

2nd December 2023

The Hon Peter McClellan AM KC
Chairperson
New South Wales Sentencing Council

Via email: sentencingcouncil@justice.nsw.gov.au

Dear The Hon Peter McClellan AM KC

Submission to the Issues Paper: Weapons-related offences: sentencing young offenders

Please find the following as my submission with respect to the Sentencing Council's issues paper into sentencing young offenders. I am aware of the recent BOCSAR report demonstrating a steady decrease in violent incidences of knife crimes amongst young persons over a twenty-year period from 2002-2022. This data does not support the severity of reforms recently introduced by the current government in October 2023 in the *Criminal Legislation Amendment (Knife Crimes) Act 2023* (NSW).

On exploring the literature, particularly from the UK, it would appear a more effective approach is to understand what motivates knife crimes and to address the root causes through alternative approaches to sentencing. It is this approach I have taken in responding to some of the questions posed in the Issues Paper.

Q2.1 Pre-court diversions

Recommend warnings and cautions by police to be strengthened by encouraging *voluntary* participation in a community program such as described by ACYP in their submission *PWE10*,¹ and as mentioned in Chapter 6.

- The purpose would be to encourage early participation in diversion programs as a primary prevention initiative to address the root cause of knife carrying.
- Programs could be placed in specific targeted areas as identified in Chapter 4 of the population groups comprising the socio-economic disadvantaged and Aboriginals.
- Further funding is recommended to expand community-based programs.
- Evaluation of participation and outcomes would provide evidence-based data to inform future decision making.

British Example:

*The success of the violence reduction unit (VRU) in Glasgow, Scotland used a creative and holistic approach substantially reduced knife crime.² An inclusion in their education program was discussion on the results of knife violence which included an impactful talk by a mother who lost her son to violence. The program applied education-based initiatives including community support and help for offenders with 'housing, relocation, employment and training.'*³

¹ NSW Police and NRL 'Anti-Violence Campaign' that was introduced in 2022 and developed in partnership with PCYC, the NSW Department of Education and ACYP

² Gary Young and Caelainn Barr, 'How Scotland reduced knife deaths among young people' 4 December 2017, *The Guardian*. <https://www.theguardian.com/membership/2017/dec/03/how-scotland-reduced-knife-deaths-among-young-people>

³ Ibid. Further discussion on programs to combat youth violence can be found in: Dr Fergus Neville, Dr Christine A. Goodall, et al "Public Health, Youth Violence and Perpetrator Well-Being' Peace and Conflict: Journal of Peace Psychology, Vol 21(3),

Q2.2 Court diversions

Recommendation for each young person appearing before the court is to be referred to:

- A youth justice conference and follow through program including an outcome plan
- If diversion strategies are to improve and address risk factors amongst the offender population, aged 10-17, effective conferences, awareness raising and mentoring are critical.
- Adequate resources would need to be made available.

Q2.3 Mental health diversion

Where the Children's Court discharges a child or young person on the grounds of mental health, under section 14 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) attention should be paid to the definition under Section 5 Cognitive Impairment (2)(e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder.

Cognitive impairment of the description in S 5 (2)(e) appears in psychologist reports tendered at sentencing of adults. It is therefore important that such persons are included in youth justice conferencing, attend counselling or awareness classes even mentoring activities.⁴ Without guidance and assistance, this cohort may fall into a cycle of offending making court appearances over their lifetime.

Grimshaw and Ford documented the links between adverse childhood environments, maltreatment, and traumatic violent experiences, as both contributing to and resulting in violent behaviour, seen in enhanced impulses 'towards self-preservation at the expense of compassion for others.'⁵ Hence, punitive measures alone will have little impact in reducing knife and weapons offences in young persons.

Recommended:

Legislative guidance on considering cognitive impairment by the courts, prior to determining an outcome, may go some way to address the root causes of weapons offences amongst young persons.

Q3.1 Penalty notices

Penalty notices can perform a 'preventive measure' for less serious offences such as carrying a knife on school premises. But, as already raised is the issue of the young offenders' limited capacity to pay a fine. Suggested capping or limiting the fine is recommended as incapacity to pay may encourage further offences as recorded in UK literature.

My recommendation is in line with suggestions for reforms suggested in 6.42 and 6.43 of the Issue Paper:

6.42 One option for reform could be to ensure the availability of penalty notices for people under the age of 18 years in relation to the custody of a knife offence, and to consider whether this option should be available for other offences.

6.43 ... in respect of the custody of a knife offence that was available under the *Summary Offences Act*, a police officer, before issuing a penalty notice to a young person, had to determine whether they should, instead, receive a warning, a caution, or a referral to a youth justice conference.

Aug 2015, 322-333. <http://dx.doi.org/10.1037/pac0000081>. Also, K.D. Brown et al, 'Aggression and Violent Behaviour' 67 (2022) Science Direct, 2. <https://doi.org/10.1016/j.avb.2022.101774>.

