



Children's Court of New South Wales

Hon Peter McClellan AM KC
Chairperson
New South Wales Sentencing Council

By email: sentencingcouncil@dcj.nsw.gov.au

24 November 2023

Dear Mr McClellan,

Re: Weapons-related offences: sentencing young offenders issues paper

Thank you for the opportunity to provide feedback on the *Weapons-related offences: sentencing young offenders* Issues Paper ('the Paper').

The Children's Court acknowledges that weapon-related offending is a concern for the community. In sentencing young offenders, the Children's Court seeks to address the purposes of sentencing with priority towards rehabilitation and diversion from the justice system, where appropriate.¹

Please find the Children's Court response to the Paper below.

Part 2: Diversion

Young Offenders Act 1997 (NSW)

The Children's Court does not support any amendment to the current diversionary scheme under the *Young Offenders Act 1997 (NSW)* with regards to weapons-related crime. The majority of young offenders do not reoffend, and many recidivist young offenders cease offending when they reach maturity. Diverting a young person from the criminal justice system avoids costly, adversarial criminal court processes while ensuring the young person is held accountable for their conduct within their community.

¹ *KT v R* [2008] NSWCCA 51 [22].

Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW)

Many young offenders have been diagnosed with adverse mental health, neurodiversity, or cognitive impairments. Research into the presentation of detainees in youth justice centres reveals young people with mental health and cognitive impairments are overrepresented in the criminal justice system.²

The Court should maintain the discretion to divert a young offender into therapeutic support when diversion is more appropriate than a sentence. The diversion of eligible offenders in appropriate circumstances reduces the overrepresentation of young people in custody and facilitates treatment to address the causes of offending and reduce the likelihood of future offending.

An increase in diversions, as noted in 4.18 of the Paper, may be attributable to the introduction of the Act in 2020 which expanded the definitions of ‘mental health impairment’ and ‘cognitive impairment’. The change in definition expanded the application of the Act, which increased the number of offenders eligible for diversion.³ A recent study into the previous Act revealed young offenders who received a diversion reoffended at a lower rate than young offenders who had been sentenced at law for similar offences.⁴ There is no justification to support different processes for weapon-related offending.

Part 3: Sentencing Practice and Procedure

Question 3.3 (2) Are there any principles relevant to sentencing young people for weapons-related offences that should be considered for introduction in NSW?

The Children’s Court does not support the implementation of specific sentencing principles for weapons-related offences.

Legislating sentencing principles that direct or suggest custodial sentences for offences that involve weapons is contrary to statutory and common law principles that have been developed

² S Boiteux and S Poynton, *Offending by Young People with Disability: A NSW Linkage Study*, Bulletin No 254 Bureau of Crime Statistics and Research, January 2023.

³ Claire Gaskin et al., ‘Youth Mental Health Diversion at Court: Barriers to Diversion and Impact on Reoffending’ *Crime & Delinquency*, 0(0) 1-33.

⁴ Ibid.

in recognition of the developmental stage of children and young people.⁵ The Children's Court does not support the implementation of sentencing principles as cited at 3.51 of the Paper.

The principle that punishment and general deterrence should be subordinate to the need to foster a young offender's rehabilitation is currently applied in appropriate cases.⁶ That discretion enables the Court to balance the needs of the young offender with the needs of the community. In some cases, there is a short-term need for community protection but in every case, there is a long-term need for young people to address the causes of offending and develop into positive members of the community.

The appropriateness of a particular sentence should not depend solely on the possession of a knife or weapon. The *Children (Criminal Proceedings) Act 1987* (NSW) provides that a young offender is not to be sentenced to a period of detention unless it would be wholly inappropriate to sentence a child or young person to a community-based order. The appropriateness of a sentence is determined by the maximum penalty for the offence, the nature of the offending and the circumstances of the offender. Consideration of whether a young offender has engaged in 'adult like' behaviour has been a factor in assessing the appropriate sentence.⁷ Aggravating factors, as set out in s 21A,⁸ align with criteria that informs a determination about whether offending could be characterised as adult behaviour, include planning or pre-meditation, possession of a weapon and the criminal history of an offender.⁹ Importantly, the presence of any of these factors do not, by themselves, demonstrate 'adult like' behaviour.¹⁰

The existing legislative and common law frameworks provide the appropriate discretion for judicial officers to achieve the purposes of sentencing when sentencing young people for weapons-related offences.

Part 4: Young offenders and weapons

Question 4.1 What other issues are there around the prevalence of weapons offences by children and young people?

⁵ *KT v R* [2008] NSWCCA 51.

⁶ *Ibid.*

⁷ *TM v R* [2023] NSWCCA 185.

⁸ *Crimes (Sentencing Procedure) Act 1999* (NSW).

⁹ *R v Adamson* (2002) 132 A Crim R 511, [31]-[32].

¹⁰ *TM v R* [2023] NSWCCA 185.

The Children's Court notes the observations made in Youth Justice NSW's submission, cited at 4.13 of the Paper:

The data demonstrates that violent crimes involving firearms or knives where the person of interest or offender is 10-17 years old have been steadily decreasing over a twenty-year period from 2002-2022.

Previous studies of weapons-related offending have found a disparity between statistical evidence and community perceptions of knife crime, observing the difficulty in making accurate claims about the levels of knife possession or the use of knives in violent offending.¹¹

Policing practices, such as stop and search operations or the implementation of STMPs, influence statistics on the prevalence of knife possession. Data published in 2022 revealed that police conducted more than 4,400 strip-searches on children between July 2020 and May 2022.¹² It has also been reported that STMPs encouraged Police officers to act beyond their statutory powers to search when interacting with young people.¹³ It follows that Police will uncover more weapons in possession of a particular demographic (young people) when they target and search them more frequently. The perceived increase in possession of weapons may be due to an increase in the use of search powers against young people, particularly given there has been no corresponding increase in the use of knives in violent offending.

