

20 March 2023

The Hon. Peter McClellan AM KC
Chairperson
NSW Sentencing Council

By Email: sentencingcouncil@justice.nsw.gov.au

Dear Chairperson,

NSW Sentencing Council Review of firearms, knives, and other weapons offences

Thank you for the opportunity to make a preliminary submission to the NSW Sentencing Council's (**the Council**) review of sentencing for firearms, knives and other weapons offences.

Legal Aid NSW is concerned about, and invites the Council to specifically consider, the following issues as part of this review:

- The impact of sentencing for summary knife and weapons offences on vulnerable communities, including children and young people, and homeless persons.
- Inconsistencies in the law across different jurisdictions, and the applicable penalties or possession of non-lethal 'recreational' weapons and firearms, such as gel-blasters and imitation firearms.

Summary knife and weapon offences

Legal Aid NSW does not support any summary offences being made indictable offences and argues that current provisions have a disproportionate impact on vulnerable individuals and communities, many of whom who are overpoliced.

There are a range of 'knife' and 'weapons' offences under the *Summary Offences Act 1988*, including s.11B – custody of an offensive implement, s.11C – custody of a knife in a public place or school and s.11E – wielding a knife in a public place of school. Section 3 defines knife to include a 'knife blade', 'razor blade' or 'any other blade', but not 'anything...declared by the regulations to be excluded from this definition'. Currently, the Regulations do not provide any such exclusion.

Breadth of items captured

In our experience, the interpretation of what constitutes a 'knife' is broad and somewhat inconsistent. In *Police v O'Brien* [2012] NSWLC 7, Favretto LCM considered at length the legislative history of these offences in the context of a prosecution under s.11C for possession of a pair of scissors. In concluding that a pair of scissors did not fall within the definition of a knife under s.3 and s.11C, his Honour said:

[26] "...To say that a pair of scissors is a blade because they are a cutting instrument does not particularly assist because otherwise that would also include a saw, shearing blades, secateurs and paint scrapers to name a few other instruments with blades. Many of the variety of knives referred to in the debates would in common experience be possessed by gangs or be regarded as a status symbol within gangs or be part of knife culture...It would defy common sense to suggest a pair of scissors, a screwdriver, saw, secateurs, shearing blades or paint scraper as examples to be items of knife culture..."

[28] "...it is clear that the object of the legislation was to fight "knife culture" through prohibiting the custody of knives in public places and schools...To adopt the words of the UK Court of Appeal (Criminal Division) in *R v Davis*:

It seems to us, in that comparison, that it would be quite unlikely, indeed in our view impossible, that Parliament intended an article such as a screwdriver, just because it has a blade, to fall into the same category as a sharply pointed item or a folding pocketknife.

Those words are apposite to the custody of not only a screwdriver but also a pair of scissors under s 11C." (Emphasis added)

Notwithstanding the analysis in *O'Brien*, we understand that it remains common for children and young people, homeless individuals, Aboriginal and Torres Strait Islander people, those with mental illness or cognitive impairment, and those living in areas of relative poverty to be prosecuted and sentenced for possession of items like scissors, box cutters, multi-tools. Common scenarios our lawyers encounter that involve prosecution for items such items include:

- Homeless individuals carrying small pocket knives, multitools or other items that they rely on for a variety of day to day functions, including to open bottles, prepare food, or cut up cardboard.
- Rough sleepers who have previously been the victim of serious domestic violence or assault and violence on the street, who carry such items for a sense of security and for self-protection.
- where a person is required to apply regularly for jobs to maintain Job Seeker allowance and may be 'between' casual or short term jobs like warehousing or painting, and carry such items with their belongings or in their vehicles.

Impact on vulnerable individuals and communities

Anecdotally, police rarely appear to accept our clients' explanations for possession as "reasonable", or exercise discretion not to charge. Put plainly, in our experience, our clients are rarely given the benefit of the doubt afforded to non-indigent individuals with no criminal record.

While s.29A provides that penalty notices may be issued for offences under s.11C, a notice cannot issue to a person who has previously been dealt with for any knife related offence (including a prior s.11C). Those who receive Future Court Attendance Notices often do not attend court and are often dealt with in their absence under s.196 *Criminal Procedure Act* 1986.

While a defence of "reasonable excuse" is available, the defendant bears the onus of proof which can be difficult to establish because of an accused's personal circumstances and

criminal history. Defended hearings are also discouraged, in part, by lengthy delays, and onerous bail conditions that can be imposed over that period.

Duty solicitors report that it is common within this client cohort to see lengthy criminal records for repeated custody of a knife offences without any history of violence (or significant or knife related violence). This can make bail more difficult in future. It is also common to see repeated fines imposed, which can compound an individual's financial hardships and debt levels, followed by escalating sentences – including short terms of imprisonment – imposed, even in the absence of violent offending.

