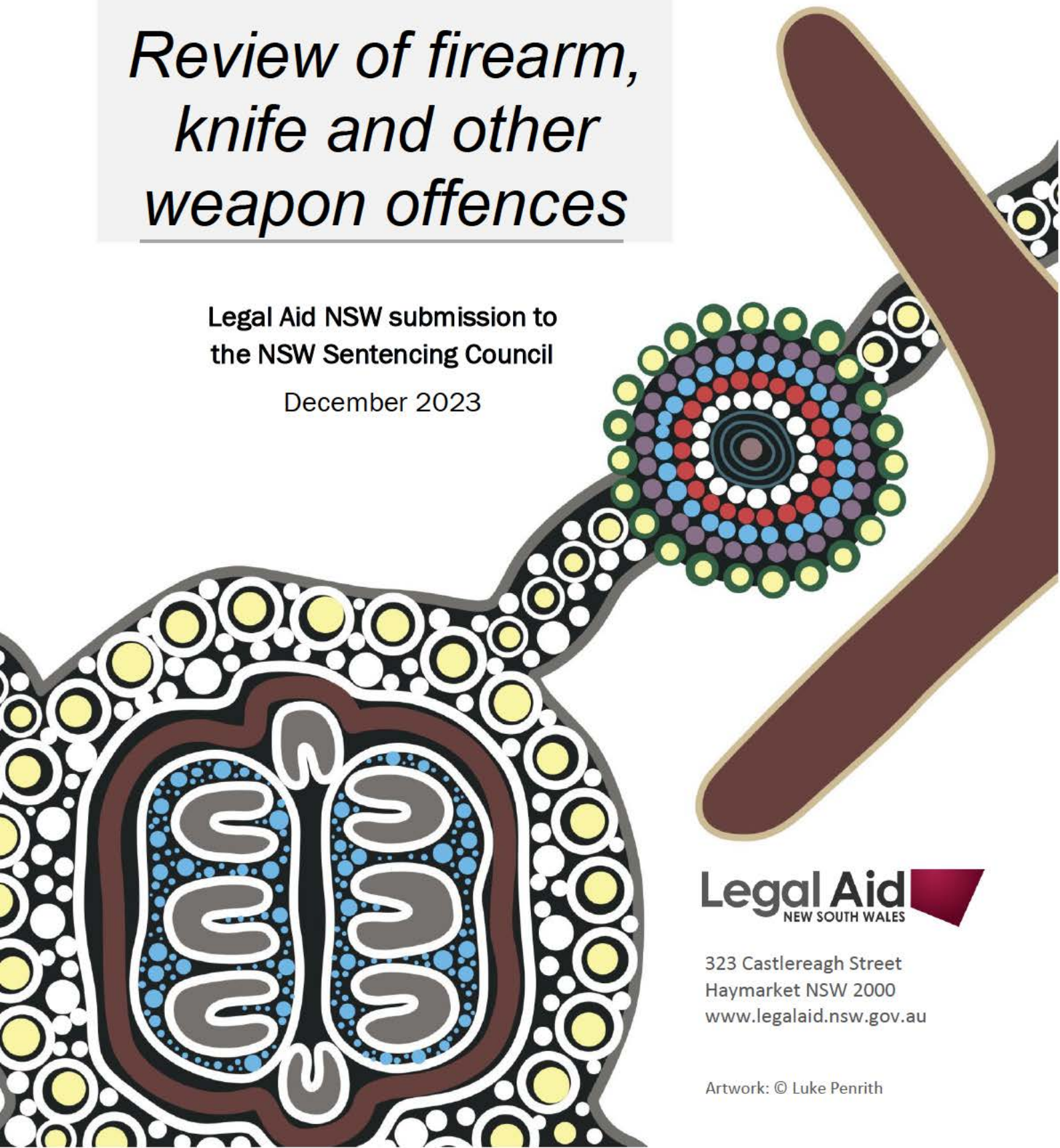


NSW Sentencing Council

Review of firearm, knife and other weapon offences

Legal Aid NSW submission to
the NSW Sentencing Council

December 2023



Legal Aid
NEW SOUTH WALES

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Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The **Civil Law Division** provides advice, minor assistance, duty and casework services from the Central Sydney office and most regional offices. The purpose of the Civil Law Division is to improve the lives of people experiencing deep and persistent disadvantage or dislocation by using civil law to meet their fundamental needs. Our civil lawyers focus on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines.

The Civil Law practice includes a dedicated fines and Work Development Order (**WDO**) Service, which administers the WDO Scheme in partnership with the Department of Communities and Justice and Revenue NSW. Our WDO service provides specialist fines advice, assistance and representation to eligible people with unpaid fines. The WDO Service works to increase access to WDOs for disadvantaged people through strategic outreach, community engagement and capacity building.

