders*, Issues Paper (2023) [6.23]–[6.34].

120. UK Home Office, *Knife Crime Prevention Orders (KCPOs): Practitioners' Guidance* (2021) 17–18.

121. Legal Aid NSW, *Submission WE11*, 39–40; NSW Bar Association, *Submission WE12* [60]–[61]; Youth Justice NSW, *Submission WE09*, 6–8; NSW Young Lawyers Criminal Law Sub-Committee, *Submission WE15* [21]–[22]; NSW, Public Defenders, *Submission WE19* [135]–[136].

raised concerns about the disproportionate impact of proactive policing on Aboriginal people.¹²²

- 5.114 Youth Justice NSW raises concerns with KCPOs including that they:
- are onerous and contribute to “stealth criminalisation” of young people, meaning it is easy for a young person to unknowingly breach the order
 - pre-emptively view young people as “deviant” based on perceived rather than actual bad behaviour. This stigmatises young people, hindering the rehabilitation process and their ability to desist from crime, and
 - could compromise established principles of justice including due process, proportionality and special protections for children and young people.¹²³
- 5.115 We have also heard concerns that there is no evidence they would work in NSW.¹²⁴
- 5.116 There may also not be a need for KCPOs, as other diversionary or sentencing options already exist. For instance, some community-based sentences can include conditions that might be appropriate in the context of knife crime, such as place restrictions and non-association orders.¹²⁵ Participation in programs can be ordered under existing or proposed options (including conditional cautions).
- 5.117 However, some submissions favoured KCPOs. For instance, one submission considered that there was scope for KCPOs in NSW “as a tool to address and deter repeat offending, protect community safety, and promote rehabilitation”.¹²⁶ Another thought there was scope for a modified KCPO scheme. Courts would have the discretion, upon conviction, to impose a KCPO that includes a “positive requirement to work towards addressing the relevant offending and risk factors”.¹²⁷

Police powers to conduct random searches

- 5.118 Another suggestion made to the Council was to give NSWPF powers to conduct random searches of the public with metal detectors or hand-held scanning devices (wands) to detect knives and other weapons in designated public areas.¹²⁸ Public

122. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 15, 21; NSW Young Lawyers Criminal Law Sub-Committee, *Submission WE15* [22]; NSW Bar Association, *Submission WE12* [65]–[66]; Legal Aid NSW, *Submission WE11*, 39.

123. Youth Justice NSW, *Submission WE09*, 6–8.

124. Confidential, *Submission WE13*, 16.

125. *Children (Criminal Proceedings) Act 1987* (NSW) s 33D; *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 8A.

126. NSW Police Force, *Submission WE17*, 4.

127. L Jessup-Little, *Submission WE14*, 5.

128. NSW Sentencing Council, *Weapons-Related Offences: Sentencing Adult Offenders*, Consultation Paper (2023) [6.77]; NSW Sentencing Council, *Weapons-Related Offences: Sentencing Young Offenders*, Issues Paper (2023) [6.55]–[6.63].

discussion has recently focused on the Queensland approach introduced by the *Police Powers and Responsibilities (Jack’s Law) Amendment Act 2023* (Qld). This allows police to use scanning devices to detect knives in specified “safe night precincts” as well as public transport stations and vehicles.

- 5.119 An evaluation of an initial 12-month trial of the use of metal detecting wands in two safe night precincts in Queensland was undertaken in 2022. While the evaluation found an increased detection in knife carrying, it also found:
- no evidence of a deterrent effect in weapons carrying
 - no evidence of any statistically significant reduction in violent crime and
 - some evidence of the use of “stereotypes and cultural assumptions” in the selection of people to be searched.¹²⁹
- 5.120 The NSWPF submitted that a proposal to introduce new police search powers should not be considered in this review because it is not a sentencing issue.¹³⁰ The NSWPF’s view was that the exercise of police powers prior to arrest and charge is not in the scope of this review.¹³¹ Several other submissions expressly opposed the proposal.¹³²
- 5.121 There were concerns that the proposal would have a disproportionate impact on Aboriginal people.¹³³ ALS referred to the overwhelming body of evidence that Aboriginal people are more like to be subjected to proactive policing practices, such as stop and search. ALS also raised that policing practices are a key driver of the over-incarceration of Aboriginal people.¹³⁴
- 5.122 There were also concerns any reform of this type would increase the frequency of interactions between young people and police. This could lead to more aggressive interactions and worsen negative perceptions of police.¹³⁵
- 5.123 There are indications that a reform of this type might not be effective in reducing knife crime. For instance, Legal Aid pointed to UK research showing there was

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

130. NSW Police Force, *Submission WE17*, 5.

131. NSW Police Force, *Submission WE17*, 5.

132. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 15; NSW Young Lawyers Criminal Law Sub-Committee, *Submission WE15* [32]–[38]; NSW Bar Association, *Submission WE12* [65]–[66]; Legal Aid NSW, *Submission WE11*, 27, 44; Confidential, *Submission WE13*, 17; Youth Justice NSW, *Submission WE09*, 9–10.

133. NSW Bar Association, *Submission WE12* [66]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 15–16.

134. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 15–16.

135. Confidential, *Submission WE13*, 17; NSW Young Lawyers Criminal Law Sub-Committee, *Submission WE15* [33].

limited evidence about the effectiveness of stop and search on crime rates. To have even a modest impact on crime rates, there may need to be a massive expansion of stop and search on a scale likely to be unacceptable to some communities.¹³⁶ Random scanning, by itself, does not address the underlying causes of offending.¹³⁷ Further, we noted in our Consultation Paper the existing police powers in NSW to search for weapons.¹³⁸

5.124 However, as we have outlined, in response to several tragic knife crime related events, the NSW Government introduced a bill that is modelled on Queensland's Jack's law, to trial police powers to use a hand-held scanner on members of the public without a warrant in designated areas.¹³⁹ The bill includes monitoring and review measures, including:

- a requirement that the Commissioner of the NSWPF provide information about the use of the scanners in the NSWPF's annual report
- a statutory review of the powers two years from the date it commences and
- a sunset clause that provides the powers will expire 3 years after commencement.

5.125 Having regard to the submissions we received, we consider it appropriate that, if implemented, the impact of any new powers should be carefully monitored and considered along with an evaluation of the existing Queensland scheme.

136. Legal Aid NSW, *Submission WE11*, 44.

137. NSW Sentencing Council, *Weapons-Related Offences: Sentencing Young Offenders*, Issues Paper (2023) [6.63].

138. NSW Sentencing Council, *Weapons-Related Offences: Sentencing Adult Offenders*, Consultation Paper (2023) [6.83]–[6.86].

139. Law Enforcement (Powers and Responsibilities) and Other Legislation Amendment (Knife Crime) Bill 2024 (NSW); NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 15 May 2024, 32 [proof]; NSW Government, "New Measures to Get Knives off the Street and Boost Community Safety" (7 May 2024) <<https://www.nsw.gov.au/media-releases/measure-to-get-knives-off-street>> (retrieved 24 May 2024).

6. Standard non-parole periods

In brief

In this chapter, we outline concerns we heard about the standard non-parole period scheme, and we recommend the NSW Government consider a separate review of the scheme to examine these issues. If this recommendation is not adopted by the NSW Government, we recommend adjustments to the standard non-parole periods for some weapons offences and the monitoring of a further offence.

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- 6.1 We have been asked to consider whether the current standard non-parole periods (SNPPs) for weapons offences remain appropriate.
- 6.2 We received detailed submissions on this issue, some of which criticised the SNPP scheme. We heard concerns about the methods used to determine which offences fall within the scheme and the SNPPs for those offences. These criticisms were directed towards the scheme in general, and not only in its operation in relation to weapons offences.
- 6.3 In this chapter, we outline the concerns we heard about the scheme as a whole. While it is beyond the scope of this review to revisit the general principles behind the SNPP scheme and its application, we recommend the NSW Government consider commissioning a separate review of the SNPP scheme so that these issues can be given full consideration.
- 6.4 The terms of reference ask us to consider whether the current SNPPs for weapons offences remain appropriate. To determine this, we have applied the existing guidance on how SNPP offences are to be selected, and how SNPPs are to be set. Applying these settings, we conclude that no weapons offences should be added or removed from the SNPP scheme. We have further concluded that the SNPPs for some weapons offences should be adjusted. We consider that these recommendations should be implemented if the NSW Government chooses not to adopt our recommendation for a more comprehensive review of the scheme.

Overview of SNPPs

- 6.5 SNPPs apply to a limited number of offences identified in part 4 division 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*Crimes (Sentencing Procedure) Act*).

Why was the scheme introduced?

- 6.6 The purpose of the introduction of the SNPP scheme was to provide “further guidance and structure to judicial discretion”.¹ The scheme was introduced alongside the establishment of the NSW Sentencing Council in February 2003. These reforms aimed to promote consistency and transparency in sentencing and promote public understanding of the sentencing process.² Achieving consistency and transparency in sentencing promotes predictable sentencing patterns for an offence and reduces the likelihood of appeals.

1. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 23 October 2002, 5813.

2. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 23 October 2002, 5813.

- 6.7 The scheme was established as an alternative to the introduction of mandatory sentencing, which was considered by the NSW Government to be unjust and likely to have a disproportionate impact on children and young people and Aboriginal and Torres Strait Islander people.³
- 6.8 The SNPP scheme currently applies to over 40 serious criminal offences in NSW. However, only ten offences within the scope of this review have SNPPs. The involvement of a weapon is an essential element of each of these offences. We set out the offences in Appendix E.

What is the role of SNPPs and how are they applied by courts?

- 6.9 Along with the maximum penalty for the offence, the SNPP is a guidepost for courts when sentencing an offender. Courts are required to take the SNPP into account, without limiting other matters that can or must be considered.⁴
- 6.10 The SNPP represents 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”.⁵ A non-parole period is the minimum period that the offender must be kept in prison.
- 6.11 The High Court decision in *Muldrock v R* clarified that courts must not engage in a “two-stage approach” to sentencing SNPP offences.⁶ This occurs when the court first assesses whether the offence falls within the middle of the range of objective seriousness for offending of that type and then determines whether there are any matters that justify an adjustment to the non-parole period from the SNPP. Rather, a court must identify all of the matters which have a bearing upon the appropriate sentence for an offence, and then determine the sentence taking into account all of these matters.⁷
- 6.12 Amendments to division 1A of the *Crimes (Sentencing Procedure) Act* made in 2013 intended to clarify the operation of the scheme following the High Court decision in *Muldrock v R*. This included clarification that:

limiting consideration to the objective factors applies only when giving meaning to the hypothetical “middle of the range” offence described in section 54A. It does not prevent courts from taking into consideration all relevant factors,

3. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 23 October 2002, 5814.