Legal Aid NSW invites the Sentencing Council to explore:

- the number and geographical spread of s.196 convictions and sentencing for summary knife and weapon offences
- available statistics reflecting the impact of sentencing for summary offences against children and young people, homeless people and Aboriginal and Torres Strait Islander peoples.
- The potential impact of removal of the prohibition on penalty notices for second or subsequent knife related offences on court outcomes.
- the potential impact on sentence outcomes of exempting small scissors and small bladed multitools (e.g. bottle openers or tools with blades under a certain size) from s.11C.

Inconsistencies between jurisdictions and application of maximum penalty and standard non parole periods to non-lethal weapons and imitations.

Criminalisation of recreational items lawful in other places

Legal Aid NSW is concerned about the increasing capture of items that meet the technical definition of a 'firearm' or 'prohibited weapon' but are neither deadly or capable of inflicting serious harm and remain legal to buy or market in other parts of the country. As technology has progressed, items developed and marketed for 'recreational' purposes have been captured within the broad technical definitions of 'firearms' and 'prohibited weapons'.

The most recent and prevalent example of the issue involves 'gel blasters' – a type of toy gun, able to be purchased in Queensland or online, that shoot small water or gel-based pellets. These toys have been classified as firearms in various states and territories, at different times, because of their appearance, but remain legal to buy and possess in Queensland. They are neither lethal or capable of inflicting serious harm, and yet attract the same maximum penalty as possession of a firearm capable of carrying lead/copper ammunition.

We received widespread feedback from solicitors across the state raising concern about the severity of penalties for possession of gel-blasters, including examples where terms of imprisonment were imposed for young adults that resulted ultimately in non-convictions on appeal.

While the cross-jurisdictional issue is resolved when a type of firearm or weapon is prohibited nationally, the issue has demonstrated capacity for recurrence as manufacturing evolves and new 'recreational' items are marketed at children or for discrete lawful purposes. For example, we have received reports of a new type of 'salt gun' designed and marketed for use against insects, but which may fall within the technical definition of an "air gun".

The issue exposes the challenges to sentencing where laws designed to curb organised, violent, and serious criminal behaviour also capture 'ordinary' members of the community who do not intend, or know, that they are committing criminal conduct.

Imitation weapons and firearms in 'the hierarchy'

When properly exercised, the judicial discretion available to sentencing judges is a strength of our judicial system. However, achieving consistency in sentencing is challenging when significant single maximum penalties apply to such a diverse range of items or conduct.

While a hierarchy of prohibited weapons was recognised by Simpson J (as her Honour then was) in *R v Williams* [2005] NSWCCA 355, in *Jacob v R* [2014] NSWCCA 65, RS Hulme AJ (Ward JA agreeing) at [180]–[184] recognised the difficulties in assessing objective seriousness given the wide variety of "prohibited weapons" encompassed by the Act. Where 'reasonable minds may differ' widely about sentencing outcomes, there is potential for inconsistent sentencing outcomes.

Although sentencing discretion permits a court to have regard to the nature of a firearm or weapon and the relative risk posed to safety, previous examinations of sentencing outcomes for firearms offences in Australia found that "*while some concessions have been made in certain circumstances because of a lack of actual use of a weapon during an armed robbery, it appears that imitation or unloaded firearms do little to mitigate the seriousness of the offending behaviour.*"¹

As identified by the Australian Institute of Criminology in its 2008 examination of court outcomes for firearms offences, "...*judicial discretion and the relative restriction of sentencing procedures operating in different jurisdictions can further act to influence a varying regime in the type and severity of sentences handed down.*"²

We note that in Victoria for example, a separate provision and lower maximum penalty applies to possession, use or carrying an imitation firearm under the *Control of Weapons Act 1990* (Vic).³ We query whether this legislated distinction produces more nuance and consistent sentencing outcomes.

Lastly, we note that the statistical data currently available for weapons and firearms offences may not permit isolation of all relevant particulars in order to evaluate incidents involving "functional" weapons and firearms vs imitations.

Legal Aid NSW invites the Sentencing Council to consider:

1. Whether the available data adequately distinguishes offences involving an imitation firearm to enable examination of offence type and sentencing trends.
2. Whether other jurisdictions distinguish between imitation firearms, air and other non-lethal projectile firearms and lethal firearms, and the applicable maximum penalties.

¹ Davies, M, and Mouzos, J (2008) 'Court Outcomes for firearm offences in Australia' Australian Institute of Criminology: Technical and Background Paper 31, p.37.

² Davies (above n1), p.iii.

³ S.5AB(1) – a non-prohibited person must not possess, use or carry an imitation firearm without an exemption order or approval (penalty: 240 penalty units or imprisonment for 2 years). Note the penalty for such possession by a 'prohibited person' is 1200 penalty units or imprisonment for 10 years): s.5AB(2).

3. Whether there is consistency in approaches to sentencing for offences involving non-lethal weapons and firearms, and imitations.

We look forward to providing more comprehensive submission following the Council's consideration of the preliminary issues, and further consultation.

Again, thank you for the opportunity to comment at this early stage. If you have any questions, please contact [REDACTED]

Yours sincerely

Monique Hitter
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