The **Criminal Law Division** assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

This submission draws on the expertise of our civil and criminal law services and specialist teams across the state, including the Children's Law Service.

Should you require any further information, please contact:

Name:

Position:

Phone:

Email:

2. Executive Summary

Legal Aid NSW (**Legal Aid**) welcomes the opportunity to make a submission to the Sentencing Council's review of sentencing for firearm, knife and other weapon offences.

Legal Aid acknowledges the devastating impact that serious violent crime can have on individual victims, their families, and communities. We recognise that high profile cases involving serious injury or fatal use of firearms or knives generate significant public interest and concern.

Without diminishing the seriousness of these incidents, the available crime statistics suggest strongly that they are the exception to longer term trends. Statistics from the Bureau of Crime Statistics and Research (**BOCSAR**) demonstrate that weapon related offences are generally trending down. Assaults and robbery offences involving a knife or firearm were lower in the year to March 2023 than in almost any other year over the past two decades,¹ and there has been a long-term downward trend in the number of incidents of non-fatal shooting offences recorded by police since 2004.² Similarly, prohibited and other regulated weapons offences were recorded as a June 2023 as being stable over the previous two years, and down over the previous five years.³

While there is anecdotal evidence that the carrying of knives seems to be more prevalent particularly amongst young people, there is little objective data to confirm this. Although rates of custody of a knife offences are at a near-highpoint, there is no statistical indication that there has been a sharp rise in the carrying of knives, with 2023 rates not dissimilar to those recorded in the preceding three years.⁴ There is also a close relationship between policing practices and recorded crime statistics: measures which contribute to increased rates of *detection* do not necessarily correlate with a conclusion that there is increased *prevalence*.

Amendments in response to a small number of high-profile cases have the potential to cause unintended, adverse consequences within already vulnerable communities. Punitive measures such as harsher penalties and expanded police powers are likely to undermine Closing the Gap targets and perpetuate cycles of disadvantage through continued re-entry into the criminal justice system.

Legal Aid considers that sentences currently being imposed for weapons related offending in NSW are generally appropriate, and that there are a range of appropriate options to address the various purposes of sentencing under s.3A of the *Crimes (Sentencing Procedure) Act 1999*.

¹ Bureau of Crime Statistics and Research (**BOCSAR**) 'Offences involving weapons' Available: [Offences involving weapons \(nsw.gov.au\)](https://www.bocsar.nsw.gov.au/Documents/Datasets/NSW_trends.xlsx)

² Ibid

³ BOCSAR, 'NSW Recorded Crime Statistics, June 2023 Quarter' Available: https://www.bocsar.nsw.gov.au/Documents/Datasets/NSW_trends.xlsx

⁴ Fitzgerald, J, Executive Director of BOCSAR, quoted in, 'Data doesn't support this: violent NSW knife crimes at a 20-year low as new penalties take effect.' *The Guardian* (17 July 2023). Available: [Data doesn't support this: violent NSW knife crimes at a 20-year low as new penalties take effect | New South Wales | The Guardian](https://www.theguardian.com/australia-news/2023/jul/17/data-doesnt-support-this-violent-nsw-knife-crimes-at-a-20-year-low-as-new-penalties-take-effect)

NSW has some of the highest maximum penalties in the country, and a robust appellate jurisdiction.

Legal Aid NSW opposes any increases to maximum penalties or expansion of the standard non-parole period regime, and supports the introduction of separate summary offences for certain weapons and imitation firearm offences. Noting criticisms of the use which has been made other police-powers based regimes, Legal Aid opposes expansion of police powers as a means of addressing concerns about use and carrying of weapons.

Instead, we support development of a better understanding of the social drivers that encourage children to engage in weapon possession and risky behaviour, and evidence-based holistic responses. We are of the view that such responses must acknowledge the special vulnerability of young people, the wider impact of social disadvantage, and the influence of intergenerational trauma. Legal Aid acknowledges that the broad range of expertise within the community, and supports consultation about ways to better coordinate adult and youth crime responses outside the narrow lens of sentencing. We remain of the view that police can play a meaningful and positive role in this process.

We have particular concerns about the impact of certain possession offences against disadvantaged and vulnerable individuals such as First Nations people and the homeless, and have proposed a range of reforms to minimise that disproportionate impact.

3. Adult offenders

3.1 Maximum penalties

Prohibited weapons (Q 3.1)

Legal Aid NSW believes the maximum penalty for possessing prohibited weapons is **more than adequate** and would **oppose any increase** to the available penalty for this offence.