4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(2).

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

6. *Muldrock v R* [2011] HCA 39, 244 CLR 120 [28].

7. *Muldrock v R* [2011] HCA 39, 244 CLR 120 [28], [29].

including those personal to the offender, when determining the appropriate sentence under section 54B.⁸

- 6.13 Courts must record reasons for setting a non-parole period that is longer or shorter than the SNPP.⁹ This does not require a court to identify the extent to which the seriousness of the offence differs from the hypothetical offence in the middle of the range of seriousness (the offence to which the SNPP is referable).¹⁰
- 6.14 A court may also impose a non-custodial sentence for an SNPP offence, and must record its reasons for doing so, including each mitigating factor taken into account.¹¹
- 6.15 The SNPP scheme does not apply to the sentencing of an SNPP offence in circumstances where:
- the offender is being sentenced to life imprisonment
 - the offender is being sentenced to detention under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW)
 - the offence for which the offender is being sentenced is dealt with summarily (that is, by the Local Court), or
 - the offender was under the age of 18 at the time the offence was committed.¹²

Existing guidance on SNPP selection and length

- 6.16 In our 2013 report on SNPPs, we provided guidance on how to determine whether an offence should be included in the SNPP scheme and if so, the SNPP that should apply to that offence.¹³
- 6.17 We set out principles that should govern whether offences should be retained, included in, or removed from, the SNPP scheme. These principles are whether the offence:
- has a significant maximum penalty
 - is triable on indictment only
 - involves elements of aggravation
 - involves a vulnerable victim

8. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 18 September 2013, 23737.

9. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(3).

10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(6).

11. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54C(1).

12. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D.

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

- involves a special risk of serious consequences to the victim or the community
 - is prevalent
 - has a pattern of inadequate sentencing, and
 - has a pattern of inconsistent sentences.¹⁴
- 6.18 In addition, the fact that an offence covers a wide range of offending behaviour can be considered in deciding whether to exclude an offence from the scheme.¹⁵
- 6.19 The report stated that it was not necessary for all these principles to be present for an offence to be appropriate to include in the SNPP scheme.¹⁶
- 6.20 The current approach for setting the SNPP derives from the following general propositions we set out in our 2013 report:
- an offence in the middle of the range of objective seriousness should generally (not in every case) receive a head sentence in the order of 50% of the maximum penalty for the offence, and
 - the non-parole period for an offence (other than for offences receiving a life sentence), before allowing for subjective circumstances, should be in the order of 75% of the head sentence, in accordance with the general requirement that the parole period of a sentence must not exceed one-third of the non-parole period.¹⁷
- 6.21 This results in a common starting point for calculating an SNPP that is 37.5% of the maximum penalty for an offence (that is, 75% of 50% of the maximum penalty).
- 6.22 We recommended that the starting point for the SNPP can then be reduced or increased (to no more than 50% of the maximum penalty) as appropriate, having regard to the following matters:
- the special need for deterrence
 - the need to recognise the exceptional harm the offence may cause
 - the potential vulnerability of victims
 - the extent to which the offence may involve a breach of trust or abuse of authority, and
 - sentencing statistics and practice, including relevant appellate guidance as to appropriate levels of sentencing for the offence.¹⁸

14. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [2.2] rec 2.1(1).

15. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [2.2] rec 2.1(2).

16. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [0.6], [2.3].

17. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [4.28]; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2).

18. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [4.30]–[4.31], rec 4.1.

A review of the SNPP scheme may be necessary

Recommendation 6.1: A separate review of the SNPP scheme

The NSW Government should consider referring a review of the SNPP scheme to the NSW Sentencing Council. The review could consider:

- (a) whether the SNPP scheme is consistent with established sentencing principles and whether it is achieving its purpose
- (b) the existing guidelines for determining which offences should be included in the scheme, and the length of SNPPs.

- 6.23 Although this review focuses on knives, firearms and other weapons offences, we received submissions about the appropriateness of SNPPs for non-weapons offences. We heard concerns about the scheme itself, including calls to abolish it entirely.¹⁹ Other issues were whether the process for selecting SNPP offences and setting the lengths of SNPPs require reform.
- 6.24 While we acknowledge these concerns, we are not able to examine these issues within the terms of reference for the present review. This is because the concerns raise wider issues about the existence and operation of the SNPP scheme, which go beyond the scope of a review of SNPPs for weapons offences.
- 6.25 In our view, a separate and wider review of the SNPP scheme may be necessary to examine these concerns. That review should consider the SNPP scheme holistically, instead of dealing with only one category of offences (as the present review does).
- 6.26 In this section, we discuss the concerns we heard about the SNPP scheme. These issues could appropriately form part of the terms of reference for a more complete review of the SNPP scheme.

Concern that the scheme conflicts with sentencing principles

- 6.27 One criticism, raised by the Public Defenders, the NSW Bar Association and the Aboriginal Legal Service (ALS), is that the SNPP scheme conflicts with established sentencing principles. In particular, the scheme is inconsistent with the principles of individualised justice and instinctive synthesis.²⁰
- 6.28 Under the principle of individualised justice, a sentencing court has broad discretion to consider all the relevant circumstances of the case before it, and each sentence must be individualised to each case.²¹

19. Legal Aid NSW, *Submission WE11*, 16; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 11; NSW, Public Defenders, *Submission WE19* [32]–[33].

20. NSW, Public Defenders, *Submission WE19* [33], [48]; NSW Bar Association, *Submission WE12* [32].

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

- 6.29 Instinctive synthesis is the process by which a court identifies and evaluates all relevant factors and then makes a judgment as to the appropriate sentence.²²
- 6.30 The Public Defenders contended that the scheme elevates the objective seriousness of an offence over other sentencing considerations, including instinctive synthesis and individualised justice.²³
- 6.31 The Public Defenders submission criticised the concept that an SNPP represents an offence that, taking into account only objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness. The submission argued that:
- it is difficult, if not impossible, to conceive ... [that] if a sentencing judge is truly approaching the matter from the perspective of an instinctive synthesis, how this concept is of any value to the sentencing exercise. The s 3A purposes of sentencing (the basis for which a sentence is imposed) are not able to be addressed by focus on this narrowed component of a case. Respect for the proportionality principle does not require anything like the consideration of the factor required by the scheme to be taken into account.²⁴
- 6.32 The Public Defenders considered that there remain unresolved issues with the scheme and uncertainty about its application.²⁵ The Public Defenders considered the scheme to be a “diversion and distraction”²⁶ from the sentencing task, and that it “runs a meaningful risk of producing unjust sentences”.²⁷
- 6.33 The NSW Bar Association submitted that while SNPPs have a role as a legislative guidepost, it is important to guard against undermining judicial discretion and individualised justice in sentencing.²⁸
- 6.34 The ALS further submitted that the curtailing of sentencing discretion creates a risk of “unjustified increased incarceration” of Aboriginal and Torres Strait Islander people.²⁹
- 6.35 The Public Defenders, Law Society of NSW and the ALS considered that existing sentencing law, including the common law principle of instinctive synthesis, statutory sentencing principles, maximum penalties and other mechanisms such as

22. *Markarian v R* [2005] HCA 25, 228 CLR 357 [51]; *Muldock v R* [2011] HCA 39, 244 CLR 120 [26].

23. NSW, Public Defenders, *Submission WE19* [46]–[48].

24. NSW, Public Defenders, *Submission WE19* [121].

25. NSW, Public Defenders, *Submission WE19* [47].

26. NSW, Public Defenders, *Submission WE19* [35].

27. NSW, Public Defenders, *Submission WE19* [50].

28. NSW Bar Association, *Submission WE12* [32].

29. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 11.

guideline judgments, are sufficient for courts to appropriately sentence offenders.³⁰

Concern that the scheme is not meeting its objectives

- 6.36 The Public Defenders queried whether the SNPP scheme is achieving its purpose, in particular to ensure adequacy and consistency in sentencing.³¹
- 6.37 The Public Defenders expressed concern that the scheme may encourage courts to treat disparate offending similarly, because of the undefined concept of offending in the “middle of the range” of objective seriousness.³²
- 6.38 We heard concerns that courts may not be applying the SNPP scheme, which detracts from the scheme’s purpose of achieving adequacy in sentencing. In the Public Defenders view, some of the SNPPs are so high that if they were actually imposed, and courts applied the orthodox approach to setting the balance of the term, this would result in inappropriately high sentences “close to, at or above the maximum, which should be for worst cases”.³³ The Law Society of NSW observed that, in their members’ experience, it is more common for judges to depart from the SNPP than apply it.³⁴

Concern that the scheme has internal inconsistencies

- 6.39 We heard concerns that the table of SNPP offences³⁵ generally lacks consistency between the applicable maximum penalties for offences and their respective SNPPs.³⁶ The concerns are that offences with the same maximum penalty often have different SNPPs, and that some offences have a higher ratio of maximum penalty to SNPP than other similar offences, with no apparent justification. These concerns are not confined to offences within the scope of this review.
- 6.40 For example, aggravated sexual touching has a maximum penalty of 7 years’ imprisonment.³⁷ It has an SNPP of 5 years, the highest ratio of SNPP to maximum penalty of any offence in the scheme (71%). We recommended in 2013 that this SNPP be reduced to 4 years and that the maximum penalty be increased to 8 years’ imprisonment to address this anomaly, while still reflecting the seriousness of the

30. NSW, Public Defenders, *Submission WE19* [33]; Law Society of NSW, *Submission WE08*, 7; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 11.

31. NSW, Public Defenders, *Submission WE19* [33].

32. NSW, Public Defenders, *Submission WE19* [46].

33. NSW, Public Defenders, *Submission WE19* [72].

34. Law Society of NSW, *Submission WE08*, 7.

35. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, table.

36. NSW, Public Defenders, *Submission WE19* [80]; Confidential, *Submission WE13*, 8.

37. *Crimes Act 1900* (NSW) s 61KD(1).

offence.³⁸ This recommendation was not implemented. The Public Defenders considered that the SNPP for this offence remains “an extreme example of the problems of the scheme”.³⁹

- 6.41 In another example, wounding with intent to cause bodily harm or resist arrest has a maximum penalty of 25 years’ imprisonment.⁴⁰ It has an SNPP of 7 years, which equates to a ratio of SNPP to maximum penalty of 28%, the second lowest in the scheme. We recommended in 2013 that the SNPP for this offence be increased from 7 to 9 years to reflect its seriousness.⁴¹ This was not implemented. We also recommended that the SNPPs of the equivalent offences involving firearms (with the same maximum penalty) be increased to 9 years.⁴² This was implemented. This is an example of an offence with a lower SNPP than equivalent offences with the same maximum penalty, with no clear justification.
- 6.42 Cultivation, supply or possession of a commercial quantity of drugs where it relates to cannabis leaf has a maximum penalty of 15 years’ imprisonment and an SNPP of 10 years.⁴³ This is a ratio of maximum penalty to SNPP of 67%. This ratio is higher than the version of the offence that involves prohibited plants other than cannabis, which has the same SNPP but a maximum penalty of 20 years’ imprisonment.⁴⁴
- 6.43 One of the lowest proportions of SNPP to maximum penalty applies to the offence of robbery while armed or in company, with wounding or grievous bodily harm (GBH).⁴⁵ This offence has a maximum penalty of 25 years’ imprisonment and an SNPP of 7 years. It is a ratio of maximum penalty to SNPP of 28%.
- 6.44 We discuss further inconsistencies in SNPPs for weapons offences later in this chapter.

