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NSWCCL SUBMISSION

NSW SENTENCING COUNCIL

CONSULTATION PAPER ON WEAPONS-RELATED OFFENCES: SENTENCING ADULT OFFENDERS

3 December 2023

NSWCCL

Acknowledgement of Country

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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Submissions to Sentencing Council consultation paper on weapons-related offences: sentencing adult offenders

The Sentencing **Council** is asked to conduct a review of sentencing for firearms, knives and other weapons offences and make any recommendations for reform that it considers appropriate. The Council released a **consultation paper** in September 2023 seeking further submissions on key issues identified in preliminary research and analysis. The NSW Council for Civil Liberties (**NSWCCL**) is grateful for the opportunity to make a submission in response to this consultation paper.

Our submission will focus on offences involving custody of knives and questions raised in relation to items 5 and 6 of the Terms of Reference, namely:

- 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;

1 Maximum penalties

- 1.1 Given the focus of our response is on knives, we propose to provide a response in relation to question 3.1 and parts of question 6.2 together as we consider they deal with similar issues.

Question 3.1: Maximum penalties for possession of prohibited weapon

- (i) Is the maximum penalty for possessing a prohibited weapon in NSW adequate?
- (ii) Should maximum penalties depend on the type of prohibited weapon possessed? If yes, what categories should be used and what maximum penalty would be appropriate for each category of prohibited weapon?

Question 6.2: Summary offences relating to knives

- (ii) Should certain specified classes of knives or blades be excluded from the definitions in s 931A of the *Crimes Act 1900 (NSW)* (uncommenced)? If so, what should be excluded?
 - (iii) Should the reasonable excuse provisions in s 931B of the *Crimes Act 1900 (NSW)* (uncommenced) include an excuse that recognises circumstances of homelessness? Why or why not?
 - (iv) Should the excuse of self-defence, or defence of another person, be available as a reasonable excuse when mixed with other purposes?
- 1.2 In addition to comparing sentences to other jurisdictions, the consultation paper notes that other considerations concerning the appropriateness of maximum penalties are whether:
- o the maximum penalties reflect the seriousness of the offence, including the various conduct captured by the offence;

- the differences in maximum penalties reflect the difference in seriousness of comparable offences, and
- there is any evidence as to the inadequacy of current maximum penalties.

(a) Weapons Prohibition Act

- 1.3 Question 3.1 is posed in relation to maximum penalties under the **Weapons Prohibition Act 1998 (NSW)** and **Firearms Act 1996 (NSW)**. The former includes prohibitions in relation to possession of certain types of knives without a permit.
- 1.4 The consultation paper reveals that NSW's maximum penalties very significantly exceed those of other Australian jurisdictions.¹ Given this, NSWCCCL submits that in order for the Council to consider recommending any increase to the maximum penalty there would need to be evidence of a very significant increase in offending. No such evidence has been provided to the Council. In our submission, the current maximum penalty is more than adequate.
- 1.5 NSWCCCL holds the concern, as noted in the consultation paper, that a broad range of weapons is captured by a single maximum penalty.² NSWCCCL does consider that maximum penalties should depend on the type of prohibited weapon possessed. At present, the same maximum penalty exists for possession or use of a missile launcher as it does for a laser pointer. NSWCCCL does not consider it has sufficient expertise to provide the Council with recommended maximum sentences for each category of prohibited weapon suffice it to say that the possession of an item that could cause mass destruction should be sufficiently higher than an item emitting a beam of light. The maximum penalties of other Australian jurisdictions may also be informative.
- 1.6 NSWCCCL submits that a starting point in terms of categories of weapons would be the suggestion from the Office of the Director of Public Prosecutions (**ODPP**) to consider differentiating between the weapons that are capable of inflicting serious injury and those of a more miscellaneous nature.³ NSWCCCL submits that military-style weapons should also be a distinct category.

(b) Crimes Act offences

- 1.7 The consultation paper examines offences previously in sections 11C and 11E of the **Summary Offences Act 1988 (NSW)**. On 20 June 2023, the Attorney General Michael Daley MP introduced the Criminal Legislation Amendment (Knife Crimes) Bill 2023. This Bill passed parliament on 29 June 2023 and was assented to on 13 July 2023. It repealed s 11C and s 11E of the Summary Offences Act and created new indictable offences in the **Crimes Act 1900 (NSW)**. These new provisions commenced on 23 October 2023 and are found at sections 93IB and 93IC.
- 1.8 Despite the government proceeding with the above changes without waiting for the completion of the Council's review, relevant submissions can still be made regarding the appropriateness of maximum penalties.
- 1.9 Similar to the criticism of the Weapons Prohibition Act and the broad definition of 'prohibited weapon', the definition of 'knife' in s 93IA of the Crimes Act is very broad.

