



## Submission

**Submission date:**

4 December 2023

**Submission Topic:**

Sentencing adults for weapons-related offences

**Expressions called for by:**

NSW Sentencing Council

**Closing date:**

4 December 2023

**Submission by:**

Local Court of NSW

**Submission:**

The NSW Sentencing Council has been asked by the Attorney General to conduct a review of sentencing for firearms, knives and other weapons offences (focusing on, but not limited to, offences involving the use or carrying of firearms, knives and other weapons) and make any recommendations for reform that it considers appropriate.

Please find **attached** a table of submissions of the Local Court of NSW in response to each of the published questions asked by the Sentencing Council in the Consultation Paper dated September 2023.

It is also noted that any changes to process, form and substance will require sufficient lead time for preparation and judicial education. For this reason, it will be necessary to include the Judicial Commission of NSW in any consultation phase, as any proposed changes progress towards commencement.

Given the impact any amendments may have on the Local Court, the Chief Magistrate would be grateful for the opportunity to be further consulted and involved in the implementation of any recommended amendments.

Thank you for the opportunity to comment.

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**Theo Tsavdaridis**

Deputy Chief Magistrate | Local Court of NSW

Downing Centre Local Court | Level 4, 143 - 147 Liverpool Street, Sydney NSW 2000



Questions from consultation paper	Local Court of NSW submission
<b>2. The offences</b>	
<p><b>Question 2.1: Legislative framework and focus offences</b></p> <p>(1) Are there any broad issues of consistency (not addressed in the chapters that follow) across the legislative framework that you think should be addressed?</p> <p>(2) Are there any Acts or provisions that you think should be included in the focus offences?</p>	<p>(1) - (2): The Local Court considers that the scope of the review is a matter for the Sentencing Council, having regard to the terms of reference. Where relevant, this submission refers to the Local Court’s preliminary submission on this topic dated 3 March 2023 (“the preliminary submission”).</p>
<p><b>Question 2.2: Offences excluded from scope</b></p> <p>Are there any offences we propose to exclude from scope that you think should be included, and why?</p>	<p>The Local Court considers that the scope of the review, having regard to the terms of reference, is a matter for the Sentencing Council.</p>
<b>3. Maximum penalties</b>	
<p><b>Question 3.1: Maximum penalties for possession of prohibited weapon</b></p> <p>(1) Is the maximum penalty for possessing a prohibited weapon in NSW adequate?</p> <p>(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?</p>	<p>(1) The Local Court is disinclined to comment on the sufficiency of maximum penalties or any perceived need to increase maximum penalties, as outlined in the preliminary submission at [6], noting the Court’s acknowledgment that increased maximum penalties is an indication that higher penalties should be imposed.</p> <p>(2) In addition to the response provided above at (1), the Local Court’s view is that any divergence in maximum penalties depending on the type of prohibited weapon possessed is a matter for Government.</p>
<p><b>Question 3.2: Possession contrary to a weapons prohibition order</b></p> <p>Is the maximum penalty for possession contrary to a weapons prohibition order appropriate? If not, why, and what should be the maximum penalty?</p>	<p>See response to question 3.1(1).</p>
<p><b>Question 3.3: Maximum penalties for firearm possession</b></p> <p>(1) Are the maximum penalties for possessing a firearm, prohibited firearm or pistol adequate?</p>	<p>(1) - (3): See response to question 3.1(1).</p>



<b>Questions from consultation paper</b>	<b>Local Court of NSW submission</b>
<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>(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><b>Question 3.4: Minimum or mandatory sentences for firearm offences</b></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>The Local Court’s view is that the imposition of minimum sentences for certain firearms offences is a matter for Government. However, the Local Court generally considers it beneficial that the full suite of sentencing options be available to a judicial officer imposing a sentence for firearms offences, as this enables due regard to be had to the various aggravating and mitigating factors pertinent to each matter, assessed on the merits of each case and according to law.</p> <p>In addition to limiting the exercise of judicial discretion, the Local Court also observes that minimum sentences can reduce the incentive to plead guilty and consequently increase the Court’s workload.</p>
<p><b>Question 3.5: Maximum penalties for gel blasters and imitation firearms</b></p> <p>(1) Are the maximum penalties for gel blaster use or possession in NSW appropriate?</p> <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>(3) Are the maximum penalties for imitation firearm use/possession in NSW appropriate?</p> <p>(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?</p>	<p>(1) and (3): See response to question 3.1(1).</p> <p>In relation to (2) and (4), the Local Court considers that question of whether gel blasters and imitation firearms should be dealt with separately from the general definition of firearm, and what maximum penalties should apply, is a matter for Government.</p> <p>However, it is becoming increasingly apparent that many published judgments urge caution in too quickly placing these types of firearms in the same category as traditional firearms, especially since they are, in the main, toys.</p> <p>The Sentencing Council’s attention is drawn to the decisions below, all of which were dealt with by way of a non-conviction on sentence.</p>