Some submissions questioned the existing guidance

- 6.45 We heard criticisms of the principles for selecting appropriate SNPP offences and about the process for setting the SNPP.⁴⁶
- 6.46 We also heard a proposed alternative, or additional principle, that offences in the scheme should be limited to those that have a maximum penalty of 20 years’

38. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) rec 4.2(a)(i).

39. NSW, Public Defenders, *Submission WE19* [44].

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

41. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) rec 4.2(a)(iii).

42. *Crimes Act 1900* (NSW) s 33A(1), s 33A(2); NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) rec 4.3(a)–(b).

43. *Drug Misuse and Trafficking Act 1985* (NSW) s 23(2), s 33(2)(b).

44. *Drug Misuse and Trafficking Act 1985* (NSW) s 23(2), s 33(2)(a).

45. *Crimes Act 1900* (NSW) s 98.

46. NSW, Public Defenders, *Submission WE19* [122]–[131].

imprisonment or more.⁴⁷ These issues would need to be examined further in a separate review of the SNPP scheme, which we have recommended. Other stakeholders we heard from either supported in principle or did not oppose the current approach.⁴⁸

- 6.47 On the process of setting SNPPs, several stakeholders considered the starting point of 37.5% to be too high. Legal Aid submitted that the ratio should instead be between 25% and 40% of the maximum penalty.⁴⁹ The ALS considered that 37.5% should be the upper limit.⁵⁰ Similarly, the Public Defenders considered that starting from 37.5% and adjusting it upwards ignores sentencing trends and statistics, and unnecessarily escalates penalties.⁵¹
- 6.48 The Public Defenders raised substantive issues with the assumption that a mid-range offence should attract a head sentence of 50% of the maximum penalty (and therefore the basis of the 37.5% starting point) and with the factors relevant to adjusting an SNPP from this starting point. The Public Defenders considered this assumption to be “conceptually flawed” and invalid because it does not reflect existing law, including the sentencing principles of instinctive synthesis and proportionality.⁵²
- 6.49 The Public Defenders considered the assumption particularly problematic for offences which can result in penalties other than full-time imprisonment. They submitted that these offences cannot be graded on a spectrum by years in prison in the same way as more serious offences, because the sentencing options for these offences do not start with any time in prison.⁵³
- 6.50 The Public Defenders submitted that the current factors to be taken account in adjusting the SNPP are matters that would be relevant to determining the maximum penalty for the offence. These matters therefore directly contribute to the common starting point of 37.5% and so in the Public Defenders’ view, to consider them again in adjusting the starting point is not warranted. The Public Defenders view was that these factors would only be relevant in determining the length of an SNPP if an “offence-by-offence” approach to setting SNPPs was taken, rather than the approach of a common starting point that can be adjusted up or down.⁵⁴

47. Legal Aid NSW, *Submission WE11*, 17; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 11; NSW, Public Defenders, *Submission WE19* [5], [51].

48. NSW Police Force, *Submission WE16*, 5; Confidential, *Submission WE13*, 6–7.

49. Legal Aid NSW, *Submission WE11*, 17.

50. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 11–12.

51. NSW, Public Defenders, *Submission WE19* [50].

52. NSW, Public Defenders, *Submission WE19* [35], [51], [103], [112].

53. NSW, Public Defenders, *Submission WE19* [51].

54. NSW, Public Defenders, *Submission WE19* [51].

- 6.51 We acknowledge the limitations of the 2013 guidance pointed out by these submissions. We agree that the assumption underpinning the approach may not apply to all offences, for example those that have sentencing options other than full-time imprisonment. This includes any offence for which a court may order an intensive correction order (ICO) as an alternative to full-time imprisonment. ICOs are not available for certain types of serious offences, including, relevantly for this review, offences involving the discharge of a firearm.⁵⁵
- 6.52 However, the 2013 approach does provide a degree of consistency and transparency. It is simple to apply compared with the alternative approach of determining SNPPs on an offence-by-offence basis. We outlined concerns with this alternative approach in our 2013 report, including its complexity and its potential to result in more inconsistency.⁵⁶
- 6.53 We also acknowledge the concerns about the SNPP scheme, and the methods for selecting offences for inclusion in the scheme and determining SNPP length. We therefore recommend consideration be given to commissioning a separate review of the scheme that would allow these matters to be considered.
- 6.54 However, our terms of reference require us to consider whether the current SNPPs for weapons offences remain appropriate. The rest of this chapter is concerned with this question. We provide recommendations about the SNPPs for weapons offences, and consider the NSW Government should adopt these recommendations if it chooses not to commission a wider review of the SNPP scheme.

No weapons offences should be added

Recommendation 6.2: No weapons offence should be added

No weapons offence should be added to the SNPP scheme.

- 6.55 We received proposals to add four *Firearms Act 1996* (NSW) (*Firearms Act*) offences to the scheme.⁵⁷ The offences are:
- unauthorised manufacture of a pistol or prohibited firearm (s 50A(2))
 - shortening a firearm or possessing, supplying or giving possession of a shortened firearm (s 62)
 - acquiring, possessing or using a pistol or prohibited firearm while subject to a Firearms Prohibition Order (FPO) (s 74(1)), and

55. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(1)(f).

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

57. Confidential, *Submission WE13*, 6–7; NSW Police Force, *Submission WE16*, 1, 5.

- supplying, acquiring, possessing or using an unregistered pistol or prohibited firearm (s 36).

6.56 We have considered these offences against the principles relevant to determine whether an offence should be included in the scheme. While they align with some of the principles, we agree with the ALS that there needs to be a “strong evidence base” to add offences to the SNPP scheme.⁵⁸ In our view, there is insufficient evidence to include these offences in the scheme.

The offences meet some key principles for inclusion

6.57 We heard that these offences should be included in the SNPP scheme as they are serious offences. The NSW Police Force expressed this view in relation to the offence of the unauthorised manufacture of a pistol or prohibited firearm.⁵⁹ We have also heard that the seriousness of the three other offences, listed above, means they should be included in the SNPP scheme.⁶⁰

6.58 It could also be said that each of the offences listed above meets one of the principles relevant for inclusion in the scheme, being that they involve a special risk of serious consequences to the community. Section 50A(2) also meets two other principles relevant for inclusion in the scheme, being that it is triable on indictment only and has a significant maximum penalty of 20 years’ imprisonment.

6.59 Another argument is that the offences under s 62, s 74(1) and s 36 are similar to other offences in the SNPP scheme and therefore should be included for consistency and transparency of sentencing. The Office of the Director of Public Prosecutions (ODPP) identified that these offences are similar to the offence of unauthorised use or possession of a pistol or prohibited firearm, which is within the SNPP scheme.⁶¹ The ODPP’s view is that these offences “are of seemingly equal seriousness in terms of their elements and the applicable maximum penalty”.⁶²

6.60 A further perspective is the absence of an SNPP could affect a decision on whether to charge an offence, as opposed to another offence with a higher SNPP that could be charged for the same conduct. This argument was raised in relation to s 74(1) of the *Firearms Act*, along with the concern that an inadequate sentencing regime for this offence could undermine the deterrent effect of FPOs.⁶³

58. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 12.

59. NSW Police Force, *Submission WE16*, 1.

60. Confidential, *Submission WE13*, 6–7.

61. *Firearms Act 1996* (NSW) s 7.

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

63. Confidential, *Submission WE13*, 6.

6.61 These submissions suggested that these four offences meet some of the principles for inclusion on the SNPP scheme. However, they do not meet other key principles and therefore do not merit inclusion in the scheme.

The offences are not prevalent

6.62 One factor weighing against their inclusion in the SNPP scheme is that these are not high-volume offences. One of the principles relevant to selecting an offence to be included in the SNPP scheme is that it is prevalent.⁶⁴

6.63 From 2013–2022, the proven matters involving adult offenders (in the Local or higher courts) where the offence was the principal offence were low. As shown in the table below, the volume of these offences is much lower than the offence of unauthorised possession or use of a prohibited firearm or pistol (which has an SNPP).

Table 1: Proven matters involving adult offenders in the Local or higher courts by principal proven offence and number dealt with in the District or Supreme Court, 2013–2022

Offence	Number of proven matters	Number dealt with on indictment (in the District or Supreme Court)
Unauthorised possession or use of a prohibited firearm or pistol (<i>Firearms Act s 7(1)</i>)	1564	378
Shortening a firearm or possessing, supplying or giving possession of a shortened firearm (<i>Firearms Act s 62</i>)	334	86
Acquiring, possessing or using a pistol or prohibited firearm while subject to an FPO (<i>Firearms Act s 74(1)</i>)	97	20
Unauthorised manufacture of a pistol or prohibited firearm (<i>Firearms Act s 50A(2)</i>)	14	14
Supplying, acquiring, possessing or using an unregistered pistol or prohibited firearm (<i>Firearms Act s 36</i>)	367	11

Source: NSW Bureau of Crime Statistics and Research, ab23-22643, table 1, table 2, ab23-22460, table 2.

64. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [2.2] rec 2.1(1)(f).