The current maximum penalty of 14 years' imprisonment for 'possess prohibited weapon' under s.7 *Weapons Prohibition Act 1998* (**Weapons Act**) is **the highest in Australia**. The next highest available penalty is in the ACT, with a maximum penalty of only 5 years' imprisonment and/or 500 penalty units.⁵

Sentencing statistics demonstrate that, overwhelmingly, weapon possession matters are dealt with summarily and result in non-custodial sentences.⁶ Despite this sentencing trend, BOCSAR statistics indicate that prohibited and regulated weapons offences are **down 3.2%** over the 5 years to June 2023, and stable over the last 2 years.⁷

While sentencing patterns suggests that prosecution and sentencing discretion is being appropriately exercised in low-level offences, it also supports a conclusion that a maximum penalty of 14 years is disproportionately high in the vast range of circumstances in which s.7 offences are prosecuted.

Noting the significantly higher maximum penalty in NSW and issue raised by Q 3.2 about inconsistent penalties for possession contrary to a Weapons Prohibition Order (**WPO**), we **support reduction of the maximum penalty for an offence of weapon possession under s.7**.

Several jurisdictions also distinguish categories of prohibited weapons and articles, with lower maximum penalties for those which are less inherently dangerous. Currently, s.7 of the *Weapons Act* encompasses a wide range of weapons, implements and articles, posing challenges for sentencing and potentially skewing statistics. It is also difficult to reconcile, as a matter of principle, why military and other deadly weapons are subject to the same penalty as items like knuckledusters, which are freely available for purchase through mainstream platforms like Amazon or eBay and are commonly sold as novelty items, such as a meat tenderiser.⁸

We agree with the preliminary submission made by the Office of the Director of Public Prosecutions (**ODPP**) that legislative amendment to **differentiate between weapons** which are

⁵ *Prohibited Weapons Act 1996* (ACT), s.5.

⁶ Consultation Paper (Adults), p.25.

⁷ Bureau of Crime Statistics and Research, NSW Trends Q2, 2023, ref NSW_trends23Q2.

⁸ See for example: [Alloy Tenderiser Meat Hammer Household Tenderizer Duster Kitchen Cooking Tool : Amazon.com.au: Kitchen & Dining](https://www.amazon.com.au/Kitchen-Dining-Tools-Accessories/b?ref=astore-portal)

capable of inflicting serious injury and those of a miscellaneous nature may assist in addressing difficulties that arise from having a broad single class of prohibited weapons.

Legal Aid **supports comprehensive review of Schedule 1** to determine:

1. whether all items currently prescribed should remain illegal with criminalisation of mere possession as opposed to use or threatened use, and
2. evidence-based differentiation between items which are inherently capable of inflicting serious injury and are designed for that purpose (e.g. military weapons), and those which are likely to cause less serious (or no) injury such as handcuffs, body armour vests or knuckledusters. Such differentiation should consider how and for what purposes such items are commonly marketed and their availability for sale.

We also **support the creation of a separate offence, with a lower maximum penalty** for less serious weapons and articles. We suggest that 2 years' imprisonment would be consistent with the approach in other Australian jurisdictions.

Possession contrary to a Weapons Prohibition Order (Q. 3.2)

We **oppose any increase** to the maximum penalty for possession contrary to a WPO under s.34(1) *Weapons Act*.

Noting that the current maximum penalty for weapon possession under s.7 of the *Weapons Act* is between 2.8 and 14 times higher than any other Australian jurisdiction,⁹ any attempt to reconcile these penalties should consider **reduction** in the maximum penalty available under s.7, rather than an increase to the penalty under s.34(1).

Maximum penalties for firearm possession (Q. 3.3)

Legal Aid NSW believes the maximum penalty for firearm possession are **adequate** and we would **oppose any increase** to the available penalty for these offences.

Except for issues which arise with imitations and gel blasters (dealt with below at p.10-13), the *Firearms Act 1996 (Firearms Act)* differentiates between various types of firearms, with a hierarchy of seriousness and the ability to deal with appropriate offences summarily. Unlike weapons possession where the maximum penalty in NSW is a far outlier, the maximum penalties for firearms in NSW appear to be broadly consistent with other Australian jurisdictions.

The statistics provided in the Consultation Paper show use of the broad range of sentencing options in the Local Court, but with only **18%** of offenders receiving a custodial sentence for s.7(1) offences, and **10%** for s.7A(1) offences.¹⁰ This, and the limited numbers of offences dealt with on indictment, suggests that prosecution and sentencing discretion is being appropriately exercised in lower-level offences, and that the available maximum penalties are more than

⁹ See Consultation Paper, p.26 – the ACT has the highest maximum after NSW at 5 years' imprisonment, while in the NT the maximum penalty for controlled weapons similar to the NSW category of 'miscellaneous weapons' is 12 months' imprisonment.

¹⁰ Consultation Paper, p.29-30.

adequate to reflect the objective seriousness of the firearms being located and circumstances of possession.

