



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC/CLIC:CBcd041223

4 December 2023

Hon Peter McClellan AM KC
Chairperson
NSW Sentencing Council
GPO Box 31
Sydney NSW 2001

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

Dear Mr McClellan,

Firearms, knives and other weapons offences

Thank you for the opportunity to provide a submission in response to the Consultation Paper and Issues Paper for the review of firearms, knives and other weapons offences.

We welcome consideration of methods to improve the approach to, and processes involved in, sentencing offenders for weapons-related offences in NSW. We are particularly pleased to see consideration of alternative approaches to preventing, and dealing with weapons offences, including early intervention, therapeutic approaches, education and rehabilitation programs designed to reduce the incidence of weapons-related offending in NSW.

In relation to the Consultation Paper, please find attached a table containing comments in response to the questions posed.

In relation to young offenders, we particularly support investment in, and expansion of, early intervention initiatives, diversionary options, restorative justice programs and rehabilitation programs.

We offer the following comments related to the topics covered in the Issues Paper for the Sentencing Council's consideration.

Diversion

The Law Society fundamentally supports measures to divert young people from the formal criminal justice system, including through warnings, cautions and youth justice conferences under the *Young Offenders Act 1997 (YOA)*. We note that diversionary measures work to reduce reoffending and generate better outcomes for young people at a reduced cost to the criminal justice system.¹

In considering ways to improve the diversionary options available under the YOA, the Sentencing Council may wish to consider the potential benefits of removing the limitations on

¹ J Wang and D Weatherburn, '[Are police cautions a soft option? Reoffending among juveniles cautioned or referred to court](#)' (2019).

the number of occasions on which a caution can be given by police and the Courts. The Law Society has previously expressed,² and maintains the view, that the limit on the number of occasions on which a caution can be given, including for weapons-related offences, inappropriately limits the flexibility of the YOA, and is inconsistent with both the YOA principle that a child is entitled to the least restrictive form of sanction. This Review may present a valuable opportunity for the Sentencing Council to consider the efficacy of maintaining the limit on cautions for weapons-related offending.

The Sentencing Council may also wish to consider investigating factors that may be contributing to the over-representation of Indigenous young people in the criminal justice system in the context of weapons-related offending. For example, as noted in the Issues Paper, Indigenous young people were less likely to be given a caution or warning, and more likely to go to a youth justice conference or Court, than non-Indigenous young people in 2022.³ We would support exploration of this issue, and methods to address inequity in sentencing outcomes for Indigenous young people for weapons-related offending.

Sentencing Practice and Procedure

Penalties

While we consider the variety of sentencing options currently available under the *Children (Criminal Proceedings) Act 1987* largely adequate to meet the purposes of sentencing young people for weapons-related offences, there may be opportunity for improvement.

For example, the Sentencing Council may wish to consider whether, in all cases involving weapons-related offending, there are adequate sentencing options other than full-time custody available to the Courts. In considering this issue, the Sentencing Council may wish to have regard to, for example, whether it may be beneficial to have an intensive supervision order available for children, similar to Intensive Corrections Orders, or to make Youth Justice Conferences available in sentencing children and young people for strictly indictable weapons offences, to ensure that a full range of sentencing options is available.

In considering improvements to the operation and delivery of the sentencing scheme in practice, the Sentencing Council may also wish to investigate the impact of location and resourcing on young people's access to appropriate sentences. We note that, for example, young people who are sentenced for weapons-related offending in rural and/or remote locations in NSW cannot always receive a Children's Community Service Order (**CSO**), even where a CSO would be most appropriate, simply because community service initiatives are not available or properly funded in their area. We are of the view that appropriate resourcing is required to support the full functioning of sentencing schemes for children and young people, and to address any inequity in sentencing for weapons-related offending arising by reason of location alone.

Sentencing serious children's indictable offences (SCIO)

In respect of sentencing for serious children's indictable offences, the Sentencing Council may wish to consider the appropriateness of categorising as a SCIO an offence under section 97(2) of the *Crimes Act 1900* that is committed with a replica or imitation weapon.