There is no pattern of inadequate or inconsistent sentencing

- 6.64 As discussed above, one of the purposes of the SNPP scheme is to guide courts in order to ensure consistency in sentencing. Two of the principles relevant to determining whether an offence needs an SNPP are whether it has a pattern of inadequate sentencing or inconsistent sentencing. The presence of these may suggest the courts need guidance.
- 6.65 These principles are heavily interlinked with the prevalence principle. If an offence is not prevalent, it can be difficult to identify any pattern of sentencing. This is a particular problem for the unauthorised manufacture of firearms offence (*Firearms Act* s 50A(2)), because from 2013–2022 offenders have only been sentenced to full-time imprisonment for this offence on three occasions (where the offence was the most serious offence being sentenced).⁶⁵
- 6.66 These numbers are too low to establish any pattern of inconsistent sentencing. We have also not identified any Crown appeals against sentences for this offence, which suggests that there is no issue of inadequate sentencing.
- 6.67 The other offences (*Firearms Act* s 62, s 74(1) and s 36) have been sentenced more often. We have reviewed the range of sentences for these offences on the Judicial Information Research System to see if they appear to align with a normal distribution. A normal distribution is where most of the sentences cluster in the middle of the range with fewer at the outer ranges. We found the sentences for these three offences appear to reflect a normal distribution of sentences.⁶⁶
- 6.68 There are more statistically robust ways to measure sentencing consistency that could not be undertaken in this review because of the time, resources and statistical expertise it would require. For example, in its review of the impact of SNPPs on sentencing in 2010, the Judicial Commission of NSW identified statistical measures to assess the consistency of sentences.⁶⁷ This more robust approach could be undertaken in a more comprehensive review of the SNPP scheme.
- 6.69 We have not identified any Crown appeals against sentence for the s 74(1) or the s 36 offence. We have identified only one successful Crown appeal for the s 62 offence. This does not establish a pattern of inadequate sentencing for these offences.

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

66. Judicial Commission of NSW, *Sentencing Statistics*, Judicial Information Research System (retrieved 31 January 2024).

67. P Poletti and H Donnelly, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Research Monograph 33 (Judicial Commission of NSW, 2010) 17.

Two of the offences cover a wide range of offending behaviour

- 6.70 The fact that an offence covers a wide range of offending behaviour can weigh against including that offence in the SNPP scheme.
- 6.71 A wide range of offending conduct is covered by the offences of:
- acquiring, possessing or using a pistol or prohibited firearm while subject to an FPO, and
 - supplying, acquiring, possessing or using an unregistered pistol or prohibited firearm.
- 6.72 Neither of these offences requires a person to have any specific intent in undertaking the conduct.
- 6.73 We heard that the FPO offence is serious because a person subject to an FPO may also be involved in other criminal activity, and possession of a firearm contrary to an FPO may demonstrate both a “determined interest in firearm possession and a disregard for the terms of the Order”.⁶⁸ However, we are aware of concerns around the operation of the FPO scheme (see chapter 7). This suggests that FPOs may not be targeted at only the most serious offenders. We are therefore satisfied that the offence may also cover a wide range of offending behaviour.

No weapons offence should be removed

Recommendation 6.3: Retain weapons offences currently in the SNPP scheme

No weapons offence should be removed from the SNPP scheme.

- 6.74 Some submissions argued that certain weapons offences should be removed from the SNPP scheme. For the reasons discussed below, we do not presently recommend the removal of any weapons offences from the SNPP scheme.
- 6.75 Several submissions argued that the offence of unauthorised use or possession of a prohibited weapon under the *Weapons Prohibition Act 1998* (NSW) (*Weapons Prohibition Act*) should be removed from the scheme.⁶⁹ It has a maximum penalty of 14 years’ imprisonment and an SNPP of 5 years. The NSW Bar Association suggested, in the alternative, that the SNPP for this offence be reduced.⁷⁰

68. Confidential, *Submission WE13*, 7.

69. *Weapons Prohibition Act 1998* (NSW) s 7; Legal Aid NSW, *Submission WE11*, 17; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 12; NSW Bar Association, *Submission WE12* [37]; NSW, Public Defenders, *Submission WE19* [115].

70. NSW Bar Association, *Submission WE12* [37].

- 6.76 We also heard that offences that have a maximum penalty of less than 20 years' imprisonment should be removed from the scheme. Among weapons offences, this includes:
- unauthorised use or possession of a pistol or prohibited firearm (maximum penalty: 14 years' imprisonment) (*Firearms Act s 7*)
 - firing at a building with reckless disregard for safety (maximum penalty: 14 years' imprisonment) (*Crimes Act s 93GA(1)*)
 - firing at a building with reckless disregard for safety during a public disorder (maximum penalty: 16 years' imprisonment) (*Crimes Act s 93GA(1A)*), and
 - firing at a building with reckless disregard for safety during an organised criminal activity (maximum penalty: 16 years' imprisonment) (*Crimes Act s 93GA(1B)*).
- 6.77 The Public Defenders also queried whether the offences pursuant to s 33A *Crimes Act* currently in the SNPP scheme, merit inclusion.⁷¹ These offences are discharging or attempting to discharge a firearm with intent to cause GBH or resist arrest.
- 6.78 Arguably, some factors may suggest that these offences should not be included in the SNPP scheme. However, on balance, we consider their inclusion in the SNPP scheme is justified based on the evidence before us. As discussed below, we recommend an increase in the SNPP of the offence in s 7 *Firearms Act*.
- 6.79 If a separate review of the SNPP scheme was undertaken, this conclusion could be revisited with the benefit of any additional evidence that emerges, and with the benefit of considering weapons offences alongside all other offences in the scheme.

Arguments in favour of removal

- 6.80 There may be good reasons for removing the offence relating to the unauthorised possession or use of a prohibited weapon from the SNPP scheme. Concerns were raised that the offence covers a broad range of weapons and circumstances. The ALS and the Public Defenders considered the offence to be unsuitable for the scheme as it is mostly dealt with summarily, and frequently punished by way of a fine, as opposed to full-time imprisonment.⁷²
- 6.81 It could also be argued that the maximum penalty for this offence is not significant because it is 14 years' imprisonment. Maximum penalties for current SNPP offences range from 7 years' imprisonment up to life imprisonment. As mentioned above, the Public Defenders, Legal Aid and the ALS supported removing weapons offences

71. NSW, Public Defenders, *Submission WE19* [130].

72. *Weapons Prohibition Act 1998* (NSW) s 7(1); Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 12; NSW, Public Defenders, *Submission WE19* [115].

that have a maximum penalty of less than 20 years' imprisonment from the scheme.⁷³

6.82 The Public Defenders observed that the Council did not conclude that the sentencing for the offences under s 33A and s 93GA *Crimes Act* was inadequate or inconsistent.⁷⁴ Despite this, the Council recommended that they be included in the SNPP scheme.⁷⁵

6.83 However, there are reasons for keeping these offences within the SNPP scheme.

These offences are serious

6.84 Each of these offences carries a special risk of serious consequences to the community. Courts treat firearms offences, including possession of a firearm without any specific intent, seriously.⁷⁶ With respect to the prohibited weapons offence, this offence includes military-style weapons such as bombs, flame throwers and missiles, which can cause mass harm.

6.85 Discharging a firearm with intent to cause GBH or resist arrest (*Crimes Act* s 33A) carries a significant maximum penalty of 25 years' imprisonment. This offence, along with the offences under s 93GA *Crimes Act*, is strictly indictable and covers a narrow range of serious offending conduct.

6.86 The maximum penalties for the *Firearms Act* and *Weapons Prohibition Act* offences are less significant, at 14 years' imprisonment. They are triable summarily unless the prosecutor elects otherwise, and both cover a wide range of offending conduct. However, as discussed below, these offences are highly prevalent.

The general use or possess offences are highly prevalent

6.87 The offences under s 7(1) of both the *Firearms Act* and *Weapons Prohibition Act* offences are among the most prevalent offences in the scope of this review.

6.88 Between 2013–2022, among adult offenders (in the Local and higher Courts) where the offence proven was the most serious offence, the *Weapons Prohibition Act* offence was proven on 5418 occasions. The *Firearms Act* offence was proven on 1564 occasions.⁷⁷

73. See, eg, NSW, Public Defenders, *Submission WE19* [5].

74. NSW, Public Defenders, *Submission WE19* [130].

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

76. See e.g. *Rickaby v R* [2007] NSWCCA 288 [18]; *Chandab v R* [2021] NSWCCA 186 [81]; *R v Hamze* [2005] NSWSC 136 [20]; *Laspina v R* [2016] NSWCCA 181 [6]; *R v Leota* [2020] NSWDC 244 [19]; *R v Ali* [2020] NSWDC 125 [31]; *Harris v R* [2019] NSWCCA 236 [74]; *R v Yealland* [2018] NSWDC 364 [31]; *R v Debnam* [2018] NSWDC 139 [28]; *Cooper v R* [2005] NSWCCA 428 [20].

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

6.89 Most of these matters were dealt with summarily in the Local Court.⁷⁸ Among proven matters involving adult offenders from 2013–2022, where the offence was the most serious offence:

- the *Firearms Act* offence was dealt with on indictment by the District Court or Supreme Court on 378 occasions, and
- the *Weapons Prohibition Act* offence was dealt with on indictment by the District Court or Supreme Court on 50 occasions.⁷⁹

The Crimes Act offences are more serious but less prevalent

6.90 The strictly indictable *Crimes Act* offences are far less prevalent. Matters from 2013–2022 (in the Local and higher Courts) involving adult offenders where these offences were the principal (most serious) offence proven include:

- discharging a firearm with intent (*Crimes Act* s 33A): 64
- recklessly firing a firearm at a building (*Crimes Act* s 93GA(1)): 60
- recklessly firing a firearm at a building in the course of organised criminal activity (*Crimes Act* s 93GA(1B)): 3, and
- recklessly firing a firearm at a building in the course of a public disorder (*Crimes Act* s 93GA(1A)): 0.⁸⁰

6.91 Recklessly firing a firearm at a building in the course of a public disorder has never been sentenced, nor has a charge ever been finalised for the offence.⁸¹ This may suggest broader issues with the need for the offence that go beyond sentencing, and therefore beyond the scope of this review.

Removing these offences from the SNPP scheme carries risks

6.92 There are risks associated with removing an offence from the scheme. These include that removal may disrupt sentencing patterns for an offence and may also increase the likelihood of appeals.

6.93 Sentencing patterns for the *Firearms Act* and *Weapons Prohibition Act* offences do not suggest that courts are imposing high sentences. From 2013 to 2022, for adult offenders being sentenced where these offences were the most serious offence:

- 98% (446 of 455) of head sentences for unauthorised use or possession of a prohibited weapon were 24 months or less, and

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

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

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

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

- 49% (383 of 642) of head sentences for unauthorised use or possession of a pistol or prohibited firearm were 24 months or less.⁸²

6.94 This suggests that courts have been able to appropriately sentence lower-level instances of these offences even though they both carry an SNPP.

Adjust SNPPs for certain *Firearms Act* offences

6.95 Our terms of reference ask us to consider whether the current SNPPs for weapons offences remain appropriate. We have applied the existing guidance on how SNPPs are to be set and conclude that the SNPPs for some weapons offences should be adjusted. These recommendations should be implemented by the NSW Government if it chooses not to commission a separate review of the scheme.

6.96 We recommend adjustments to the SNPPs of the following *Firearms Act* offences:

- unauthorised use or possession of a pistol or prohibited firearm
- possession of more than 3 firearms, any one of which is a pistol or prohibited firearm
- supply of firearms, and
- repeat supply of firearms.