Legal Aid NSW **does not support introduction of a separate scheme and penalties for 'prohibited persons'**. A regime which automatically declares broad classes of person as 'prohibited' is not consistent with individualised and evidence-based justice. It is also unnecessary having regard to the penalties for firearm possession generally, and range of statutory controls which already operate in NSW to restrict or criminalise possession of firearms by certain classes of person believed to pose a risk to community safety. These include:

- Section 11 of the *Firearms Act* which grants the Commissioner broad power to refuse to issue a licence including where the person is not 'fit and proper', may not exercise responsible control over firearms, or if there is any criminal intelligence reports that person is a risk to public safety.
- The absolute restrictions on the issue of a licence to a person who is under 18 or who has been subject to a AVO within the last 10 years.¹¹
- The Firearms Prohibition Order (**FPO**) regime which provides the Commissioner with further, broad power to make a FPO if the Commissioner is of the opinion that the person is not fit, in the public interest, to have possession of a firearm. There is no legislative requirement that the person has ever held or applied for a firearms licence. It requires that an opinion is formed about the personal characteristics of the person.¹²

Similarly, we **oppose higher maximum penalties for subsequent firearm offences**. The fact that an offender has a record of previous convictions is already reflected as a factor to be taken into account on sentence.

While there is evidence from previous empirical studies of deterrence that suggest the threat of imprisonment generates a small *general* deterrent effect, the research also indicates that increases in the severity of penalties, such as increasing the length of terms of imprisonment, do not produce a corresponding increase in deterrence.¹³

In its April 2011 paper on imprisonment and deterrence, the Victorian Sentencing Advisory Council observed "*...research into specific deterrence shows that imprisonment has, at best, no effect on the rate of reoffending and often results in a greater rate of recidivism.*"¹⁴ A more recent study published by Bun et al similarly found that that while criminal activity is highly responsive to the prospect of arrest and conviction, it is much less responsive to the prospect or severity of imprisonment, if at all.¹⁵

¹¹ *Firearms Act* s.11(5)(c).

¹² *Dalziel v Commissioner of Police, NSW Police Force* [2018] NSWCATAD 79 at [54]

¹³ Ritchie, D. (2011) 'Sentencing Matters: Does Imprisonment Deter? A Review of the Evidence' Sentencing Advisory Council Victoria.

¹⁴ Ritchie, above n 13 p.2.

¹⁵ Bun, M., Kelaher, R., Sarafidis, V and Weatherburn, D (2020) 'Crime, deterrence and punishment revisited' *Empirical Economics* 59, p.2303-23333, at 2305.

Mandatory and/or minimum sentences for firearms offences (Q. 3.4)

Legal Aid **opposes the introduction of mandatory and/or minimum sentences** for firearms offences, including subsequent offences.

Mandatory sentences have a demonstrated history of disproportionately impacting on vulnerable groups within society, including Indigenous people, those with mental illness or cognitive impairment, and the impoverished. Evidence suggests that mandatory sentencing increases incarceration, is costly, and is not effective as a crime deterrent.¹⁶

We note in its 2018 report, 'Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples', the Australian Law Reform Commission considered these issues, and recommended that all Commonwealth, state and territory governments repeal sentencing provisions which impose mandatory or presumptive terms of imprisonment.¹⁷

We **adopt the Sentencing Council's previous concerns** about the constraint mandatory or presumptive sentencing has on judicial discretion.¹⁸ We agree that mandatory minimum regimes have the potential to reduce early guilty pleas and may thereby lead to higher numbers of contested matters.

We note that a range of aggravating factors under s.21A(2) *Crimes (Sentencing Procedure) Act 1999 (C(SPA))* may be relevant to sentence for firearms offences, and that there are restrictions on the imposition of an ICO for certain offences involving discharge of a firearm.¹⁹ These measures provide ample scope for a sentencing court to reflect the seriousness of an offence and community safety.

Maximum penalties for gel blasters (Q. 3.5)

The *Customs (Prohibited Imports) Regulation 1956* regulates the importation of firearms into Australia. Under reg 4F, gel blasters are not currently prohibited. The Department of Home Affairs Notice 2017/43²⁰ provides the following explanation:

*A recent review of Regulation 4F means that **devices that discharge soft and non-dangerous items** such as soft darts and hydrolysed super-absorbent polymers (**gel balls**) are no longer classified as firearms under the Regulations.*

*Where these devices resemble a real firearm, **they will be classified as an imitation** of a firearm under the Regulations. Police Certification issued by state and territory police firearm registries is required to import an imitation of a firearm.*

*Gel balls (hydrated and non-hydrated) **are not considered ammunition** under the Regulations and are **not controlled on import** into Australia.*

¹⁶ Law Council of Australia Mandatory Sentencing [Discussion Paper](#) May 2014:

¹⁷ ALRC Report 133: [Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples \(ALRC Report 133\)](#) | ALRC Recommendation 8-1.

¹⁸ Consultation Paper, [3.69].

¹⁹ *Crimes (Sentencing Procedure) Act 1999*, s.67(1)(f).