The Paper recognises that some young people possess knives out of forgetfulness or mistake, rather than as a result of violent offending or with a specific or violent purpose in mind.¹⁴ In the experience of the Court, many young people who are sentenced for possession of a knife also explain they had possession of a knife to protect themselves. A substantial number of young people who appear in the Children's Court have experienced homelessness, instability and abuse and have legitimate concerns about their safety.

¹¹ Eades C, Grimshaw R, Silvestri A & Solomon R, *Knife crime: A review of evidence and policy* (London: Centre for Crime and Justice Studies, 2nd ed, 2007) <http://www.crimeandjustice.org.uk/opus439/ccjs_knife_report.pdf>.

¹² Michael McGowan, 'NSW police strip searched more than 100 children as young as 13 in two year period' *The Guardian* (online, 14 November 2023) <<https://www.theguardian.com/australia-news/2022/aug/21/nsw-police-strip-searched-more-than-100-children-as-young-as-13-in-two-year-period>>.

¹³ Law Enforcement Conduct Commission, 'An investigation into the use of the NSW Police Force Suspect Targeting Management Plan on children and young people' (*Operation Tepito – Final Report*, October 2023), 9.

¹⁴ The Paper, 4.8.

Part 5: Sentencing Outcomes

The Children's Court submits that the sentencing patterns for the three focus offences, outlined in Part 5 of the Paper, do not need to be addressed by amending sentencing options.

The cited data indicates that possession offences are commonly dealt with in the Children's Court by way of 'other', which includes cautions and Youth Justice Conferences under the *Young Offenders Act 1999* (NSW). It is often more appropriate to divert offenders for possession offences than to impose fines, community service orders, supervision, or custody. Research suggests that carrying a weapon is a complex behaviour shaped by several factors including socioeconomic influences and perceptions of one's own safety. It is uncommon for a young person to spontaneously commit a serious offence, such as an armed robbery, simply because they are carrying a knife.

Programs that address the social welfare needs of young people through providing therapeutic support, education, pathways to employment or training are more likely to reduce the prevalence of weapon possession and reduce the risk posed by people who possess weapons than punitive responses to people who are apprehended with weapons. Research has shown that educational initiatives tailored to adolescents in high-risk areas are particularly effective in addressing knife-carrying among young people.¹⁵ An example of one such program is the BURN Crime Prevention Workshop, jointly developed by the State Government and Legal Aid NSW in 2017.¹⁶ That program addressed the legal aspects of group and robbery offending and informed participants about their rights while in custody.

There will be better outcomes for young people and the community if the government supports and expands appropriate, evidence-based programs to reduce offending.

Part 6: Reform Options

Maximum penalties and making some summary offences indictable

¹⁵ Australian Institute of Criminology, 'The carriage and use of knives by young people' *AICrime Reduction Matters* (2009) no. 75 <<https://www.aic.gov.au/sites/default/files/2020-05/crm075.pdf>>.

¹⁶ Legal Aid New South Wales, 'Community Legal Education: Schools and Young People' (20 November 2023) <<https://www.legalaid.nsw.gov.au/ways-to-get-help/community-legal-education/community-legal-education-schools-and-young-people#accordion-159847b20c-item-06415861f0>>.

The Children's Court does not support an increase to maximum penalties for young persons being sentenced for weapons-related offences.

Although the consequences of weapon-related offending can be serious, the evidence indicates there are relatively few instances of serious harm caused by young people with knives. Ideally, young people would not carry weapons. Change will occur when we interrogate the reasons young people carry weapons and dispel any perceived benefits. The Court supports initiatives that reduce the prevalence of knife possession but does not accept that amendments to sentencing options and maximum penalties will result in a reduction in weapon possession. As there has been no corresponding rise in violent youth crime involving firearms or knives, the Court submits that the available maximum penalties and sentencing options adequately address the risk of harm to the community.

The Children's Court sentences many young offenders for custody of a knife. Until the 2023 amendments to the *Crimes Act 1900* (NSW), custody of a knife carried a maximum penalty of two years imprisonment. Two years provided an appropriate sentence range for an offence of possession. More serious offending with knives or other weapons results in more significant penalties or committal to the District Court.

Mandatory minimum sentences

The Children's Court opposes mandatory minimum sentences. Research from other jurisdictions demonstrates that mandatory minimum sentences contribute to a higher rate of offending with a negligible deterrent effect and can increase the likelihood of reoffending.¹⁷ The appropriate use of sentencing discretion remains the best mechanism to achieve just outcomes that serve the best interests of the child, their family, and the community.

It is important to note that Children's Courts exist in acknowledgement of the challenges of adolescence and the need to balance the sentencing principles of punishment, denunciation, community protection, recognition of harm and deterrence with accountability and rehabilitation. Mandatory minimum sentencing would restrict the discretion and flexibility that this balancing exercise requires. Children and young persons are unlikely to become productive members of society through punitive responses to behaviour that can instead be managed appropriately within the existing sentencing regime.

¹⁷ Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 4,18.

Thank you again for the opportunity to comment on the Sentencing Council's Issues Paper. Should you have any questions regarding any of the issues raised above please do not hesitate to contact

Yours sincerely,

Judge Nell Skinner

President

Children's Court of New South Wales