Increase the SNPP for unauthorised possession or use

Recommendation 6.4: Unauthorised possession or use of pistols or prohibited firearms

The SNPP for unauthorised possession or use of a pistol or prohibited firearm (*Firearms Act 1996* (NSW) s 7) should be increased from 4 years (28.57% of the maximum penalty) to 5 years (35.71% of the maximum penalty).

6.97 We recommend that the SNPP for the *Firearms Act* offence of unauthorised possession of a pistol or prohibited firearm should be increased so it carries the same SNPP as the equivalent offence under the *Weapons Prohibition Act*.⁸³ In 2013, we recommended that the SNPP for this *Firearms Act* offence increase to 4 years to reflect the serious criminality involved in the use or possession of unauthorised firearms.⁸⁴ The recommendation was implemented by the *Crimes (Sentencing Procedure) Amendment (Firearms Offences) Act 2015* (NSW).

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

83. *Firearms Act 1996* (NSW) s 7; *Weapons Prohibition Act 1998* (NSW) s 7.

84. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) rec 4.2(b).

- 6.98 We consider that the current SNPP for this *Firearms Act* offence is low or out of proportion to its maximum penalty. This may cause difficulties for courts in sentencing.
- 6.99 The Court of Criminal Appeal observed that the maximum penalty for the offence and the previous SNPP of 3 years were “two irreconcilable standards” against which to measure the offence.⁸⁵ More recently, after the increase of the SNPP of the offence from 3 years to 4 years, it was still described as “relatively low”.⁸⁶
- 6.100 The ODPP submitted that the low SNPP would mean that offences in the mid-range of objective seriousness or lower would fall towards the bottom of the 14-year sentencing range, thereby distorting the sentencing process.⁸⁷ We heard concerns that the effect of inconsistent SNPPs on sentencing may not be fully known because courts generally apply the SNPPs without commenting on their appropriateness.⁸⁸
- 6.101 We consider that it would be more consistent for unauthorised use or possession of a pistol or prohibited firearm⁸⁹ to be adjusted upward to have an equivalent SNPP to unauthorised use or possession of a prohibited weapon.⁹⁰ Sentencing outcomes from 2022 for adult offenders where these offences were the most serious offences being sentenced indicate that the firearms offence may involve more serious instances of offending than the prohibited weapons offence. In 2022, 27% (56 of 210) of unauthorised possession or pistol or prohibited firearms matters resulted in imprisonment, compared with just 8% (54 of 699) of prohibited weapons matters.⁹¹

Reduce the SNPPs for three *Firearms Act* offences

Recommendation 6.5.: Adjust SNPPs for supply and possession of firearms

Reduce the SNPPs for the following offences from 10 years (50% of maximum penalty) to either 8 years (40% of maximum penalty) or 9 years (45% of maximum penalty):

- (a) Possession of more than 3 firearms, any one of which is a pistol or prohibited firearm (*Firearms Act 1996* (NSW) s 51D(2))

85. *R v Najem* [2008] NSWCCA 32 [38].

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

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

88. Confidential, *Submission WE13*, 8.

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

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

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

- (b) Supply of firearms (*Firearms Act 1996* (NSW) s 51(1A), s 51(2A))
- (c) Repeat supply of firearms (*Firearms Act 1996* (NSW) s 51B(1)).

6.102 The SNPPs for the following *Firearms Act* offences are currently set at 50% of their maximum penalty:

- possession of more than 3 firearms, any one of which is a pistol or prohibited firearm
- supply of firearms, and
- repeat supply of firearms.

6.103 While acknowledging the seriousness of these offences, we consider this to be disproportionately high.

6.104 Under the current approach, 50% is the highest proportion that could be considered appropriate.⁹² This would suggest that these offences are the most serious offences in the SNPP scheme. While they are serious offences, they cannot be said to be the most serious offences in the scheme.

6.105 The only other offences in the scheme which currently have their SNPPs set at 50% of the maximum penalty are:

- aggravated sexual assault⁹³
- cultivation, supply or possession of a commercial quantity of prohibited plants other than cannabis leaf,⁹⁴ and
- manufacture or production of a commercial quantity of prohibited drugs.⁹⁵

6.106 Current SNPP offences which have their SNPPs set lower than 50% include:

- conspiracy to murder⁹⁶
- attempt to murder⁹⁷
- aggravated sexual intercourse with a child aged 10–14 years,⁹⁸ and
- attempt, or assault with intent, to have sexual intercourse with a child under 10 years of age.⁹⁹

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

93. *Crimes Act 1900* (NSW) s 61J.

94. *Drug Misuse and Trafficking Act 1985* (NSW) s 23(2).

95. *Drug Misuse and Trafficking Act 1985* (NSW) s 24(2).

96. *Crimes Act 1900* (NSW) s 26.

97. *Crimes Act 1900* (NSW) s 27, s 28, s 29, s 30.

98. *Crimes Act 1900* (NSW) s 66C(2).

99. *Crimes Act 1900* (NSW) s 66B.

- 6.107 Discharging or attempting to discharge a firearm with intent to cause GBH¹⁰⁰ has a higher maximum penalty (25 years) than these firearms offences and carries a lower SNPP (9 years, or a ratio of 36% of its maximum penalty).
- 6.108 We have not identified any matter where a court has imposed a non-parole period of 10 years for any of these firearms offences.
- 6.109 If the SNPPs were reduced, these offences would still carry the highest ratio of SNPP to maximum penalty of any weapons offence. They would be higher than:
- discharging or attempting to discharge a firearm with intent to cause GBH (9 years or a ratio of 36% of the maximum penalty)¹⁰¹
 - firing at a building with reckless disregard for the safety of any person (9 years or a ratio of 36% of the maximum penalty), and
 - aggravated firing at a building with reckless disregard for the safety of any person (6 years or a ratio of 37.5% of the maximum penalty).¹⁰²
- 6.110 Reducing the SNPP to 8 years, or a ratio of 40%, would put these offences alongside reckless GBH/wounding, grooming offences, conspiracy to murder, attempt to murder and attempting to, or assaulting with intent to, have sexual intercourse with a child under 10. Reducing the SNPP to 45% would put these offences alongside aggravated sexual intercourse with a child aged 10–14.¹⁰³
- 6.111 On balance, we prefer an SNPP of 40% of the maximum penalty for these offences.

Monitor sentencing outcomes for new offence

Recommendation 6.6: Monitor any new tiered prohibited weapons offence

If a new lower-tier offence, with a lower maximum penalty, is introduced for the offence of unauthorised possession or use of prohibited weapons (*Weapons Prohibition Act 1998* (NSW) s 7):

- (a) the new lower-tier offence should not be included in the SNPP scheme, and
- (b) the NSW Government should monitor sentencing outcomes to assess whether the new lower-tier offence should be included in the SNPP scheme.

- 6.112 In chapter 4 (Recommendation 4.1), we recommend that the *Weapons Prohibition Act* offence of unauthorised possession or use of prohibited weapons be split into a tiered offence. If the recommendation is adopted, we further recommend that

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

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

102. *Crimes Act 1900* (NSW) s 93GA(1), s 93GA(1A), s 93GA(1B).

103. *Crimes Act 1900* (NSW) s 66C(2).

sentencing outcomes for the lower-tier offence be monitored to see if an SNPP is required.

- 6.113 Unauthorised possession or use of a prohibited weapon currently has a maximum penalty of 14 years and an SNPP of 5 years. Under our Recommendation 4.1, only the most serious prohibited weapons would have a maximum penalty of 14 years' imprisonment and an SNPP.
- 6.114 We recommend the new lower-tier offence have a lower maximum penalty. The new offence would not automatically have an SNPP unless there was legislative amendment to include it in the scheme. This means that lower-level offending conduct that is currently subject to an SNPP, would no longer have an SNPP to guide sentencing.
- 6.115 We consider it appropriate, if the new tiered offence is created, for the offence to be monitored against the principles for selecting an offence for inclusion in the SNPP scheme, to determine whether it requires an SNPP.

7. Other issues

In brief

This chapter considers several broad issues that relate generally to sentencing for firearms, knives and other weapons offences. We do not recommend any reforms in response to these issues.

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No changes to sentencing principles and factors	118
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No changes to aggravating factors	120
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- 7.1 In previous chapters, we discuss each weapon type (knives, firearms, and prohibited weapons) separately. In this chapter we discuss sentencing issues that are common to each weapon type: mandatory minimum penalties, sentencing principles and factors, and weapons and firearms prohibition orders. We do not recommend any changes in relation to these issues.

Mandatory minimum penalties should not be introduced

- 7.2 We do not recommend that mandatory or minimum penalties be introduced for any weapons-related offending, whether committed by adults, or children and young people.
- 7.3 Mandatory minimum penalties require a court, in certain circumstances, to impose a minimum or fixed penalty when sentencing for an offence.¹
- 7.4 A mandatory minimum penalty is also a “yardstick” or guideline that imposes an increased starting point for a term of imprisonment for an offence in the least

1. NSW Sentencing Council, *Assaults on Emergency Services Workers*, Report (2021) [8.8]; *Hurt v R* [2024] HCA 8 [54], [57], [58].

serious circumstances.² This increases the appropriate term of imprisonment generally for the offence.³ Mandatory minimum penalties are the opposite to maximum penalties which are reserved for the worst type of case.⁴

- 7.5 While mandatory minimum penalties exist in NSW, they are rare and depart from the standard legislative approach that provides a maximum penalty.⁵ The NSW offences that have a mandatory minimum penalty are very serious and include assault causing death when intoxicated and murder of a police officer.⁶

There are many reasons against mandatory minimum penalties

- 7.6 Our reasons for not recommending mandatory minimum penalties include that they:
- may be ineffective as a deterrent⁷
 - limit the exercise of judicial discretion⁸
 - limit the ability of courts to give effect to the principles of individualised justice, proportionality and the use of imprisonment as a last resort⁹
 - reduce the incentive to plead guilty and in turn, can increase court workloads¹⁰
 - may be inappropriate in situations where there is a broad range of offending, and¹¹
 - may give rise to arbitrary and unjust results.¹²

2. *Hurt v R* [2024] HCA 8 [54], [57], [58]. See also NSW, Public Defenders, *Submission WE19* [24].

3. *Hurt v R* [2024] HCA 8 [54], [57], [58].

4. *Hurt v R* [2024] HCA 8 [65]; *R v Way* [2004] NSWCCA 131, 60 NSWLR 168 [51].

5. NSW Sentencing Council, *Assaults on Emergency Services Workers*, Report (2021) [8.9]; Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report 133 (2017) [8.3]; Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014) [67].

6. *Crimes Act 1900* (NSW) s 19B(1), s 25A(2), s 25B(1).

7. Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report 133 (2017) [8.13]; NSW Sentencing Council, *Assaults on Emergency Services Workers*, Report (2021) [8.23]–[8.25]; Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014) [31]–[41].

8. Law Society of NSW, *Submission WE08*, 6; Legal Aid NSW, *Submission WE11*, 11; NSW Bar Association, *Submission WE12* [19]; Confidential, *Submission WE13*, 4; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 9; NSW Sentencing Council, *Assaults on Emergency Services Workers*, Report (2021) [8.23]–[8.25].

9. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 9.

10. Local Court of NSW, *Submission WE10*, 3; NSW Sentencing Council, *Assaults on Emergency Services Workers*, Report (2021) [8.23]–[8.25].

11. NSW Sentencing Council, *Homicide*, Report (2021) [7.29]–[7.30]. See also Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 9–10.

12. NSW Bar Association, *Submission WE12* [19]; NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [9.11].

- 7.7 Mandatory minimum penalties may also impact Aboriginal and Torres Strait Islander peoples disproportionately due to their over-representation in the criminal legal system and the extremely high rates at which the system incarcerates them.¹³
- 7.8 Mandatory minimum penalties restrict a court’s ability to take into account individual characteristics and can cause unjust impacts on vulnerable groups, including people with mental illness, socioeconomic disadvantage, or alcohol or drug dependency.¹⁴
- 7.9 Mandatory minimum penalties may be particularly ineffective against children and young people given their lack of knowledge of penalties and difficulty in understanding consequences.¹⁵
- 7.10 For reasons that are similar to those raised above, submissions opposed introducing mandatory minimum penalties generally.¹⁶ Some opposed the introduction of mandatory minimum penalties for firearms offences, or for children and young people, specifically.¹⁷

No mandatory minimum penalties for firearms offences

- 7.11 The NSW Police Force (NSWPF) supported consideration of mandatory minimum penalties for certain firearms offences (such as repeat offences and using a firearm during an offence or act of violence), except for children and young people.¹⁸
- 7.12 Our view is that mandatory minimum penalties should not be introduced for firearms offences. As explained in chapter 2, it is uncommon for offenders who have been convicted of firearms possession or use offences to commit the same offence again.¹⁹ In addition, where an offence involves the actual use of a firearm or a violent act, other offences under the *Crimes Act 1900* (NSW) (*Crimes Act*) can

13. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 9; Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report 133 (2017) [8.16]; Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014) [110].

14. Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report 133 (2017) [8.14]–[8.15]; Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014) [128].

15. Youth Justice NSW, *Submission WE09*, 5.

16. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 9; Confidential, *Submission WE13*, 4; NSW Bar Association, *Submission WE12* [18]; Law Society of NSW, *Submission WE08*, 4; NSW, Public Defenders, *Submission WE19* [18]; Children’s Court of NSW, *Submission WE03*, 6.

17. See Youth Justice NSW, *Submission WE09*, 5; Legal Aid NSW, *Submission WE11*, 54, 60; NSW Police Force, *Submission WE17*, 3; Confidential, *Submission WE13*, 4, 16; L Jessup-Little, *Submission WE14*, 1; NSW Bar Association, *Submission WE12* [58].

18. NSW Police Force, *Submission WE17*, 3; NSW Police Force, *Submission WE16*, 4.

19. *Firearms Act 1996* (NSW) s 7(1), s 7A(1), s 74(1).

apply. These generally have higher maximum penalties than the possession or use offences in the *Firearms Act 1996* (NSW) (*Firearms Act*).²⁰

No mandatory minimum penalties for knife offences

- 7.13 We also do not support the introduction of mandatory minimum penalties for knife offences, whether committed by adults, or children and young people.
- 7.14 Unless “exceptional circumstances” would make the sentence unjust, mandatory minimum penalties apply in England and Wales to people aged 16 and 17 for:
- the offence of threatening with an offensive weapon in public²¹
 - the offence of threatening with a bladed article or offensive weapon,²² and
 - second or subsequent offences of possessing offensive weapons or bladed articles.²³
- 7.15 The above offences attract a mandatory minimum penalty of a 4-month detention and training order, which is a custodial sentence.²⁴
- 7.16 The NSWPF suggested that if NSW was to consider mandatory minimum sentencing, those types of sentences could be appropriate for repeat knife offences. However, the NSWPF did not support mandatory minimum sentencing for children. In its view, this would remove the flexibility under the *Young Offenders Act 1997* (NSW) to consider the individual circumstances of a child.²⁵
- 7.17 Instead of mandatory minimum penalties for knife crime, we support alternative responses that address the underlying causes of offending, which we explain in chapter 5.

No changes to sentencing principles and factors

- 7.18 We do not recommend any changes to the current sentencing principles and factors for any weapons offences, for adults, or children and young people. Our view is that the current sentencing framework, including the aggravating and mitigating factors, remains appropriate and does not require reform in relation to

20. See, eg, *Crimes Act 1900* (NSW) s 114(1), s 97(1), s 98.

21. *Prevention of Crime Act 1953* (UK) s 1A.

22. *Criminal Justice Act 1988* (UK) s 139AA.

23. *Prevention of Crime Act 1953* (UK) s 1(1); *Criminal Justice Act 1988* (UK) s 139(1), s 139A(1)–(2).

24. *Sentencing Act 2020* (UK) s 312, s 315.

25. NSW Police Force, *Submission WE17*, 3.

weapons offences. Many submissions agreed.²⁶ We also do not consider that a review of general sentencing principles is appropriate in a review specific to the sentencing of weapons offences. The Aboriginal Legal Service (ALS) agreed with this and stated that there should be a separate comprehensive review of the current sentencing regime that specifically evaluates the requirement to consider the unique systemic and background factors of Aboriginal and Torres Strait Islander peoples.²⁷ We explained the sentencing principles and factors applicable to weapons offending in the consultation paper and issues paper.²⁸

No need for sentencing principles specific to knife offending

- 7.19 We do not recommend introducing sentencing principles specific to knife offending. Rather than amending sentencing legislation, we consider that the non-sentencing based proposals we discuss in chapter 5 would be more effective in addressing offending behaviour.²⁹
- 7.20 In England and Wales, deterrence and protection of the public are prioritised in sentencing for knife crimes. Courts should normally sentence knife possession offences at the “most severe end of the appropriate range of sentences” (as set out in the relevant sentencing guideline).³⁰
- 7.21 We do not support the introduction of this approach into NSW. Our view is that the current sentencing principles and factors are adequate, as a court can consider all the relevant circumstances of the case. The principle of individualised justice requires that each sentence appropriately reflect the circumstances of each case and offender.³¹ Some submissions did not support the approach in England and Wales for similar reasons, including that it was incompatible with established principles of the sentencing of children and young people in NSW.³²

26. Law Society of NSW, *Submission WE08* 7; Confidential, *Submission WE13*, 8, 9; Local Court of NSW, *Submission WE10*, 8; NSW Police Force, *Submission WE16*, 5; Children’s Court of NSW, *Submission WE03*, 3.

27. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 12.

28. NSW Sentencing Council, *Weapons-Related Offences: Sentencing Adult Offenders*, Consultation Paper (2023) ch 5; NSW Sentencing Council, *Weapons-Related Offences: Sentencing Young Offenders*, Issues Paper (2023) [3.39]–[3.76].

29. See Legal Aid NSW, *Submission WE11*, 34–35.

30. *R v Povey* [2008] EWCA Crim 1261 [4]–[5]; UK, Sentencing Council, “Bladed Articles and Offensive Weapons: Having in a Public Place” (1 June 2018) <www.sentencingcouncil.org.uk/offences/magistrates-court/item/bladed-articles-and-offensive-weapons-possession/> (retrieved 23 May 2024).

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

32. Children’s Court, *Submission WE03*, 2–3; Confidential, *Submission WE13*, 13; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 18–19.

- 7.22 One submission supported the approach taken in England and Wales. The NSWPF stated that the focus on reducing offending and public safety as paramount considerations is particularly important when sentencing children and young people for indictable and serious indictable weapons offences.³³
- 7.23 While acknowledging the importance of these considerations, we consider that the existing sentencing principles allow courts to adequately take into account community protection and deterrence. They also allow consideration of any other relevant purposes of sentencing and the individual circumstances of the case.
- 7.24 These considerations are currently reflected in the purposes of sentencing, which a court must take into account when sentencing children and young people. This is in addition to the principles under section 6 of the *Children (Criminal Proceedings) Act 1987* (NSW).³⁴
- 7.25 A court balances the purposes of sentencing to determine the weight it gives to general deterrence and retribution. For children and young people, rehabilitation can have more significance than general deterrence and retribution, unless the child or young person has acted like an adult or has committed a crime of violence or considerable gravity. In determining this, the court can consider factors such as the use of any weapon.³⁵ However, the court may decide that the need to protect the community is more prominent, and the need for rehabilitation of the offender is reduced.³⁶

No changes to aggravating factors

- 7.26 We do not propose any changes to the existing list of aggravating factors contained in the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*Crimes (Sentencing Procedure) Act*).³⁷
- 7.27 In sentencing an offender, a court has broad sentencing discretion that allows it to consider all the relevant circumstances of the case before it.³⁸ Our view is that this approach allows a court to consider any relevant aggravating factors, as well as any family and domestic violence context as is particular to each case.³⁹

33. NSW Police Force, *Submission WE17*, 2.

34. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(b)–(c); *BP v R* [2010] NSWCCA 159 [73].

35. *KT v R* [2008] NSWCCA 51 [25]; *LS v R* [2020] NSWCCA 120 [96].

36. *KT v R* [2008] NSWCCA 51 [25]; *LS v R* [2020] NSWCCA 120 [96]; NSW Sentencing Council, *Weapons-Related Offences: Sentencing Young Offenders*, Issues Paper (2023) [3.41]–[3.43].

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

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

39. See also NSW Sentencing Council, *Fraud*, Report (2022) [6.21]–[6.25]; NSW Sentencing Council, *Homicide*, Report (2021) [2.46].