²⁰ Department of Home Affairs Notice No. 2017/43, 'Revised treatment of gel ball blasters and similar low powered devices'. Available [here](#).

Once imported to the country, gel blasters are regulated or prohibited to various degrees across the states and territories. While the Queensland state government recently announced it will introduce new laws to restrict the *sale* of knives, certain other bladed items and replica firearms, including gel blasters, to juveniles,²¹ gel blasters remain legal to possess.

Gel blasters are widely available for purchase online, including from Australian registered companies and on platforms like Amazon. **Annexure A** provides some examples. They are **often described in ways which use to word ‘toy’** (albeit not ‘children’s toy’), including by NSW Police in a Circular sent to parents dated 30 August 2022: **Annexure B**.²²

Some sellers emphasise their “recreational” nature, and that they are a “*safe and fun way to enjoy shooting games without the potential harm caused by traditional firearms*”. Some sellers describe gel blasters on their webpage as “*restricted devices*”, and “*legal in NSW, as long as you have the correct licence for them*”, but such statements are not necessarily displayed prior to purchase authorisation (if at all).

The effect of such inconsistencies in regulation and prohibition, and unfettered online access appears to be that **many people – both adults and young people – remain unaware that gel-blasters are illegal to possess without a firearms licence**.

It is accepted that gel blasters have been held to meet the technical definition of an air gun, and that some have a realistic appearance consistent with a prohibited firearm or a pistol. There is no dispute that, if used in the commission of an offence such as robbery, a gel blaster would appropriately be regarded as an offensive weapon or instrument under s.4 *Crimes Act 1900*.²³ Similarly, its use or threatened use in the course of another offence could amount to an aggravating factor under either s.21A(2)(b) or (c) of the *C(SP)A*. However, for the purpose of criminalised *possession*, the nature, capability, and purpose of the firearm’s possession is central to an assessment of objective seriousness.

Expert evidence in the case of *R v Smith* [2023] NSWDC 88 (**R v Smith**) indicated that while gel blasters and paintball guns operate by similar mechanism (projection via compressed air or gas) **paint ball guns have an impact force 14 times greater than a gel blaster**, and that the **impact force of a nerf gun is only “one” lower than the gel blaster**.²⁴

Further to the judicial comments about gel blasters noted in the Consultation Paper, in the recent decision of *R v Lucas* [2023] NSWSC 1357, Lonergan J noted that the offence under s.7A(1) does not differentiate between a firearm capable of firing bullets and an item such as a gel blaster. In finding that possession of a gel blaster pump action shotgun offence was ‘trivial’ and dealing with the offence under s.10(1)(a), her Honour accepted that:

²¹ [New laws to restrict the sale of knives and replica gel blasters to juveniles to enhance community safety - Ministerial Media Statements](#)

²² Assistant Commissioner Gavin Wood APM, Letter to parents – ‘Gel Blasters in New South Wales’ (30 August 2022): Available [here](#).

²³ Including ‘any thing that, in the circumstances, is used, intended for use or threatened to be used for offensive purposes, whether or not it is ordinarily used for offensive purposes or is capable of causing harm.’

²⁴ *R v Smith* at [16].

- The item itself is a light, evidently plastic toy that has the capacity to fire water infused coloured balls that will splatter on impact.
- The item was purchased from a company in Queensland, a State of Australia where, amongst other States and Territories of Australia, such an item is not considered to be a firearm, and it is legal to possess such a toy without any permit.
- this and other gel blasters were purchased as a toy by the offender with a view to playing outdoor fun and games
- the circumstances of actual possession involved the offender taking various photos and “selfies” with the gel blaster.

Having regard to these factors, **we support gel blasters being exempted** from the definition of ‘firearm’ by inclusion in cl 4 of the *Firearms Regulations 2017*.

Maximum penalty for imitation firearms (Q. 3.5)

While it has been identified in other submissions that there is a public safety risk arising from the realistic appearance of gel blasters and imitation firearms, we are of the view that **different considerations apply to mere possession, as opposed to use or threatened use**.

As the Consultation Paper notes, in Victoria²⁵ and the Northern Territory the maximum penalty for possession of an imitation firearm is 2 years’ imprisonment or a fine. In Queensland, possession of a replica is criminalised when the weapon is exposed to view in public without a reasonable excuse.²⁶ The maximum penalty for such an offence is 6 months’ imprisonment and/or a fine.