We note that, notwithstanding the lower objective seriousness of an offence involving a replica weapon as opposed to a real weapon, all children and young people charged under section

² Law Society of NSW, [Letter to the Committee on Law and Safety – Inquiry into the adequacy of youth diversionary programs in NSW](#), 2018.

³ NSW Bureau of Crime Statistics and Research reference st23-22884, cited in Issues Paper, p 45.

97(2) of the *Crimes Act 1900* must be sentenced in the District Court according to law, without the benefit of penalties available under the *Children (Criminal Proceedings) Act 1987*. The Sentencing Council may wish to consider the appropriateness of this approach and whether it may be preferable to enable children sentenced for offences involving replica weapons to access penalties under the *Children (Criminal Proceedings) Act 1987*.

Firearms Prohibition Orders (FPO) and Weapons Prohibition Orders (WPO)

In conducting the Review, the Sentencing Council may also wish to consider alternative approaches to reducing reoffending by young people sentenced for weapon-related offences, including measures that function more effectively than the current FPO and WPO schemes.

We consider the current application of the FPO and WPO schemes to children and young people to be problematic for various reasons, including that FPOs and WPOs operate without expiration and with limited avenues for appeal. We are concerned that this can have the effect of leaving individuals open to experiencing a lifetime of police scrutiny under a FPO or WPO after limited contact with the criminal justice system in their youth, regardless of consequent offending. We also note that FPOs enable extensive police powers to stop and search, which can be particularly harmful for children and young people.

We would support consideration by the Sentencing Council of measures that are more effective than the FPO and WPO schemes in protecting the community, and supporting the rehabilitation of children and young people sentenced for weapons-related offences, noting the difficulties associated with the current application of the FPO and WPO schemes to children and young people in NSW.

Prevalence

We note that, as observed by Youth Justice NSW, 'violent crimes involving firearms or knives where the person of interest or offender is 10-17 years old have been steadily decreasing over a 20-year period from 2002-2022' and agree that, accordingly, 'there is no basis for increasing the severity of sentencing for crimes involving firearms and weapons given the low numbers and downward trends for young people and the recidivist impact of a control order on a young person.'⁴

The Issues Paper notes that there is some evidence to suggest prevalence of knife carrying or possession among young people. We note that any such prevalence would include circumstances where children and young people may meet the definition of possession 'without any particular purpose in mind'⁵ and/or without an intention to harm others.

In light of this, we are of the view that, in responding to any prevalence of knife possession amongst young people, an appropriate approach would involve a focus on early intervention and supporting young people to feel safe in their communities, rather than by increasing maximum penalties for deterrent effect.

Prevalence of possession offences involving gel-blasters

We are concerned about the potential prevalence of children and young people being dealt with by the criminal justice system for possessing, with no malicious or violent intent, implements that are characterised as toys in other Australian jurisdictions, including gel-blasters.

⁴ Youth Justice NSW, Preliminary Submission PWE07, cited in Issues Paper, p 43.

⁵ Issues Paper, p 41.

We note that gel-blasters are neither lethal, nor capable of causing serious harm, and that some children and young people possess gel-blasters with the intention of using them as toys, similar to nerf guns, particularly in NSW regions that border Queensland where gel-blasters are legal. We are concerned that the current categorisation of gel-blasters as firearms can have the effect of drawing children and young people, who have no malicious intent, into the criminal justice system to face disproportionately high maximum penalties.

We are of the view that gel blasters may better be dealt with separately from firearms and would support consideration of alternative means of classifying gel blasters, including whether gel blasters may instead be regulated in a way similar to paintball guns, as in South Australia.

Reform options

In considering options for reform around sentencing young people for weapons-related offending, the Law Society prefers reform options that involve an integrated, holistic approach and a focus on early intervention and prevention, including through multi-disciplinary, culturally appropriate and community-based efforts outside a criminal justice or Police-affiliated response, as well as through restorative justice and rehabilitation efforts.