- 7.28 Domestic Violence NSW proposed that weapons offences committed in the context of domestic and family violence should be considered a specific aggravating factor. It also submitted that the courts should assess these offences as being at the higher end of objective seriousness.⁴⁰ Existing aggravating factors can take into account family and domestic violence.
- 7.29 We consider that the current aggravating factors appropriately address weapons-related offending, including in the context of family and domestic violence.
- 7.30 A court is to take into account on sentence any aggravating factors where relevant and known.⁴¹ A court can consider any other objective or subjective factor not listed in the *Crimes (Sentencing Procedure) Act 1999* that affects the seriousness of the offence.⁴²
- 7.31 However, a court cannot take into account an aggravating factor where it is already an element, or an inherent characteristic, of the offence.⁴³ Neither can a court take into account an aggravating factor that has been “double counted”. This means that the factor has already been considered in assessing the objective seriousness of the offence,⁴⁴ or the factor gives rise to a more serious offence.⁴⁵
- 7.32 Some existing factors that can be relevant to weapons matters include the actual or threatened use of violence or a weapon and if the offence involved a grave risk of death to another person or persons.⁴⁶
- 7.33 Of relevance to family and domestic violence matters, it is also an aggravating factor if:
- the offence was committed in the presence of a child under 18 years of age,
 - the offender abused a position of trust or authority in relation to the victim, or
 - the offence was committed in the home of the victim or any other person.⁴⁷
- 7.34 According we are satisfied ,that a court can take into account, where appropriate, domestic and family violence facts and circumstances through the aggravating factors mentioned above.

40. Domestic Violence NSW, *Submission WE01*, 2.

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

42. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1)(c).

43. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2); *Elyard v R* [2006] NSWCCA 43 [40].

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

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

46. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(b), 21A(2)(c), 21A(2)(ib).

47. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(ea), s 21A(2)(eb), s 21A(2)(k).

- 7.35 The NSWPF considered that the list of mitigating and aggravating factors was sufficient and did not have any additional suggestions.⁴⁸
- 7.36 One reason for taking a cautious approach to reform in this area is that offending in the context of family and domestic violence can be complex and varied. For instance, we heard that people who have previously been the victim of family and domestic violence (primarily women) are commonly charged with having custody of a knife.⁴⁹ Introducing a new aggravating factor for offences committed in the context of family and domestic violence may not appropriately respond to these complexities.

Assessment of objective seriousness can include family and domestic violence

- 7.37 A court can also consider the domestic and family violence context of an offence when assessing the objective seriousness of the offence.⁵⁰
- 7.38 An offence that constitutes domestic violence may be a feature that aggravates and increases the objective seriousness of an offence.⁵¹ For example, the Court of Criminal Appeal found that the offence of intimidation can be committed in a non-domestic and family violence context. It held that for an offence of aggravated break and enter and commit serious indictable offence (intimidation), the additional presence of a domestic and family violence context can heighten the objective seriousness of the offence.⁵²

No changes regarding guideline judgments

- 7.39 We do not recommend the introduction of a guideline judgment for weapons-related offending. A new guideline judgment would not be necessary or useful given the wide sentencing discretion available to courts and the large range of factual scenarios in weapons-related offences.
- 7.40 A guideline judgment is a judgment of general principles for a group or kind of cases. Guideline judgments can suggest an appropriate range of sentences for particular kinds of offending. Courts are not bound to follow guideline judgments, but they act as a check, guide or sounding board.⁵³ Guideline judgments are produced by appellate courts to assist in balancing a court's broad sentencing discretion and consistency in sentencing.⁵⁴

48. NSW Police Force, *Submission WE16*, 5.

49. Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PWE13*, 1.

50. See eg, *Saunders v R* [2022] NSWCCA 174 [28]–[30]; *R v Campbell* [2014] NSWCCA 102 [66]–[68].

51. *Smith v R* [2013] NSWCCA 209 [36]–[48].

52. *Smith v R* [2013] NSWCCA 209 [39].

53. *R v Jurisic* (1998) 45 NSWLR 209, 216, 220–221; *Legge v R* [2007] NSWCCA 244 [58].

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

Changes to *R v Henry* are not necessary

- 7.41 We do not consider that any recommendations relating to *R v Henry* are necessary as we do not identify any concerns with the guideline judgment. Submissions received on this aspect generally considered that there were no issues with *R v Henry*.⁵⁵
- 7.42 In our consultation paper, we asked whether the guideline judgment in relation to an offence of armed robbery (*R v Henry*) was sufficient.⁵⁶
- 7.43 *R v Henry* suggests a that a total sentence of 4 to 5 years' imprisonment is an appropriate range for armed robbery offending with certain characteristics. These include a "young offender with no or little criminal history", the use of a weapon capable of killing or inflicting serious injury, and a limited degree of planning.⁵⁷ The judgment identified factors that may aggravate offending, including the nature of the weapon and the intensity of any threatened or actual use of force.⁵⁸
- 7.44 The NSWPF suggested that sentencing guidelines should be amended to reflect the seriousness of weapons offending. They said this would allow the Local Court to impose heavier penalties for possession or use of weapons.⁵⁹ The submission stated that for these offences the sentencing outcomes in the Local Court were too low and did not appropriately reflect the seriousness of the offending. The NSWPF submitted that this could reduce the deterrent effect of sentencing.⁶⁰ Rather than amending sentencing guidelines, as explained in chapter 2, we consider that the Director of Public Prosecutions' right of appeal can address any sentences that are inadequate.⁶¹

A new guideline judgment for weapons offending is not necessary

- 7.45 We do not regard a guideline judgment as necessary for weapons-related offences. Courts can already have regard to the use or threatened use of a weapon as part of the ordinary sentencing process. In assessing the seriousness of any weapons offence, a court considers the individual circumstances of each case, including any aggravating or mitigating factors.

55. Law Society of NSW, *Submission WE08*, 7; Confidential, *Submission WE13*, 9; NSW Police Force, *Submission WE16*, 5; NSW, Public Defenders, *Submission WE19* [132].

56. *Crimes Act 1900* (NSW) s 97(1); *R v Henry* [1999] NSWCCA 111, 46 NSWLR 346.

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

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

59. NSW Police Force, *Submission WE16*, 2, 4.

60. NSW Police Force, *Submission WE16*, 2.

61. *Crimes (Appeal and Review) Act 2001* (NSW) s 23(1); *Criminal Appeal Act 1912* (NSW) s 5D(1). The Attorney General also has a right of appeal under this provision.

- 7.46 In addition, a guideline judgment may not be beneficial given the variety of factual circumstances that arise from weapons-related offending generally. Any guideline judgment would be limited to a case with certain characteristics and therefore, may be of little utility.⁶²
- 7.47 The sentencing outcomes for weapons offending do not demonstrate a need for greater consistency, and one submission agreed that there were no identifiable issues or sentencing trends that suggested an urgent need to review guideline judgments for weapons-related offences.⁶³ Nonetheless, as the range of offending for weapons-related offences across the *Crimes Act*, *Firearms Act* and *Weapons Prohibition Act 1998* (NSW) is so wide, consistency of sentencing outcomes may not be possible or necessary.
- 7.48 The NSWPF suggested that we consider whether any new guideline judgments are necessary. It proposed that the factors in *R v Henry* can be used to assess the seriousness of any weapons offences.⁶⁴
- 7.49 Our view is that a court’s wide sentencing discretion, and the principle of individualised justice, allows it to consider the factors in *R v Henry* where that factor is relevant. A separate guideline judgement is not necessary to achieve this.
- 7.50 We also recognise that some decisions have cautioned against the general application of *R v Henry* due to the lack of criteria for a “young offender with no or little criminal history” and the need to also consider the maturity of an offender in conjunction with the factors raised in *R v Henry*.⁶⁵

Prohibition order schemes

- 7.51 We received submissions regarding firearms prohibition orders (FPOs) and weapons prohibition orders (WPOs). We do not make specific recommendations about these schemes, as our review focuses on sentencing for weapons offences. However, for completeness, we outline what we heard about the schemes for the consideration of the NSW Government.
- 7.52 Some submissions raised significant concerns with the WPO and FPO schemes, especially in relation to children and young people, and urged that they be reviewed.⁶⁶ Issues include:

62. NSW, Public Defenders, *Submission WE19*, 47.

63. Law Society of NSW, *Submission WE08*, 7.

64. NSW Police Force, *Submission WE16*, 5.

65. *R v Faaolii* [2016] NSWCCA 263 [72]; *Yildiz v R* [2020] NSWCCA 69 [61]; Law Society of NSW, *Submission WE08*, 7.

66. Legal Aid NSW, *Submission WE11*, 28, 41–43; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 5, 17.

- wide search powers allowed by FPOs,
- lack of procedural fairness afforded under the schemes,
- the increasing use of FPOs against children and young people with no history of firearms charges or convictions, and
- the disproportionate impact of the schemes on Aboriginal and Torres Strait Islander children and young people.⁶⁷

7.53 Legal Aid suggested that the NSW Ombudsman or the Law Enforcement Conduct Commission could conduct a review of these schemes.⁶⁸

67. Legal Aid NSW, *Submission WE11*, 41; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission WE18*, 17.

68. Legal Aid NSW, *Submission WE11*, 43.

Appendix A:

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) Ltd, 24 March 2023

Appendix B:

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) Ltd

Grace Worthington, Closing the Gap Policy Officer, Criminal Justice, Aboriginal Legal Service (NSW/ACT) Ltd

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 SC, 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 Centre

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 aged 15-20 with lived experience of weapon-related crime

Appendix C: Submissions

WE01 Domestic Violence NSW, 10 October 2023

WE02 J Maloney, 7 November 2023, 23 November 2023, 5 December 2023

WE03 Children’s Court of NSW, 24 November 2023

WE04 Health Services Union ACT/NSW/Qld, 1 December 2023

WE05 L Henderson-Lancett, 2 December 2023

WE06 NSW Council for Civil Liberties Inc, 3 December 2023

WE07 J Cooper, 4 December 2023

WE08 Law Society of NSW, 4 December 2023

WE09 Youth Justice NSW, 5 December 2023

WE10 Local Court of NSW, 5 December 2023

WE11 Legal Aid NSW, 8 December

WE12 NSW Bar Association, 11 December 2023

WE13 Confidential, 11 December 2023

WE14 L Jessup-Little, 15 December 2023

WE15 NSW Young Lawyers Criminal Law Committee, 18 December 2023

WE16 NSW Police Force, 19 December 2023

WE17 NSW Police Force, 19 December 2023

WE18 Aboriginal Legal Service (NSW/ACT) Ltd, 22 December 2023

WE19 NSW, Public Defenders, 13 February 2024

Appendix D:

Snapshot of summary offence of custody of a knife

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Aboriginal status of offenders	134
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- D.1 This appendix provides statistics from the NSW Bureau of Crime Statistics and Research (BOCSAR) for the offence of having custody of a knife in a public place or school.¹ In 2023 the offence was changed from a summary to an indictable offence.² This appendix presents a picture of how this offence operated prior to the 2023 reforms. This data may be used to inform any monitoring of the impact of the reforms, based on recommendation 5.1 (see chapter 5).