Questions from consultation paper	Local Court of NSW submission
	<p><a href="#">R v Smith [2023] NSWDC 88</a> Per Conlon SC ADCJ District Court of NSW</p> <p>18. Whilst deciding that gel blasters did fall within the S 4(1) definition of the Firearms Act, I was also clearly of the view that the gel blasters in the possession of the offender were only ever intended for use as toys.</p> <p>19. Accordingly, in respect of the S 51D(2) charges, I have assessed the offender's criminal culpability as falling at the absolute bottom of the range for offences of their type. In my view there is urgent need for Parliament to review the situation in respect of gel blasters and if it is considered they should remain illegal in NSW, they should be placed into a category of their own with appropriate penalties (including fines).</p> <p><b>Sentence</b></p> <p>79(1). Counts 10, 16, 23 and 29, without proceeding to conviction each matter is dismissed under S 10(1)(a) of the <i>Crimes (Sentencing Procedure) Act</i>.</p> <p><a href="#">R v Jake Lewis Andrew [No. 2] [2018] NSWDC 382</a> Per Haesler SC DCJ District Court of NSW</p> <p>21. Possession of a weapon that can never be used to cause actual harm is also a relevant factor. Similarly, the nature of the projective that can be fired is relevant: This point is of particular relevance for firearms which can fire a projectile that could not cause any harm (foam) or no serious harm (gel pellets).</p>



Questions from consultation paper	Local Court of NSW submission
	<p><b>Sentence</b></p> <p>47. I deal with Counts 1, 2 and 3 on the Indictment pursuant to s 10(1)(b) of <i>Crimes (Sentencing Procedure) Act 1999</i>, making a finding of guilt but without proceeding to conviction. There will be an order pursuant to 10(1)(b) and s 9: There will be a Conditional Release Order for a period of one year and three months from today's date in relation to each count on the Indictment.</p> <p><a href="#"><u>R v Lucas [2023] NSWSC 1357</u></a> Per Lonergan J Supreme Court of NSW</p> <p>2. The offence attracts a potential maximum penalty of 5 years imprisonment. The offence effectively does not differentiate between a firearm capable of firing bullets and an item such as the gel blaster the subject of this charge.</p> <p>11. The context for use of this item was given in the evidence of Benjamin, and that was that they were purchased for outdoor fun and games, and that the purchase was as a toy. That is an important factor and I accept Benjamin's evidence about that.</p> <p><b>Sentence</b></p> <p>20. Accordingly, I will make an order under s 10(1)(a) of the <i>Crimes (Sentencing Procedure) Act</i>. I find the offence proven and dismiss the charge under s 10(1)(a) of the <i>Crimes (Sentencing Procedure) Act</i>.</p>



Questions from consultation paper	Local Court of NSW submission
<b>4. Standard non-parole periods</b>	
<p><b>Question 4.1: SNPP offences to consider</b></p> <p>(1) Are there any issues with the SNPPs of the eight offences that may involve weapons that would justify considering them as part of the review?</p> <p>(2) Are there any other offences currently in the SNPP scheme, but not identified in the tables above, that we should consider? If so, why?</p> <p>(3) Are there any offences that do not currently have SNPPs that we should consider for inclusion (other than those we discuss from [4.51] onwards)? If so, why?</p>	<p>(1) - (3): The Local Court considers that the penalties (including SNPPs) prescribed for various weapons-related offences is a matter for Government, as outlined in the preliminary submission at [4]. The Local Court otherwise considers that the scope of offences to be considered in light of SNPPs under the review is a matter for the Sentencing Council.</p>
<p><b>Question 4.2: Principles to be applied in determining SNPP offences</b></p> <p>(1) Are the principles set out at [4.9] appropriate for determining whether weapons offences should be included in, retained or removed from the SNPP scheme?</p> <p>(2) Are there any other principles that would be appropriate for determining whether a weapons offence should be included in, retained or removed from the SNPP scheme? If so, why?</p>	<p>(1) - (2): In addition to the response to Question 4.1 above, the Local Court is disinclined to comment on the appropriateness of the principles to be applied in determining whether an offence should be included in the SNPP scheme.</p>
<p><b>Question 4.3: Process for setting SNPPs</b></p> <p>(1) Is the process set out at [1.8] appropriate for determining the length of an SNPP for a weapons offence? Why or why not?</p> <p>(2) Are there any principles that are particularly appropriate or inappropriate for weapons offences?</p>	<p>(1) - (2): See responses to Questions 4.1 and 4.2 above.</p>