We consider these approaches to be more cost effective, and successful in preventing and reducing harm, than punitive and deterrent-centred approaches, including increased maximum penalties.

We consider rehabilitation and restorative justice efforts to be particularly valuable for young people, as there is greater opportunity for people to gain insight into their behaviour and to address criminogenic factors before entering adulthood. By supporting a young person to access and sustain a crime-free lifestyle, including through healing relationships, building life skills and accessing support networks, rehabilitation and restorative justice efforts can work to protect the community and reduce a young person's risk of contact with the criminal justice system as an adult.

Mandatory Minimum Sentences

We oppose the introduction of any mandatory or minimum sentences. In our view, mandatory and minimum sentences inappropriately exclude judicial discretion, disproportionately impact vulnerable groups, including children and young people, and can negatively impact guilty pleas and strain criminal justice resources, while having negligible deterrent impact.

We are also of the view that mandatory minimum imprisonment sentences are contrary to principles under the *Children (Criminal Proceedings) Act 1987*, including sections 6 and 33(2), and breach Australia's international human rights obligations under the International Covenant on Civil and Political Rights, including articles 9(1) and 14(5).

If you have any questions in relation to this letter, please contact

Yours sincerely,

Cassandra Banks
President

Encl.

Weapons related offences: sentencing adult offenders

Law Society of NSW responses to relevant consultation questions

Question	Comment
Question 3.1: Maximum penalties for possession of prohibited weapon	
(1) Is the maximum penalty for possessing a prohibited weapon in NSW adequate?	There appears to be no evidence to suggest a need to increase the maximum penalty for these offences. Indeed, we understand that all other Australian jurisdictions have maximum penalties that are significantly lower than the maximum penalty for possessing a prohibited weapon in NSW.
(2) 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?	There may be scope for offences involving less serious weapons, such as a replica or imitation firearm, to attract a lesser maximum penalty than offences involving weapons capable of inflicting serious injury.
Question 3.2: Possession contrary to a weapons prohibition order (WPO)	
Is the maximum penalty for possession contrary to a WPO appropriate? If not, why, and what should be the maximum penalty?	<p>If it is intended that charges of contravening a WPO under section 34(1) of the <i>Weapons Prohibition Act 1998</i> are to be laid in addition to a substantive charge of possessing a prohibited weapon under section 7 (akin to the way in which a charge of contravening Apprehended Violence Order under section 14 of the <i>Crimes (Domestic and Personal Violence) Act 2007</i> is laid in addition to the substantive breach offence) we are of the view that the maximum penalty for offences under section 34(1) should reflect that breaching a WPO is less serious than possessing a prohibited weapon.</p> <p>If it is intended that charges under section 34(1) are to be laid as the substantive offence, in lieu of charges under section 7, we are of the view that the maximum penalty for offences contrary to section 34(1) should reflect that possessing a prohibited weapon in breach of a WPO is more serious than possessing a prohibited weapon where there is no WPO in place.</p> <p>If the Sentencing Council is of the view that there is a need to adjust the maximum penalties for these offences, we suggest that, in assessing the appropriate maximum penalties, the Sentencing Council may wish to have regard to the fact that no matters under section 34(1) of the <i>Weapons Prohibition Act 1998</i> were dealt with on indictment in 2022, and that comparative jurisdictions have significantly lower maximum penalties in place for analogous offences.</p>
Question 3.3: Maximum penalties for firearm possession	
(1) Are the maximum penalties for possessing a firearm, prohibited firearm or pistol adequate?	There appears to be no evidence that suggests a need to increase the maximum penalty for these offences.