An imitation has no capacity to inflict actual physical harm as a firearm. In *R v Smith*, Conlon ADCJ indicated concern about the state of the law regarding possession of imitation firearms, observing at [22]:

Clearly such items are capable of being used in the commission of criminal activity and should be subject to a charge under the *Firearms* legislation. However, if one was to look at a scenario where an “*imitation*” firearm was found in a child’s bedroom in the course of a search, **it is difficult to imagine that Parliament had ever intended such an item be subject to a charge under the *Firearms Act*, absent any evidence in respect of illegal use**. In my view the use of an “*imitation*” firearm whether the use be actual or intended, should be a critical factor in deciding whether a charge should flow. (Emphasis added)

Legal Aid supports creation of:

- a **separate summary offence** for possession of any imitation firearm (regardless of whether it substantially replicates the appearance of a firearm, pistol or prohibited firearm) with a maximum penalty of no more than 2 years and/or a fine; and

²⁵ Unless the person is a “prohibited person” in which case the maximum penalty is 10 years’ imprisonment and/or 1200pu.

²⁶ *Weapons Act 1990* (Qld) s.57(2).

- an offence of possessing any imitation firearm in a public place, which could potentially be a Table 2 offence with a slightly higher maximum penalty (e.g. 3 years' imprisonment and/or a fine) to reflect the higher degree of seriousness given public safety concerns.

Legal Aid NSW Proposal: s.51D(2) possession of more than 3 unregistered prohibited firearms as a Table 1 offence

An offence contrary to s.51D(2) is strictly indictable, carrying a maximum penalty of 20 years' imprisonment and a standard non-parole period of 10 years. Statistics provided by BOCSAR indicate that s.51D(2) is prosecuted to finality relatively rarely, and often results in a community based sentence:

Year	Custody	Supervised Community Sentence	Unsupervised Community Sentence	Fine	Total	Average NPP (months) where custody*
2018	9	1	2	0	12	25
2019	10	5	0	0	15	36
2020	13	3	1	0	17	31
2021	11	6	0	0	17	30
2022	5	7	2	0	14	18

Source: NSW Bureau of Crime Statistics and Research

Reference: ab23-22460 and *ab23-22643

In our experience, the strictly indictable nature of s.51D(2) can create difficulties in cases involving 3 or more gel blasters or imitation pistol firearms.

In *R v Brown*, Conlon ADCJ was critical of the decision to prosecute possession of 15 gel blasters in multiple separate s.51D(2) charges, rather than a single count, or by discrete offences triable summarily. In finding that the gel blasters were only ever intended for use as toys, his Honour assessed the offender's criminal culpability as falling "at the absolute bottom of the range for offences of [this] type."²⁷ Despite an offence under s.51D(2) being made out on the facts, his Honour observed that the Local Court would have had adequate scope to sentence, and that the inclusion of multiple counts on the indictment was an example of "overcharging".²⁸ Legal Aid has experience with similar cases, such as [redacted]'s below:

case – 51D(2) preferred for possession of 4 gel-blasters

Legal Aid NSW represented [redacted] a [redacted] man appearing before the District Court on firearm offences.

²⁷ *R v Brown* at [18]-[19].

²⁸ *R v Brown* at [71].

Police attended [redacted]'s residence (where he lived with family, including his children) looking for a friend of [redacted]'s who was visiting. Police entered [redacted]'s garage and arrested his friend. During the arrest police noticed some gel blaster bullets on a bench in the garage. Police began to question [redacted] about them. [redacted] immediately made admissions to owning a gel blaster, which he had purchased legally in Queensland. [redacted] showed police the gel-blaster, and police decided to establish a crime scene.

Police then spoke to [redacted]'s father (the legal owner of the residence) who gave police consent to search the house. During the course of the search police located a small amount of prohibited drugs, three other gel blasters, and two rusty old firearm barrels that were not in working order. All four gel blasters met the definition of being a 'prohibited firearm' as imitation pistols.

[redacted] was charged with multiple offences related to the firearms found, including an offence contrary to section 51D(2) of the *Firearms Act*. This offence was made out, given [redacted] was in possession of more than three firearms that were imitation pistols.

[redacted] was arrested by police and refused bail. He spent three months on remand before being granted bail. During his time in custody [redacted] was the victim of a serious assault, resulting in a facial fracture and requiring transport to hospital. After [redacted]'s release from custody, he was diagnosed with a mental health disorder due to the trauma of his time in custody.

After being on bail for over 6 months, [redacted] was ultimately sentenced to an Intensive Correction Order in the District Court.

When representations are made to withdraw a s.51D(2) offence in favour of summary disposition, this is often accepted by the ODPD but only where there is agreement to plead to several discrete possession charges to avoid overloading associated Form 1s. This can create difficulty in summary sentencing because while each offence may be at the very lowest end of objective seriousness, this can be overshadowed by the large number of charges, each with a relatively high maximum penalty and standard non-parole periods. [redacted]'s case is demonstrative:

[redacted]'s case – 51D(2) withdrawn for multiple discrete offences in Local Court

Legal Aid NSW represented [redacted], a [redacted] man appearing before the Local Court on firearm offences.