Demographic characteristics of offenders

Socio-economic status of offenders

- D.2 Most people found guilty of having custody of a knife in a public place or school are in the most disadvantaged quartile or second most disadvantaged quartile. This is based on the Australian Bureau of Statistics Socio-Economic Indexes for Areas (SEIFA) classifications, defined in chapter 1.
- D.3 In 2022, there were 1445 matters in the Local and higher courts, and 72 matters in the Children’s Court, where custody of a knife in a public place or school was the

1. *Summary Offences Act 1988* (NSW) s 11C(1), repealed by *Criminal Legislation Amendment (Knife Crimes) Act 2023* (NSW) sch 2.2[1].

2. *Criminal Legislation Amendment (Knife Crimes) Act 2023* (NSW).

offender’s principal proven offence.³ The table below sets out the socio-economic status of these offenders at the time of charging.

Table D.1: Socio-economic status of offenders where custody of a knife was the principal proven offence, 2022

SEIFA quartile	Local and Higher Courts	Children’s Court
Most disadvantaged	548 (38%)	30 (42%)
Second most disadvantaged	358 (25%)	20 (28%)
Second least disadvantaged	321 (22%)	13 (18%)
Least disadvantaged	132 (9%)	8 (11%)
Unknown/interstate	85 (6%)	1 (1%)

Source: NSW Bureau of Crime Statistics and Research, ab23-22643, table 8, table 15.

Gender of offenders

- D.4 The offence of custody of a knife in a public place or school is predominantly committed by males.
- D.5 In 2022, males were involved in 94% (68 of 72) of instances where custody of a knife in a public place or school was the offender’s principal offence in the Children’s Court.⁴ In the Local and higher courts, this figure was 84% (1219 of 1444).⁵

Aboriginal status of offenders

- D.6 Aboriginal people are significantly over-represented among those found guilty of having custody of a knife in a public place or school.
- D.7 Aboriginal people represented 4% of the NSW population at the 2021 census. However, in the Children’s Court in 2022, 47% (34 of 72) of instances where a custody of a knife offence was the principal proven offence involved an Aboriginal offender.⁶ In the Local and higher courts, this figure was 37% (536 of 1444).⁷

3. NSW Bureau of Crime Statistics and Research, ab23-22643, table 1, table 9.

4. NSW Bureau of Crime Statistics and Research, ab23-22643, table 14.

5. NSW Bureau of Crime Statistics and Research, ab23-22643, table 7.

6. NSW Bureau of Crime Statistics and Research, ab23-22643, table 14.

7. NSW Bureau of Crime Statistics and Research, ab23-22643, table 7.

Sentencing outcomes

- D.8 This section provides a snapshot of sentencing outcomes for the summary offence of custody of a knife in a public place in the Local Court and the Children’s Court in 2022. We discuss separately the outcomes for a first custody of a knife offence and a second or subsequent custody of a knife offence.
- D.9 The numbers of those found guilty of custody of a knife in a school were too low to show any meaningful trends. The statistics in the section below show that most of these offences were dealt with through diversionary options available under the *Young Offenders Act 1997* (NSW).⁸
- D.10 There were insufficient matters dealt with in the District Court to show meaningful trends. Only one such case resulted in a sentence in the District Court in 2022.⁹

Local Court

- D.11 For adults sentenced by the Local Court for custody of a knife in a public place (first offence) in 2022, where this was the principal offence proven, fines were by far the most common penalty. In 2022, of the 965 instances involving custody of a knife in a public place (first offence), the outcomes were as follows:
- Fine: 611 (63%)
 - Conditional release order without conviction: 95 (10%)
 - Community correction order: 109 (11%)
 - Conviction only: 50 (5%)
 - No conviction recorded: 40 (4%)
 - Conditional release order with conviction: 37 (4%)
 - Imprisonment: 19 (2%), and
 - Intensive correction order: 4 (<1%).¹⁰
- D.12 For adults sentenced by the Local Court for a second or subsequent custody of a knife in a public place offence in 2022, of the 475 instances where this was the principal offence proven, the outcomes were as follows:
- Fine: 280 (59%)
 - Community correction order: 112 (24%)
 - Imprisonment: 47 (10%)

8. *Young Offenders Act 1997* (NSW) part 3, part 4, part 5.

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

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

- Community correction order with conviction: 13 (3%)
 - Conviction only: 11 (2%)
 - Intensive correction order: 6 (1%)
 - No conviction recorded: 4 (1%), and
 - Conditional release order without conviction: 2 (0.4%).¹¹
- D.13 Between 2013 and 2022, fines made up between 60% and 65% of penalties for custody of a knife in a public place (first offence) and between 43% and 59% of penalties for custody of a knife in public place (second or subsequent offence) for adult offenders where this was the principal offence proven.¹²

Children's Court

- D.14 For people sentenced by the Children's Court for custody of a knife in a public place (first offence) in 2022, where this was the principal offence proven, a dismissal was the most common outcome. In 2022, of the 53 instances involving custody of a knife in a public place (first offence), the outcomes were as follows:
- Juvenile dismissal: 39 (74%)
 - Conditional release without conviction: 5 (9%)
 - Bond with supervision: 4 (8%)
 - Bond without supervision: 4 (8%), and
 - Juvenile probation order: 1 (2%).¹³
- D.15 For people sentenced by the Children's Court for custody of a knife in a public place (second or subsequent offence) in 2022, where this was the principal offence proven, a dismissal was the most common outcome. In 2022, of the 19 proven matters involving custody of a knife in a public place (second or subsequent offence), the outcomes were as follows:
- Juvenile dismissal: 5 (26%)
 - Fine: 4 (21%)
 - Bond with supervision: 3 (16%)
 - Bond without supervision: 3 (16%)
 - Conditional release without conviction: 2 (11%)
 - Custody: 1 (5%), and

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

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

13. NSW Bureau of Crime Statistics and Research, ab23-22643, table 11.

- Juvenile probation order: 1 (5%).¹⁴
- D.16 Between 2013 and 2022, the most common penalty for custody of a knife in a public place (first offence) in the Children’s Court was “other penalty”. This includes the matter being dismissed after a youth justice conference, and where the offence is proved but dismissed.¹⁵
- D.17 The percentage of “other penalty” for principal offences over this time period ranged from 41% to 74% for custody of a knife (first offence).¹⁶
- D.18 There were 401 proven matters in the Children’s Court for custody of a knife in a public place (first offence) between 2013 and 2022. Proven matters over this time period for custody of a knife in a public place (second or subsequent offence) are much lower (68 matters) and therefore no clear trend emerges as to the most common penalty.¹⁷
- D.19 The Children’s Court only ordered custody on two occasions for all custody of a knife in a public place matters over this time period. The first was for a first custody of a knife offence and the second was for a subsequent custody of a knife offence.¹⁸

Diversion under the Young Offenders Act

- D.20 This section discusses the use of diversions under the *Young Offenders Act 1997* (NSW) in relation to the summary offence of custody of a knife in a public place or school.
- D.21 The majority of children proceeded against by police for custody of a knife in a public place (first offence) were diverted from court. Of the 612 children falling into this category in 2022:
- 239 (39%) received a caution
 - 244 (40%) were proceeded against to court
 - 118 (19%) received a warning, and
 - 11 (2%) were referred to a youth justice conference.¹⁹

14. NSW Bureau of Crime Statistics and Research, ab23-22643, table 11.

15. NSW Bureau of Crime Statistics and Research, ab23-22643, table 10.

16. NSW Bureau of Crime Statistics and Research, ab23-22643, table 10.

17. NSW Bureau of Crime Statistics and Research, ab23-22643, table 10.

18. NSW Bureau of Crime Statistics and Research, ab23-22643, table 10.

19. NSW Bureau of Crime Statistics and Research, Kt23-22885, table 1.

- D.22 Even fewer children were proceeded against to court for custody of a knife in a school (first offence). Of the 130 individuals dealt with by police for this offence in 2022:
- 61 (47%) received a warning
 - 61 (47%) received a caution
 - 4 (3%) were proceeded against to court, and
 - 4 (3%) were referred to a youth justice conference.²⁰
- D.23 The number of children proceeded against by police for a second or subsequent offence of custody of a knife in a public place appears to be increasing over time. This figure increased from 39 in 2018 to 99 in 2022.²¹
- D.24 There was a very low volume of second or subsequent offences of custody of a knife in a school. For this offence, there were 5 or fewer proceedings a year over the 10-year period from 2013 to 2022.²²

Aboriginal children

- D.25 Aboriginal children are more likely to have their matter proceed to court when dealt with by police for the offence of custody of a knife in public (first offence).
- D.26 Of the 612 children dealt with by police for this offence in 2022, 244 (40%) were Aboriginal. Of these 244 Aboriginal children, 121 (50%) proceeded to court. By comparison, of the 366 young people who did not identify as Aboriginal, 123 (34%) proceeded to court.²³
- D.27 A lesser proportion of Aboriginal children received warnings, youth justice conferences and cautions for this offence. Of the non-Aboriginal children proceeded against by police for this offence in 2022, 243 (66%) received either a warning, a youth justice conference or a caution. For the Aboriginal cohort, this figure was 123 (50%).²⁴
- D.28 Aboriginal children were also more likely to proceed to court for the offence of custody of a knife in a school (first offence). Of the 130 children dealt with by police for this offence in 2022, 35 (27%) were Aboriginal. Of these, 3 (9%) were proceeded against to court. By comparison, of the 90 children who were not identified as Aboriginal, only one (1%) proceeded to court.²⁵

20. NSW Bureau of Crime Statistics and Research, Kt23-22885, table 1.

21. NSW Bureau of Crime Statistics and Research, Kt23-22885, table 2.

22. NSW Bureau of Crimes Statistics and Research, Kt23-22885, table 2.

23. NSW Bureau of Crimes Statistics and Research, Kt23-22885, table 1.

24. NSW Bureau of Crimes Statistics and Research, Kt23-22885, table 1.

25. NSW Bureau of Crimes Statistics and Research, Kt23-22885, table 1.

- D.29 Similar proportions of Aboriginal and non-Aboriginal children were proceeded against to court for custody of a knife in public, where that offence was a second or subsequent offence. In 2022, of the 99 children dealt with by police for this offence, 61 (62%) were Aboriginal. Of these, 47 (77%) were proceeded against to court. By comparison, of the 38 children who were not identified as Aboriginal, 30 (79%) proceeded to court.²⁶
- D.30 Numbers of matters involving custody of a knife in school (second or subsequent offence) are too low to draw any meaningful conclusions: only 2 matters were proceeded against by police in 2022 for this offence.²⁷

26. NSW Bureau of Crimes Statistics and Research, Kt23-22885, table 1.

27. NSW Bureau of Crimes Statistics and Research, Kt23-22885, table 1.

Appendix E: Weapons offences with an SNPP

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), 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(1)	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 or attempting to discharge a firearm with intent to cause grievous bodily harm	9 years	25 years
<i>Crimes Act 1900</i> (NSW) s 33A(2)	Discharging or attempting to discharge 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