<p>(2) Should increased maximum penalties for “prohibited persons” be introduced? If yes, why and what criteria should be used for a “prohibited person”, and what should the maximum penalties be?</p>	<p>We are of the view that there would be limited utility in increasing the complexity of the sentencing landscape for weapons offences by introducing an additional scheme for prohibited persons.</p> <p>We suggest that there may be greater utility in developing and implementing improvements to the existing Firearms Prohibition Order scheme, to ensure greater transparency, fairness and effectiveness in managing firearms possession.</p>
<p>(3) Should the maximum penalties for subsequent offences of firearm possession be increased? If yes, why, and what should the maximum penalties be?</p>	<p>We are of the view that the evidence does not support a need for legislative change. The high maximum penalties already available for firearm possession in NSW provide sufficient scope for appropriate sentences (including higher sentences for subsequent offending) to be ordered, with appropriate factors taken into account during the sentencing exercise.</p>
<p>Question 3:4: Minimum or mandatory sentences for firearm offences</p>	
<p>Should mandatory or minimum sentences be introduced for certain firearms offences? If so, what kind of minimum penalties should be introduced and for which offences?</p>	<p>We oppose the introduction of any mandatory or minimum sentences.</p> <p>In our view, mandatory and minimum sentences inappropriately exclude judicial discretion, disproportionately impact disadvantaged groups, and can negatively impact guilty pleas and strain criminal justice resources, while having negligible deterrent impact.</p> <p>We are also of the view that mandatory and minimum imprisonment sentences breach Australia’s international human rights obligations under the International Covenant on Civil and Political Rights, including articles 9(1) and 14(5).</p>
<p>Question 3.5: Maximum penalties for gel blasters and imitation firearms</p>	
<p>(1) Are the maximum penalties for gel blaster use or possession in NSW appropriate?</p>	<p>There appears to be no evidence to suggest a need to increase the maximum penalty for the use and possession of gel blasters in NSW. In fact, we are concerned that the current maximum penalty for gel blaster use and possession in NSW may be too severe, particularly when considering:</p> <ul style="list-style-type: none"> ▪ Gel blasters are neither lethal, nor capable of causing serious physical harm. ▪ Maximum penalties for gel blaster use and possession in NSW appear to be higher than in other Australian jurisdictions. ▪ Gel blasters are classified as children’s toys in Queensland.
<p>(2) If gel blasters should be dealt with separately from firearms and imitation firearms, what would be the appropriate way to do so and what would be the appropriate maximum penalties?</p>	<p>We are of the view that gel blasters should be dealt with separately from firearms. We would support consideration of alternative means of classifying gel blasters, including whether gel blasters may instead be regulated in a way similar to paintball guns, as in South Australia.</p> <p>If gel blasters were no longer classified as firearms, we note that sections 4D of the <i>Firearms Act 1996</i> and 4(1) of the <i>Crimes Act 1900</i> would still be enlivened in cases where a gel blaster was sufficiently similar in appearance to a firearm. We agree with the ODPP that this would “address the primary concern about such</p>

	items being presented as real firearms during the commission of other offences.” ¹
(3) Are the maximum penalties for imitation firearm use/possession in NSW appropriate?	There appears to be no evidence to suggest a need to increase the maximum penalty for these offences. We understand that all other Australian jurisdictions appear to have significantly lower maximum penalties compared with NSW.
(4) If imitation firearms should be dealt with separately from firearms, what would be the appropriate way to do so and what would be the appropriate maximum penalties?	We are of the view that, to appropriately reflect the objective seriousness of offending, the maximum penalty for the use or possession of an imitation firearm should be less than the maximum penalty available for the use or possession of a genuine firearm.
Questions 4.1 – 4.7: Standard non-parole periods (SNPPs)	
<p>While we do not wish to raise issues with the SNPPs of specific offences, we query the efficacy of the standard non-parole period scheme for weapons offences as a whole.</p> <p>In our view, SNPPs do not serve as particularly useful guidance in sentencing for weapons offences, as there is already adequate scope for sentencing courts to take into account relevant factors during the general sentencing exercise. The additional requirement to consider the relevant SNPP appears to add undue complexity to the sentencing exercise.</p> <p>Indeed, our members report that after the decision in <i>Muldrock</i>,² the utility and relevance of SNPPs appears to have reduced significantly, as it appears to be more common for the circumstances of a case to warrant departure from the SNPP, rather than application of the SNPP.</p>	
Questions 5.1 - 5.9: Sentencing principles and factors	
<p>We are of the view that the current framework with respect to the purposes and principles of sentencing, objective seriousness, and aggravating and mitigating factors under the <i>Crimes (Sentencing Procedure) Act 1999</i> is appropriate. The framework appears to provide sufficient judicial guidance, as well as sufficient scope for the appropriate exercise of judicial discretion, to support the delivery of appropriate sentences for weapons offences.</p> <p>With respect to the guideline judgment of <i>Henry</i>,³ we note the recent comments by the NSW Court of Criminal Appeal in <i>Makouk</i>,⁴ <i>Faaoloi</i>⁵ and <i>Yildiz</i>,⁶ which may call into question the authority of <i>Henry</i> as a broadly relevant guideline judgment. While we would not oppose consideration of whether a new guideline judgment is needed, there are no identifiable issues or trends in our members’ experience of sentencing for these offences that would suggest an urgent need to review the guideline judgment.</p>	
Question 6.1: Summary offences considered by the review	
(1) Do you agree with the list of summary offences to be excluded from consideration	Yes.