⁴ Georgia-Mae Chung, *Knife Crime Prevention Orders: A Review of Associated Practical Issues* (Sentencing Academy, 2023)

⁵ Roger Grimshaw & Matt ford 'Young people, violence and knives – revisiting the evidence and policy discussions.' (2018) *Centre for Crime and Justice Studies*, London.

From an interview with The Guardian, Dr Christine Goodall reporting on the Glasgow VRU recorded the following: 'A purely justice-driven approach doesn't work ... You can arrest as many people as you like. You can search as many people as you like. You can throw away the key if you want to. It just won't solve the problem.'⁶

What is at issue in NSW is the knife crimes amendments - *Criminal Legislation Amendment (Knife Crimes) Act 2023* (NSW) have the potential to simply criminalise a whole generation of our youth.

Recommended the *Criminal Legislation Amendment (Knife Crimes)* of 23 October 2023 are reversed to the provisions originally under the *Summary Offences Act* – custody of a knife and using or carrying a knife in a public place or school - the offences in s 11C and s 11E and **not** replace them with indictable offences along with the unwarranted increase in penalties.

Q4.1 Young offenders and weapons

A requirement of the Terms of Reference includes a request for information relating to the 'characteristics of young offenders.' Chapter 4 of the Issues Paper explores both characteristics and motivation. As these are cited as important to addressing the challenges of knife crime in the UK, I would like to submit the following to be considered for inclusion in statutory change.

1.) Offender motivation:

Research, largely from England and Wales, sees '**motivation**' for knife offences as influenced by 'risk' factors experienced by young people. It is well known risk factors influence behaviour. Risk factors are described by Sarah Haylock et al in Britain,⁷ as poor mental health, peer influence, prior victimisation (or bullying), violence and economic deprivation. These are not unique to Britain, as NSW sentencing case law of adult criminal offenders cite the influence of childhood deprivation and disadvantage as a contributory factor when considering the subjective circumstances of an offender.

Links between an individuals' risk factors and offending were identified by Haylock et al when reviewing youth violence:

Multiple research papers identified adverse childhood experiences and poor mental health as positively associated with youth and gang violence. It was suggested that community and societal risk factors, such as discrimination and economic inequality, were frequently linked to youth violence.⁸

Data could be collected by NSW police of numbers and locations where pre-court warnings and cautions are issued. Such data may help identify youth populations in community areas at risk of knife crimes providing valuable information for the allocation of resources. Critical to police in their support of intervention programs in England and Wales,⁹ was understanding and using data to make their task effective.

Recommendation: There is strong argument that understanding 'motivation' or what causes young people to become involved in knife crime is supported by the claims identified in recent research in the UK and USA. Understanding motivation could lead to effective alternatives to sentencing.

⁶ Above n 2 at 4 (Christine Goodall).

⁷ Sarah Haylock et al, "Risk Factors Associated with Knife-Crime in United Kingdom among Young People Aged 10–24 Years: A Systemic Review" (2020) 20 *BMC Public Health* 1, 9–10.

⁸ Sara Haylock, et al, 'Risk factors associated with knife-crime in the United Kingdom among young people aged 10-24 years: a systemic review' (2020) 20, *BMC Public Health* 1415, Abstract. <https://doi.org/10.1186/s12889-020-09498-4>

⁹ Karen Bullock, et al, 'Police practitioner views on the challenges of analysing and responding to knife crime' (2023) *Crime Science* 12, 10. <https://doi.org/10.1186/s40163-022-00180-1>.

2.) *Offender characteristics:*

Chapter 4 of the Issues Paper explores characteristics of offenders in NSW based on data collected from the Children’s Court in 2022. Two key findings are raised, one relates to socio-economic status of offenders, the other to the disproportionate number of Aboriginal offenders.

- Applying Socio-Economic Indexes for Areas (SEIFA) to the data provided in the Issues Paper Figure 4.11 depicts the socio-economic status of offenders from the Children’s Court 2022 indicating some 50% of offenders are in the category of ‘disadvantaged’.
- Of significance is the disproportionate number of Aboriginal child offenders provided in Figure 4.3 of data from the Children’s Court 2022.

Recommended:

The offender characteristics clearly identify two groups of offenders. The data provides guidance for targeted diversion programs to serve as preventive measures discussed above.

As provided in higher courts, when an offender appears in the Children’s Court, pre-sentence reports even psychologist reports, should be made available to the judge. As deterrence is not necessarily the most appropriate sentence for young offenders, pre-sentence reports may assist in considering subjective circumstances of the offender when applying principles of proportionality to the final determination.

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Thank you for the opportunity to make this submission by way of contributing to reforms of young offenders with respect to knife crimes in NSW.

Yours sincerely

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NOTE: I give permission for publication of my contributing information.