<b>Questions from consultation paper</b>	<b>Local Court of NSW submission</b>
<p><b>Question 4.4: Application of the principles and process</b></p> <p>(1) Do you have any feedback on the above application of the principles and process to a weapons offence?</p> <p>(2) Is there other relevant information (for example, cases or data) that we have not considered for s 36(1) or similar offences in our application of the principles and process?</p>	<p>(1) - (2): See response to Questions 4.1 and 4.2 above.</p>
<p><b>Question 4.5: Similar firearms offences not all having an SNPP</b></p> <p>(1) Should the offences in s 36(1) and s 74(1) (as they relate to pistols and prohibited firearms) and s 62(1) of the <i>Firearms Act 1996</i> (NSW) have an SNPP?</p> <p>(2) If so, what principles or factors are relevant to their inclusion in the SNPP scheme, and what is an appropriate length of an SNPP for each?</p>	<p>(1) - (2): See response to Question 4.1 and 4.2 above.</p>
<p><b>Question 4.6: Inconsistent proportions of SNPPs to maximum penalties</b></p> <p>Has the proportion of the SNPP to maximum penalty for s 7(1) of the <i>Firearms Act 1996</i> (NSW) (or any other offence) caused distortions or challenges in sentencing? If so, please provide examples.</p>	<p>The Local Court has not experienced any difficulties regarding sentencing for this offence, noting that the SNPP for an offence against s 7(1) of the <i>Firearms Act 1996</i> (NSW) features in matters dealt with on indictment in the District Court and Supreme Court, not summarily in matters dealt with in the Local Court, and is in excess of the Local Court's jurisdictional limit for a single offence.</p>
<p><b>Question 4.7: Difference in SNPP of similar offences</b></p> <p>What is the appropriate SNPP for the offence in s 7(1) of the <i>Weapons Prohibition Act 1998</i> (NSW) offence. Why?</p>	<p>See response to Question 4.1 above.</p>
<p><b>5. Sentencing principles and factors</b></p>	
<p><b>Question 5.1: Purposes of sentencing</b></p> <p>Are there any other cases or issues that should be considered in relation to the purposes of sentencing, specific to the offences within the scope of the review?</p>	<p>The Local Court does not consider it necessary to expand on [3.1] - [3.3] of the preliminary submission, which outlines the key matters to which the Local Court has regard in sentencing an offender for weapons-related offences, both under the <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) and distilled from applicable case law.</p>



<b>Questions from consultation paper</b>	<b>Local Court of NSW submission</b>
<p><b>Question 5.2: Objective seriousness and knife offences</b></p> <p>Are there any other cases or issues that should be considered in relation to assessing the objective seriousness of offences where a knife is involved in the commission of an offence?</p>	<p>The Local Court considers that the consultation paper’s discussion of objective seriousness and knife offences at [5.23] - [5.27] is appropriate.</p>
<p><b>Question 5.3: Objective seriousness and firearms offences</b></p> <p>Are there any other cases or issues that should be considered in relation to assessing the objective seriousness of firearms offences?</p>	<p>The Local Court considers that the consultation paper’s discussion of objective seriousness and firearm offences at [5.28] - [5.38] is appropriate.</p>
<p><b>Question 5.4: Objective seriousness and gel blasters</b></p> <p>Are there any other cases or issues that should be considered in relation to assessing the objective seriousness of gel blaster-related offences?</p>	<p>The Local Court considers that the consultation paper’s discussion of objective seriousness and gel-blaster related offences at [5.39] - [5.49] is appropriate.</p>
<p><b>Question 5.5: Objective seriousness and prohibited weapons offences</b></p> <p>Are there any other cases or issues that should be considered in relation to assessing the objective seriousness of prohibited weapons offences?</p>	<p>The Local Court considers that the consultation paper’s discussion of objective seriousness and prohibited weapons offences at [5.50] - [5.51] is appropriate.</p>
<p><b>Question 5.6: Aggravating factors and weapons offences</b></p> <p>Are there any other cases or issues that should be considered in relation to aggravating factors and weapons offences?</p>	<p>The Local Court considers that the consultation paper’s discussion of aggravating factors at [5.52] - [5.69] is appropriate.</p>
<p><b>Question 5.7: Mitigating factors and weapons offences</b></p> <p>Are there any other cases or issues that should be considered in relation to mitigating factors and weapons offences?</p>	<p>The Local Court considers that the consultation paper’s discussion of mitigating factors at [5.70] - [5.79] is appropriate.</p>
<p><b>Questions 5.8: Guideline judgments</b></p> <p>(1) Are there any concerns with the application of <i>R v Henry</i>?</p> <p>(2) Is there a need for any new guideline judgments in relation to weapons offences?</p>	<p>(1) - (2): The Local Court is disinclined to comment on the sufficiency of a guideline judgment of the Court of Criminal Appeal, or the need for any new guideline judgments in relation to weapons offences. It is noted that the guideline sentence in <i>R v Henry</i> is in excess of the Local Court’s jurisdictional limit for a single offence, but of sound guidance with respect to the broad sentencing principles to be considered on sentence.</p>