¹ ODPP, [Preliminary Submission](#).

² (2011) 212 A Crim R 254.

³ (1999) 46 NSWLR 346.

⁴ [2023] NSWCCA 142.

⁵ R v Faaoloi [2016] NSWCCA 263.

⁶ Yildiz v R [2020] NSWCCA 69.

as to whether any should be made indictable?	
(2) Are there any other summary offences, not listed above, which should be considered suitable for indictment in some cases?	No.
Question 6.2: Summary offences relating to knives	
(1) Should the offences in s 11D and s 11F of the <i>Summary Offences Act 1988</i> (NSW) be made indictable? Why or why not? And if so, should they be made table 1 or table 2 offences?	<p>Our view is that all offences that were contained under Division 2, Subdivision 1 (Knives and offensive implements) of the <i>Summary Offences Act 1988</i>, before the introduction of the Criminal Legislation Amendment (Knife Crimes) Bill 2023 were correctly categorised as summary offences, including:</p> <ul style="list-style-type: none"> ▪ 11C – custody of knife in public place or school ▪ 11D – parent allowing child to carry a knife ▪ 11E – wielding or carrying a knife in a public place or school ▪ 11F – Sale of knives to children <p>These offences do not involve injury or wounding of any type, and can capture a broad range of offending behaviour, including low level offending. We are of the view that by categorising these offences as indictable offences, lower-level offenders may be left open to facing unreasonably high maximum penalties, far disproportionate to the objective seriousness of the offence, and without achieving a deterrent effect.</p> <p>We expressed concern about the Criminal Legislation Amendment (Knife Crimes) Bill 2023 in a submission to the Attorney General dated 23 June 2023 (enclosed for your consideration) and would support consideration of re-classifying sections 11C and 11E as summary offences. At the very least, the Sentencing Council may wish to consider returning section 11C to the <i>Summary Offences Act 1988</i>, noting that offences under section 11C involve mere custody of a knife, as opposed to wielding or carrying a knife, as required by section 11E.</p> <p>We do not suggest that there is a need to increase the maximum penalties for sections 11D and 11F. However, if the Sentencing Council considers that there may be benefit in this approach, we suggest that there is sufficient scope available to increase the maximum penalty without classifying sections 11D and 11F as indictable offences, given that given that sections 11D and 11F are currently fine only offences.</p>
(2) Should certain specified classes of knives or blades be excluded from the definitions in s 93IA of the <i>Crimes Act 1900</i> (NSW) (uncommenced)? If so, what should be excluded?	We would support consideration of excluding classes of knives or blades from the definitions in section 93IA, including, for example, small bladed multi-tools or cutlery.

