

3 March 2023

NSW Sentencing Council
GPO Box 31
Sydney NSW 2001
By email: sentencingcouncil@justice.nsw.gov.au

Dear The Honourable Peter McClellan AM,

Preliminary Submission: Firearms, knives and other weapons offences review

Thank you for the opportunity to provide a preliminary submission to the Sentencing Council in response to the review of sentencing for firearms, knives, and other weapons offences.

The terms of reference for this review are as follows:

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 Office of the Director of Public Prosecutions (ODPP) prosecutes firearms and weapons offences in the Local Court (particularly in relation to firearm offences committed by Police officers) and on indictment in the District Court, as well as appearing on appeals from both Local Court and District Court proceedings.

Office of the Director of Public Prosecutions

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The following preliminary submission addresses terms of reference 4-8. The ODPP intends to address any further issues arising from those matters, and the balance of the terms of reference, following the release of the Sentencing Council's consultation paper.

Standard non-parole period offences

There are a number of firearms and weapons-related offences that carry a standard non-parole period (SNPP), as provided under Division 1A of Part 4 of the *Crimes (Sentencing Procedure) Act 1999*. A list of the relevant offences are attached to this submission as **Annexure A**.

The ODPP considers that the provision of SNPPs fulfill an important function in setting a legislative guidepost for sentencing firearm and weapons-related offences that may be characterised as falling in the middle of the range of objective seriousness: *Muldrock v R* (2011) 244 CLR 120; [2011] HCA 39 at [27].

However, there is a lack of consistency as to which offences under the *Firearms Act 1996* (**the Firearms Act**), which are of seemingly equal seriousness in terms of their elements and the applicable maximum penalty, carry a SNPP.

Offences concerning the unauthorised possession or use of pistols or prohibited firearms pursuant to s 7(1) have a maximum penalty of 14 years and a SNPP of 4 years. In contrast, possession of an unregistered pistol or prohibited firearm pursuant to s 36(1), and acquiring, possessing or using a pistol or prohibited firearm in contravention of a Firearms Prohibition Order pursuant to s 74(1), each carry the same maximum penalty of 14 years but have no SNPP. Similarly, offences for the shortening of a firearm or the possession or supply of a shortened firearm pursuant to s 62(1) each carry a maximum penalty of 14 years, but carry no SNPP.

It is further noted with respect to s7(1) that a SNPP of 4 years places offences that are characterised as within the middle of the range of objective seriousness (and those characterised as falling below this range) necessarily towards the bottom of the 14-year sentencing range as set by the maximum penalty, which may have the capacity to distort the sentencing process. This can be contrasted to the other offences in the Firearms Act which carry a SNPP (as set out in Annexure A), which have a SNPP set at half of their maximum penalty.

The ODPP also draws to the attention of the Council the SNPP of 5 years in relation to the possession of prohibited weapons pursuant to s7 (1) of the *Weapons Prohibition Act 1998* (**the WP Act**), which is notably higher than the SNPP for the possession of pistols and prohibited firearms discussed immediately above, but may be of limited utility given the breadth of offending encompassed by that section: see the discussion in *Jacob v R* (2014) 240 A Crim R 239; [2014] NSWCCA 65 at [181]-[185] per RS Hulme AJ.

Penalty notice offences

At this preliminary stage the ODPP does not seek to comment concerning penalty notice offences, other than to suggest that consideration should be given to the various fine-only offences under the WP Act and the regulatory offences under the *Weapons Prohibition Regulation 2017* being grouped together and identified as offences for which a penalty notice may be issued, similar to Schedule 1 of the *Firearms Regulations 2017*.

Maximum penalties in comparison with other jurisdictions

The ODPP considers that the maximum penalties currently in force under the Firearms Act and WP Act are generally appropriate and provide appropriate sentencing scope.

It is anticipated that the consultation paper will provide a framework against which maximum penalties from other jurisdictions can be compared. We look forward to providing further comment at that time, noting that any comparative evaluation will also need to take into account



the nature of the offences compared and the differences in sentencing practices and principles that apply in the relevant jurisdictions.

Summary offences that should be made indictable offences

The ODPP does not consider that any of the current summary offences should be made indictable offences.

Any other matters that the Council considers relevant

Gel Blasters

Relevant to the Council's consideration of current sentencing trends and practices in relation to firearm offences is the relatively recent rise in prosecutions involving gel ball blasters, also called gel blasters. Gel blasters qualify as an "air gun", and a "firearm", under s 4(1) of the *Firearms Act 1996*. The possession or supply of such a firearm, without an appropriate firearms licence, therefore stands to be prosecuted on the same basis as any other firearm (including the increased penalties that apply if the gel blaster also qualifies as a "pistol" under s4(1), or meets the criteria for a prohibited firearm as described in Schedule 1).