¹ Pages 26-27 of the consultation paper.

² Page 21 of the consultation paper.

³ NSW Office of Director of Public Prosecutions, Preliminary Submission PWE08, 4.

The only limits imposed are classes of knives prescribed by the regulations; however, no such regulations have been made. The offence could capture a range of 'knives' from something as serious as a machete to a tool such as a screwdriver.

- 1.10 The consultation paper notes that the number of finalised charges for adults under these offences (in their previous incarnation) increased between 2013 and 2022 and that offences under the then s 11C of the Summary Offences Act (now s 93IB of the Crimes Act) have a relatively high prevalence when compared with other offences relevant to the review.⁴ We will focus our comments mainly on s 93IB.
- 1.11 One argument that could be made in justifying the Government's increase of the maximum sentence for these offences from two to four years is that the above statistics show the previous penalty was not a sufficient deterrent. The preliminary submission from Youth Against Violence suggests there is concern in the community that sentencing laws are too light giving young people the impression that carrying knives 'isn't too serious'.⁵ Possibly a similar impression is provided to adults. However, recorded crime statistics for violent offences involving firearms or knives were lower in the year to March 2023 than in almost any other year in the past two decades.⁶
- 1.12 The reasons given by the Government for the increase in maximum penalties for custody of knives included to respond to serious knife-related incidents in New South Wales and better protect the safety of the community.⁷ Tellingly, the government stated it was acting to address community concern given the 'very high profile' events involving knives over the past year.⁸ The Attorney-General alleged it would provide a stronger deterrent against 'deliberate acts of violence'.⁹ Despite this reasoning, sentences in relation to actually injuring a person with a knife were not increased. It is highly likely that the offenders involved in the 'high profile' incidents were charged with much more serious offences than custody of a knife. The higher penalties for those offences were insufficient to deter the offenders from using the knives, yet the legislature expects an increase in the maximum penalty for custody of a knife will.
- 1.13 It is of interest that the consultation paper references a Bureau of Crime Statistics study that concludes increasing the risk of arrest or the risk of imprisonment reduces crime, while increasing the duration of prison sentences 'exerts no measurable effect at all'.¹⁰
- 1.14 The consultation paper notes that an increase in the maximum penalty for an offence is an indication that the legislature intends for the offence to attract heavier sentences.¹¹ The maximum penalty represents the 'legislature's assessment of the seriousness of the offence' and the worst possible case of the offence.¹² NSWCCCL submits, however, that given the definition of 'knife' is so broad it is not clear exactly what a 'worst possible case' is. The law as drafted is a blunt instrument making it prima facie as much of an offence to be carrying a pair of nail scissors as it is to be carrying a broad sword.
- 1.15 As the consultation paper explains, the common law principle of proportionality requires that sentences reflect the objective seriousness of the offending. This principle finds

⁴ [6.17] - [6.18] of the consultation paper.

⁵ Youth Against Violence, Preliminary Submission, PWE06, 1.

⁶ NSW Bureau of Crime Statistics and Research, Offences Involving Weapons; Firearm and Knife Violence Statistics, April 2003 to March 2023 (1 August 2023) <https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/weapons.aspx> (retrieved 26 November 2023).

⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 June 2023, 22 (Michael Daley, Attorney-General).

⁸ *Ibid* 23.

⁹ *Ibid* 24.

¹⁰ W-Y Wan and others, The Effect of Arrest and Imprisonment on Crime, Crime and Justice Bulletin No 158 (NSW Bureau of Crime Statistics and Research, 2012) 15-16.

¹¹ Page 22 of the consultation paper.