<p>(3) Should the reasonable excuse provisions in s 92IB of the <i>Crimes Act 1900</i> (NSW) (uncommenced) include an excuse that recognises circumstances of homelessness? Why or why not?</p>	<p>We would support consideration of how section 92IB may be amended to include an excuse that recognises circumstances of homelessness.</p> <p>In improving the operation of section 92IB, we would also suggest consideration of an amendment to clarify that the list of excuses provided under section 92IB is non-exhaustive.</p>
<p>(4) Should the excuse of self-defence, or defence of another person, be available as a reasonable excuse when mixed with other purposes?</p>	<p>We would support consideration of incorporating self-defence or defence of another person into the list of reasonable excuses, noting that this would allow a Court to assess what is reasonable in the circumstances of each case.</p>
<p>Question 6.3: Penalty notices for subsequent custody of knife offences</p>	
<p>(1) Should penalty notices be generally available for second or subsequent custody of knife offences? Why or why not?</p>	<p>We do not oppose this option.</p>
<p>(2) 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?</p>	<p>We do not oppose this option.</p>
<p>Question 6.4: Fine-only offences in the prohibited weapons Acts</p>	
<p>Should the above fine-only offences be prescribed as penalty notice offences in the <i>Weapons Prohibition Regulation 2017</i> (NSW)?</p>	<p>We do not oppose this option.</p>
<p>Question 6.5: Other penalty notice offences relating to use or possession</p>	
<p>Is there any reason why the review should consider penalty notice weapons offences other than s 11C of the <i>Summary Offences Act 1988</i> (NSW)?</p>	<p>We do not oppose the Sentencing Council's proposal not to consider other penalty notice weapons offences in detail.</p>
<p>Question 6.6: Alternative approaches to dealing with adult weapons offences</p>	
<p>(1) Are there examples of early intervention programs and education campaigns that we should consider in</p>	<p>We are not aware of any such examples.</p>

the context of adult weapon-related offending?	
(2) Are there any other examples of schemes relating to police powers to search for weapons that should be considered?	<p>No. We are concerned that the expansion of police powers can have harmful unintended consequences, including disproportionate impacts on vulnerable cohorts such as Indigenous Australians, children and people experiencing poverty and/or homelessness, with little deterrent or protective effect. We consider other approaches to dealing with adult weapons offences to carry less risk and provide greater value, including investment in measures to reduce poverty and increase civilian safety, community initiatives and supporting diversion (including cautioning schemes), early intervention and education.</p> <p>If the Sentencing Council considers there to be value in expanding police powers, we would be grateful for the opportunity to provide assistance and feedback on the development of any specific proposed reforms.</p>
(3) Are there any schemes that place conditions on adult weapon-related offenders that should be considered?	We would support consideration of improvements to the Firearms Prohibition Order and WPO schemes, including measures to increase transparency and mechanisms of appeal.
(4) Are there any examples of rehabilitation programs that should be considered when dealing with adults who have been convicted of weapon related offences?	We are not aware of any such examples.
Questions 6.7 – 6.8: Characteristics of weapons offenders and victims of weapon-related crime	
<p>In our members' experience, many adults who commit, or are at risk of committing, weapons possession offences do so out of fear rather than malicious or harmful intent, and many are fearful because they are vulnerable and/or have themselves been victims of weapons-related crime. Breaking down the victim-offender dichotomy and understanding the factors that drive and influence offending, including social vulnerability and disadvantage, is, in our view, particularly important in developing approaches to prevent and respond to weapons-related crime in NSW.</p>	



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref:CLC: CBcd230623

23 June 2023

The Hon. Michael Daley MP
Attorney General
GPO Box 5341
SYDNEY NSW 2001

Dear Attorney,

Criminal Legislation Amendment (Knife Crimes) Bill 2023

We write to express concerns about the introduction of the Criminal Legislation Amendment (Knife Crimes) Bill 2023 (**Bill**) before the Sentencing Council has published its Review of firearms, knives and other weapons offences (**Review**).