<b>Questions from consultation paper</b>	<b>Local Court of NSW submission</b>
<p><b>Questions 5.9: Sentencing principles and factors generally</b></p> <p>Are there any other sentencing considerations, principles or factors specific to weapons offences that should be considered as part of the review?</p>	<p>The Local Court considers that the consultation paper’s discussion of sentencing principles and factors at Chapter 5 is appropriate.</p>
<p><b>6. Other issues</b></p>	
<p><b>Question 6.1: Summary offences considered by the review</b></p> <p>(1) Do you agree with the list of summary offences to be excluded from consideration as to whether any should be made indictable?</p> <p>(2) Are there any other summary offences, not listed above, which should be considered suitable for indictment in some cases?</p>	<p>(1) - (2): As noted in the preliminary submission at [7], 94.7% of Table 1 offences are finalised in the Local Court, whilst 99.7% of all Table 2 offences are finalised in the Local Court. The appropriateness of jurisdiction was discussed by Deane J, albeit in a dissenting judgment as to the substantive issues, in <i>Kingswell v The Queen</i> (1985) HCA 72; 62 ALR 161 at 200-201:</p> <p>“The correct criterion of what constitutes a serious offence is that it not be one which can appropriately be dealt with summarily by justices or magistrates. Within the limit of those offences which are capable of being appropriately so dealt with, the question of whether a particular offence should, as a matter of legislative policy, actually be dealt with summarily by justices or magistrates is a matter for Parliament.”</p>
<p><b>Question 6.2: Summary offences relating to knives</b></p> <p>(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> <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?</p> <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>(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>(1): See response to question 6.1.</p> <p>(2) - (4): The Local Court considers that the inclusion of certain classes of knives or blades for the purpose of an offence provision, and the availability of defences and/or reasonable excuses to certain offences, is a matter for Government.</p>



Questions from consultation paper	Local Court of NSW submission
<p><b>Question 6.3: Penalty notices for subsequent custody of knife offences</b></p> <p>(1) Should penalty notices be generally available for second or subsequent custody of knife offences? Why or why not?</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>(1) - (2): The Local Court is disinclined to comment on the availability of issuing penalty notices, as outlined in the preliminary submission at [5].</p>
<p><b>Question 6.4: Fine-only offences in the prohibited weapons Acts</b></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>See response to question 6.3.</p>
<p><b>Question 6.5: Other penalty notice offences relating to use or possession</b></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>The Local Court considers the scope of penalty notice offences under review is a matter for the Sentencing Council.</p>
<p><b>Question 6.6: Alternative approaches to dealing with adult weapons offences</b></p> <p>(1) Are there examples of early intervention programs and education campaigns that we should consider in the context of adult weapon-related offending?</p> <p>(2) Are there any other examples of schemes relating to police powers to search for weapons that should be considered?</p> <p>(3) Are there any schemes that place conditions on adult weapon-related offenders that should be considered?</p> <p>(4) Are there any examples of rehabilitation programs that should be</p>	<p>(1): The Local Court is not aware of early intervention programs or educational campaigns directed at adult-related weapons offending. The Local Court’s research indicates, as might be expected, that these programs and campaigns are largely targeted at young people.</p> <p>(2): The Local Court is not aware of other schemes relating to police powers to search for weapons that should be considered.</p> <p>(3): The Local Court is not aware of any schemes that place conditions on adult weapon-related offenders that should be considered.</p> <p>(4): The Local Court is not aware of any rehabilitation programs that should be considered when dealing with adults who have been convicted of weapon-related offences. The Local Court is aware that potentially relevant rehabilitative programs will</p>



<b>Questions from consultation paper</b>	<b>Local Court of NSW submission</b>
considered when dealing with adults who have been convicted of weapon-related offences?	often be directed at violent offenders more generally (for example the Violent Offenders Therapeutic Program offered in custody). While this may overlap with some weapons-related offenders to the extent their offending involved the use of violence, others will not be eligible for violent offender programs (which nonetheless are not specifically directed at weapons-related offending).
<b>Question 6.7: Characteristics of weapons offenders</b>  Is there anything we should specifically consider when it comes to characteristics of weapons offenders?	The Local Court is disinclined to comment on the characteristics of weapons-related offenders, as outlined in the preliminary submission at [2].
<b>Question 6.8: Experiences of victims of weapon-related crime</b>  (1) Are there any other issues we should consider relating to victims' experiences of crime involving a weapon?  (2) Are there any specific concerns about the operation of the VSS or Charter of Victims Rights when it comes to victims (and their families) of violent crime involving a weapon?	(1) - (2): The Local Court does not consider it is best-placed to comment on victim experiences of weapon-related crime, or the practical operation of the VSS or Charter of Victims Rights.