¹² *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].

statutory expression in the purpose of adequate punishment.¹³ The courts have noted the wide variety of weapons captured under the definition of ‘prohibited weapons’ under the Weapons Prohibition Act and that it is difficult to determine what kind of offence would fall in the middle range of objective seriousness, based on weapon type.¹⁴ Legal Aid stated that the wide array of prohibited weapons may give rise to inconsistent sentencing outcomes.¹⁵

- 1.16 NSWCCCL submits that similar to the above, the broad definition of ‘knife’ could make it difficult to assess objective seriousness and lead to inconsistent sentencing outcomes. The preliminary submission from the Aboriginal Legal Service (**ALS**) highlights this well at page 4. It has been held that items such as scissors and screwdrivers are not intended to fall within the category of ‘knife’,¹⁶ however, the ALS is aware of decisions finding the opposite.
- 1.17 It is also clear that these offences are impacting disadvantaged groups.¹⁷ Legal Aid, like ALS, notes it is common for people to be prosecuted and sentenced for possession of items like scissors, box cutters and multi-tools.¹⁸ As described by Legal Aid, these are often necessary tools for people who are homeless in order to carry out day to day functions. While someone who is not homeless could be using similar items in the privacy of their homes, a homeless person is criminalised for the same behaviour, simply because their home is in a public place.
- 1.18 NSWCCCL submits that it is not at all clear that simply doubling the maximum sentence for custody of knife offences will lead to a decrease in knife related crime. It certainly sends a message that the legislature considers the custody of a knife in public a more serious offence; however, the law is drafted with such a lack of particularity it can easily lead to unfair and absurd results.
- 1.19 NSWCCCL agrees with the comments of Favretto LCM in *Police v O’Brien*¹⁹ that the object of the legislation is to ‘fight “knife culture”’ and common sense says scissors and screwdrivers are not examples of items that are part of knife culture. The law itself, however, fails to give this clear expression. How many of the finalised charges referred to in paragraph 1.10 above actually assisted in combatting ‘knife culture’? NSWCCCL submits that if the Government is to double the penalty for custody of a knife in public and make it an indictable offence, then it is even more incumbent on it to craft the law to better target the weapons and the types of offenders to prevent violent knife crime, rather than casting a wide net leading to results that could defy common sense.
- 1.20 NSWCCCL submits that specified classes of knives or blades should be excluded from the definitions in s 93IA of the Crimes Act. Guidance on the classes of knives and blades to be excluded can be found in Favretto LCM’s judgment in *Police v O’Brien* and we suggest, would include common tools, gardening implements and household items like scissors, box cutters and waiter’s friends.
- 1.21 Legal Aid’s preliminary submission also highlights the problems caused by the reverse onus of the accused having to prove a ‘reasonable excuse’ for having a knife in their custody.²⁰ This does not appear to be restricted to people who are homeless.

¹³ *R v Scott* [2005] NSWCCA 152 [15].

¹⁴ *Jacob v R* [2014] NSWCCA 65 [180]–[181], [184].

¹⁵ Legal Aid NSW, Preliminary Submission PWE12, 4.

¹⁶ *Police v O’Brien* [2012] NSWLC 7.

¹⁷ [6.115] to [6.121] of the consultation paper.

¹⁸ Above n15, 2.

¹⁹ Above n16, [26] - [28].

²⁰ Above n18.

NSWCCL at a minimum submits that the reasonable excuse provisions should include an excuse that recognises circumstances of homelessness; however, a better solution would likely be to better refine the definition of knife as noted above.

- 1.22 NSWCCCL submits that s 93IB(2) provides that it is a defence if the accused proves they had a reasonable excuse for having custody of the knife in public. If a person has a reasonable excuse that should not be negated simply because they also may use it for self-defence or defence of another person.

2 Penalty notices

Question 6.3: Penalty notices for subsequent custody of knife offences

- (i) Should penalty notices be generally available for second or subsequent custody of knife offences? Why or why not?
 - (ii) Should penalty notices be available for second or subsequent custody of knife offences in circumstances where the person's only previous knife related offence is custody of knife and/or offensive implement (current s 11B and s 11C), not a violent knife offence?
- 2.1 NSWCCCL submits that there is a certain contradiction in the Government doubling the maximum sentence for custody of knife offences and making them indictable but at the same time maintaining the ability to issue penalty notices for the offence. It could be seen to be sending a mixed message about the seriousness of the offence. It could also indicate that there is some recognition of the excessive breadth of behaviour caught within the offence.
- 2.2 NSWCCCL submits that penalty notices should be available for second or subsequent custody of knife offences given the broad impact this law has as discussed above. NSWCCCL notes, however, that penalty notices have their own drawbacks, particularly on vulnerable groups as noted in the consultation paper.²¹
- 2.3 If the purpose of the law is to combat 'knife culture' then a restriction preventing second or subsequent penalty notices if previous knife offences included violent knife offences would seem more in accordance with this aim.

Yours sincerely,

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²¹ [6.55] - [6.57] of the consultation paper.