The Law Society is strongly of the view that thorough and considered consultation, including with legal experts, is more likely to result in reforms that are more effective because they are evidence-based, and are designed to minimise unintended consequences. In addition to other key legal stakeholders, the Law Society regularly engages in consultation processes to support Government to develop the best possible reforms, including criminal justice reforms.

The Law Society considers that, in introducing the Bill before the Sentencing Council publishes the Review, the Government has missed a critical opportunity to implement effective criminal justice reform that is informed by legal experts. This is particularly concerning, as the changes proposed in the Bill are not minor.

Implications of the Bill

As you know, the Bill will double the maximum penalty from two to four years imprisonment for offences of possessing or wielding a knife in a public place or school, currently under sections 11C and 11E of the *Summary Offences Act 1988* (NSW). We suggest that a maximum penalty of four years is not appropriate for the conduct captured by these provisions, and that these offences are currently correctly categorised as summary offences.

The proposed increase in the maximum penalty is significant, and in our view, disproportionate to the relatively minor conduct that can be captured by the provisions. We note that these offences do not involve any injury or wounding. In fact, conduct captured under section 11C involves possession only, which can include circumstances where a blade (including scissors) may be kept in the glove box of a car or at the bottom a bag. We note that, while a “reasonable excuse” defence is available for these offences, the onus of proof is reversed, with the defendant having to prove that they had a reasonable excuse for possession.

If implemented, this proposal will exacerbate the Law Society’s pre-existing concern that, as some knives offences, including under section 11C of the *Summary Offences Act 1988*, capture a broad range of offending behaviour, lower-level offenders will face disproportionately

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966

lawsociety.com.au

T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au

Law Council
OF AUSTRALIA
CONSTITUENT BODY

high maximum penalties. This concern was raised for the consideration of the Review in the **attached** submission.

Critically, we are also concerned that the Bill, if passed, will have a disproportionate and detrimental impact on vulnerable groups, including children and people experiencing homelessness, instead of the intended deterrent effect. While we appreciate that existing diversionary options for children will continue to be available for these offences, we note that not all children will be subject to those diversionary options. Indeed there are often barriers to accessing diversionary options, particularly in regional, rural and remote areas. Under the proposed reform, children who are not diverted and are instead prosecuted for these offences will be charged, tried and/or sentenced for an offence that is considered higher in objective seriousness, due to the increased maximum penalty, increasing the risk of incarceration. For other vulnerable groups, including adults experiencing homelessness and poverty, youth diversionary options are not available, and they may face longer periods of incarceration.

The proposed reforms may also have resourcing implications, as these offences may now be prosecuted on indictment in the District Court, and defendants may be more inclined to defend charges that carry a higher maximum penalty.

We suggest that the Sentencing Council should have been permitted to complete its review, and its reported findings be considered in the drafting of legislation in this regard. We now suggest that the legislative process could be improved if the Bill is referred for inquiry by the Legislative Council's Law and Justice Committee.

If you have any questions in relation to this letter, please contact

Yours sincerely,

Cassandra Banks
President

Encl.



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC:CBcd010323

1 March 2023

Hon Peter McClellan AM KC
Chairperson
NSW Sentencing Council
GPO Box 31
Sydney NSW 2001

By email: nsw-lrc@justice.nsw.gov.au

Dear Mr McClellan,

Review of sentencing law for firearms, knives and other weapons offences

Thank you for the opportunity to provide a preliminary submission on issues relevant to the Terms of Reference for the Sentencing Council's Review of the law of sentencing for firearms, knives and other weapons offences (**Review**). The Law Society's Criminal Law Committee contributed to this submission.

The Law Society welcomes the Review and supports the comprehensive consideration of sentencing offences for firearms, knives and other weapons offences in NSW, including consideration of appropriate measures to improve sentencing in these matters. In our view, there is scope for addressing aspects of sentencing for these offences to achieve, among other things, greater consistency and proportionality in outcomes. We offer the following comments relevant to the Terms of Reference for the NSW Sentencing Council's consideration in conducting the Review.