NSW Police were notified by an ex-partner of [redacted]'s that he had possession of gel blasters at home. A search warrant was executed, with police locating an assortment of firearms and other weapons in [redacted]'s bedroom. In total, the police located 23 firearms, including 21 gel blasters (8 of which were non-functional), and 2 air-rifles (1 which was non-functional). Police also found various types of ammunition such as gel blaster pellets and individual bullets, and an assortment of prohibited weapons like knuckledusters and a laser pointer.

[redacted] was cooperative and made full admissions to police, explaining he had purchased the gel blasters online from Queensland, and had only used them at home for recreational purposes. The air-rifles had been handed down to him – one as an heirloom and the other as a gift).

He had no prior convictions, and spent 5 days in custody before being granted bail.

[redacted] had a difficult childhood and a history of homelessness from his teenage years. Despite this, he finished high school and then consistently maintained employment.

Legal Aid made representations to the prosecution to withdraw the s.51D(2) offence, with pleas to a small number of offences and use of a Form 1 to be dealt with in the Local Court. The prosecution agreed to withdraw the s.51D(2) offence, but only on the basis of a plea of guilty to 8 discrete firearms offences (the 2 air-rifles and each of the 4 'functional' gel-blasters), with the remaining 15 gel blaster possession charges on a Form 1.

At sentence, the Crown conceded that full time imprisonment was not warranted. In arguing whether the s.5 threshold was crossed, there was a degree of artificiality in sentencing for the firearms having regard to the 5 year maximum penalty which applied to the one and only firearm (air-rifle) that actually functioned, as opposed to the 14 year maximum penalty which applied to the numerous 'prohibited firearm' and 'pistol' gel-blaster counts, including those on the Form 1.

Ultimately, the Magistrate found the s.5 threshold was not crossed, and was sentenced to Community Corrections Orders.

If the **distinction between imitation firearm vs imitation prohibited firearm or pistol were abolished** so that, regardless of appearance, an imitation (including a gel blaster) was a 'firearm' for the purpose of s.51D, then s.51D(1) may be preferred in cases such as and *R v Brown*. This is a Table 2 offence, and it can accommodate any number of firearms located.

Another option is to **make s.51D(2) a Table 1 offence**. This would enable differentiation between serious examples of warehousing or stockpiling of dangerous firearms, and person found in possession of non-lethal firearms where there is no evidence that they are associated with greater criminality. It would also minimise the complexity of summary sentencing exercises in cases where multiple firearms are involved.

3.2 Standard non-parole periods (SNPP)

Legal Aid NSW has previously opposed retention of the SNPP scheme, and advocated for a review of the standard non-parole period (**SNPP**) system, including consideration of abolishing the scheme if it is found to detract from the principles underlying it.²⁹ We note that the Sentencing Council has not been asked to consider whether the SNPP scheme remains appropriate as part of this review, nor was it asked to consider whether the SNPP scheme should exist or not in its 2013 review.

We maintain our support for a more comprehensive review of the SNPP scheme in NSW.

SNPP offences to consider (Q. 4.1)

Legal Aid NSW **opposes expansion** of the current list of SNPP offences.

²⁹ Legal Aid NSW Preliminary Submission to the NSW Law Reform Commission on Crimes (Sentencing Procedure) Act 1999, November 2011 (NSW Law Reform Commission Report 139, Reference PSE 18); Legal Aid NSW Submission to the NSW Sentencing Council Review of Standard Minimum Non Parole Periods, October 2013.

Principles to be applied in determining SNPP offences (Q. 4.2)

We have previously advocated for SNPP to be reserved for the most serious offences, reflected by a maximum penalty of 20 years or more.

Process for setting a non-parole period (Q. 4.3)

We have previously advocated for SNPPs to be fixed at between 25 – 40% of the maximum penalty, and maintain that 40% is an appropriate upper limit for such offences.

Similar offences with different SNPP (Q. 4.5)

Legal Aid NSW **opposes** a SNPP being applied to s.36(1), s.74(1) for pistol and prohibited firearms, and s.62(1). The fact that these offences carry the same maximum penalty as other offences which have a SNPP is not, of itself, a sufficient basis to impose a SNPP where none is currently prescribed.

Possess prohibited weapon SNPP (Q. 4.7)

We note our proposal that prohibited weapons list be reviewed, with differentiation between military weapons and other dangerous weapons capable of inflicting serious harm, and less dangerous or ‘miscellaneous’ articles.

Refinement of the category of weapons which sits within s.7(1) of the *Weapons Act* and are subject to the SNPP may assist in determining a more precise range of offending and applying the SNPP. However, on the basis that the offence covers such a broad range of weapons and circumstances, and is overwhelmingly dealt with summarily, Legal Aid **supports abolition of the SNPP in s.7(1) *Weapons Act*.**

3.3 Sentencing principles

Legal Aid supports broad sentencing discretion which balances the various purposes under s. 3A C(SP)A.