The ODPP understands that the possession and supply of gel blasters is criminalised in other Australian jurisdictions but not in Queensland, and that it is not an offence against the laws of the Commonwealth to import gel blasters into Australia (although the subsequent possession in places other than Queensland may amount to an offence).

To date there has been no appellate consideration of how the sentencing principles applicable to other firearms should be applied to gel blasters. Several District Court decisions have highlighted that they are generally considered to be non-lethal and not capable of causing significant physical harm (notwithstanding the fear they might provoke in victims if presented during the commission of an offence). This approach has led to the possession of gel blasters being assessed as falling within the lower range of objective seriousness.¹ We note that the sentences imposed for gel blasters in such circumstances may have the effect of distorting the sentencing statistics in relation to firearm offences generally.

Although not directly a sentencing issue, the Sentencing Council may wish to consider whether gel blasters should continue to be categorised as "firearms" under the *Firearms Act 1996*. Comparisons might be drawn between gel blasters and paintball guns, which are excluded under s4(1) from being "firearms" and are now regulated under the *Paintball Act 2018*, which contains its own offences for the unauthorised use, purchase, supply, disposal and possession of paintball guns. The penalties for such offences are found in Part 2 of that Act and range from financial penalties only to terms of imprisonment of two years.

The ODPP notes that if gel blasters were declared not to be firearms, by inclusion in cl 4 of the *Firearms Regulations 2017* or otherwise, if they substantially duplicate in appearance a firearm and are not produced and identified as children's toys they may nevertheless qualify as "imitation firearms": see s 4D(3) and (4) of the *Firearms Act 1996*.² Criminalisation of gel blasters where they qualify as imitation firearms would appear to address the primary concern about such items being presented as real firearms during the commission of other offences. In this regard, it should also be noted that imitation firearms meet the definition of "dangerous weapon" under s4(1) *Crimes Act 1900*.

Weapons Prohibition Act 1998

¹ See *R v KZ* [2022] NSWDC 643 at [93]-[96]; *R v Foster* [2022] NSWDC 660 at [13],[23]-[27]; *R v Frederickson-Angell* [2021] NSWDC 22 at [57],[72]; *R v Andrews* [2018] NSWDC 382 at [31]-[33]

² Note that gel blasters are presently excluded from being imitation firearms under s4D(3) because they are "firearms" under s4(1).



Relating to the discussion above concerning the SNPP that applies to possession of a prohibited weapon under s 7(1) *Weapons Prohibition Act 1998* and the difficulties that arise in assessing the objective seriousness of individual offences within such a broad range of weapons, the Council may wish to consider whether legislative amendment that differentiates, for the purposes of sentence, between weapons included in Schedule 1 that are capable of inflicting serious injury and those of a more miscellaneous nature would assist in addressing these difficulties.

Thank you for the opportunity to make this submission. For any further information, please contact [REDACTED]

Yours faithfully

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Sally Dowling SC
Director of Public Prosecutions

STANDARD NON-PAROLE PERIOD OFFENCES INVOLVING FIREARMS

Act	Offence	SNPP
Section 7 <i>Firearms Act 1996</i>	Unauthorised possession or use of pistols or prohibited firearms	4 years
Section 51(1A) or (2A) <i>Firearms Act 1996</i>	Unauthorised sale of prohibited firearm or pistol	10 years
Section 51B <i>Firearms Act 1996</i>	Unauthorised sale of firearms on an ongoing basis	10 years
Section 51D(2) <i>Firearms Act 1996</i>	Unauthorised possession of more than 3 firearms any one of which is a prohibited firearm or pistol	10 years
Section 7 <i>Weapons Prohibition Act 1998</i>	Unauthorised possession or use of prohibited weapon — (where the offence is prosecuted on indictment)	5 years
Section 29 <i>Crimes Act 1900</i>	Shoot, or attempt to discharge loaded arms at person with intent to commit murder	10 years
Section 33A(1) <i>Crimes Act 1900</i>	Discharging a firearm with intent to cause grievous bodily harm	9 years
Section 33A(2) <i>Crimes Act 1900</i>	Discharging a firearm with intent to resist arrest or detention	9 years
Section 93GA(1) <i>Crimes Act 1900</i>	Fire a firearm at a dwelling-house or other building with reckless disregard for the safety of any person	5 years
Section 93GA(1A) <i>Crimes Act 1900</i>	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
Section 93GA(1B) <i>Crimes Act 1900</i>	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
Section 98 <i>Crimes Act 1900</i>	Assault with intent to rob, or Robbery armed with offensive weapon causing wounding or grievous bodily harm	7 years
Section 112(2) <i>Crimes Act 1900</i>	Aggravated Break, enter and commit serious indictable offence (armed with offensive weapon)	5 years
Section 112(3) <i>Crimes Act 1900</i>	Specially aggravated Break, enter and commit serious indictable offence (armed with dangerous weapon)	7 years