Standard non-parole periods

The Law Society welcomes a review of standard non-parole periods for firearms, knives and other weapons offences in NSW and supports measures to ensure that standard non-parole periods are appropriate and consistent, with reference to both the maximum penalty for the offence and the objective seriousness of the conduct captured by the charge. This would be a welcome continuation of previous work undertaken by the NSW Sentencing Council and the NSW Law Reform Commission on standard non-parole periods.¹

We note that, currently, there are discrepancies between the standard non-parole period and the maximum penalty for some firearms, knives and other weapons offences. For example, an offence against section 7(1) of the *Firearms Act 1996*, which carries a maximum penalty of 14 years imprisonment, has a four-year standard non-parole period, while an offence under

¹ NSW Sentencing Council, *Standard Non-parole Periods: A background report by the NSW Sentencing Council* (November 2011); NSW Law Reform Commission, *Report 134: Sentencing: Interim report on standard minimum non-parole periods* (May 2012); NSW Law Reform Commission, *Report 139: Sentencing* (July 2013).

section 51(1A) of the *Firearms Act 1996*, which also carries a maximum penalty of 14 years imprisonment, has a ten-year standard non-parole period.

The Law Society suggests that the Review may wish to consider such disparities, including whether they may be affecting sentence outcomes for these offences, in assessing the appropriateness of standard non-parole periods for firearms, knives and other weapons offences. Any proposed reform would need to be informed by a nuanced investigation, including consideration of the appropriateness of maximum penalties for each offence, the range of conduct that can be captured under the offence provision, and whether sentencing patterns indicate that a standard non-parole period is necessary, and not simply by raising standard non-parole periods that currently sit proportionally lower by comparison to the maximum penalty.

We would be grateful for the opportunity to provide feedback on any suggested reforms to improve and clarify standard non-parole periods in these matters.

Maximum penalties

The Law Society supports investigation into the operation and appropriateness of maximum penalties for firearms, knives and other weapons offences in NSW, including with reference to relevant standard non-parole periods and to maximum penalties in other jurisdictions.

In conducting this investigation, the Review may wish to consider the appropriateness of maximum penalties with reference to their interaction with laws and offences for firearms, knives and other weapons offences in other Australian jurisdictions. We note that, for example, a person in possession of gel-blasters, which are classified as toys in Queensland, in NSW can face maximum penalties of 14 and 20 years imprisonment under sections 7 and 51D of the *Firearms Prohibition Act 1996* respectively. We suggest that it would be of benefit for the Review to consider potential sentencing issues and injustice arising, particularly in border locations, from the disparity in laws around firearms, knives and other weapons offences across jurisdictions.

We also note that, currently, some offence provisions for firearms, knives and other weapons offences in NSW capture a particularly broad range of offending behaviour, which can have the effect of leaving lower-level offenders open to facing disproportionately higher maximum penalties. For example, under section 11C of the *Summary Offences Act 1988*, a person who in public possesses a blade, which can include ordinary items such as household scissors, can face the same maximum penalty as a person who possesses a machete in a school, being two years imprisonment. As such we suggest that the Review may wish to consider the appropriateness of maximum penalties in view of the particularly broad range of conduct that can fall under a single firearms, knives or other weapons offence provision.

Other relevant matters

In conducting the Review, the Sentencing Council may also wish to consider how sentencing for firearms, knives and weapons offences interacts with, or may be impacted by, the operation of weapons and firearms prohibition orders (**FPOs**) in NSW, including the length of FPOs and the extensive police powers to search in connection with FPOs.

The Law Society would also support investigation into the broader legislative structure of provisions that relate to firearms, knives and other weapons offences as a whole, and consideration of how a clearer and more accessible legislative scheme may be achieved. We note that the current complexity of the offence provisions for these matters can result in complex charging practices and in turn, create unduly complex sentence proceedings and would support investigation of appropriate measures to address these issues.

If you have any questions in relation to this letter, please contact

Yours sincerely,

Cassandra Banks
President