Objective seriousness of firearms offences (Q. 5.3)

Degree of serviceability, and the offender’s belief in its capability, are two factors that are important to take into account on sentence. By virtue of s.4 of the *Firearms Act*, a firearm is defined as “a gun...that is (**or at any time was**) capable of projecting a projectile....” This means that the potential circumstances of offending, particularly for offences of possession, are very broad.

The recent District Court decision of Grant ADCJ in *R v Johnson* [2023] NSWDC 428 demonstrates the breadth of the Act. It involved a firearm described as:

a .22 calibre homemade single shot firearm ...comprised of a **brass threaded section of pipe fixed to a timber frame by a hose clamp**. The exhibit is fitted with a metal hammer which pivots about a screw on the frame. The hammer is connected to a small spring. A small rubber band was wrapped around the hammer and a screw on the frame. Tension from the rubber band pulled the hammer forward... **The spring and rubber band did not provide enough force to the hammer to discharge the primed**

cartridges. Additional rubber bands were added to the mechanism and it was tested. **Even with ten rubber bands, the hammer was unable to discharge a primed cartridge case.** With ten bands fitted, the mechanism **could not be manipulated by hand.**³⁰ (Emphasis added)

In cross-examination, the police expert conceded that to fire the item one would need a vice and hammer. The defence submitted that that in the particular circumstances of this case the item was not a firearm. The defence argued that s.4, properly construed, does not extend to an item that is only capable of propelling a projectile if an external aid or aids which are added by police, and which were not part of its design or build or manufacture are used.

In rejecting this argument, and finding that the Act's expansive definition of a firearm captures devices that can with reasonable external assistance *be made* "capable of propelling a projectile", his Honour said:

35. The term "capable" must be considered with s 4(2) of the Act which provides that a firearm with something "missing" or with a "defect or obstruction" is still taken to be a prohibited firearm. The hammer and vice are not items that are "added" to the instrument. Rather, they are necessary and are a fundamental aspect of its operation.

36. The homemade item is constructed in a way that it can only launch projectiles when external force from the item's hammer is applied...**Taking the statute as a whole; force to the item's hammer is not a modification to the homemade item. It is merely giving external assistance to the weapon thereby allowing it to fulfil the purpose for which it was built, namely, to propel a projectile.** (Emphasis added).

The offender in that case is yet to be sentenced.

In *R v Mezzadri* [2011] NSWCCA 125, the Court of Criminal Appeal held at [19] "*It is obvious that the possession of unserviceable weapons must be significantly less objectively serious than the possession of serviceable weapons. Of course, the degree to which the weapons in question were unserviceable, that is to say whether the missing parts were capable of being found and the ease with which the gun could be made to work would be relevant.*"

In addition to serviceability, the Court also held that the **offender's belief that the firearm was unserviceable** was "a material objective circumstance which again pointed to the lower end of objective seriousness together with the lack of intention to repair, use or dispose of them."³¹

Objective seriousness of offences involving gel blasters and air guns (Q. 5.4)

We note the observation in the case of *R v Yalim* [2023] NSWDC 111 at [59] that gel blasters could be "dangerous in the wrong hands". Available evidence would seem to indicate that gel blasters are not actually capable of causing serious harm, and have significantly lower impact force than even paintball guns.

While the realistic appearance of a gun-like object is likely to affect victims and witnesses in the same way as a 'real' firearm, **the actual dangerousness posed** by such gun-like objects to

³⁰ *R v Johnson* [2023] NSWDC 428 at [10]-[14].

³¹ *R v Mezzadri* at [19]

others is objectively lower and should be reflected in sentencing. This was accepted by Haesler DCJ in *R v Andrew (No. 2)* [2018] NSWDC 382 at [21]:

“Possession of a weapon that can never be used to cause actual harm is also a relevant factor. Similarly, the nature of the projectile 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)”

3.4 Other issues

Summary offences made indictable (Q 6.1)

Legal Aid **opposes** any current summary offences being made indictable.

Knife offences – exemptions and defences (Q. 6.2)

s.11D and s.11F

Legal Aid **opposes** s.11D and s.11F *Summary Offences Act* being made indictable. In particular, we are concerned that increasing the penalty for s.11D (which is currently a fine only offence) may result in targeting of parents³² in already disadvantaged and over policed communities. It could lead to prosecutions of parents and guardians in addition to, or instead of, their children.

If a penalty of imprisonment were imposed, this would likely exacerbate the disproportionate impact that knife prosecutions have on vulnerable communities.

Demographics

As the preliminary submissions of Legal Aid, Aboriginal Legal Service NSW/ACT (**ALS**) and the Law Society all indicated, anecdotally, **vulnerable individuals** including those with cognitive impairment, homeless or rough sleepers and young people **are regularly charged with custody of a knife** offences. Homeless people, children and other disadvantaged people tend to be **highly visible** and frequent places that are often a target of proactive policing. It makes them **more likely to be stopped and searched** than other members of the community.

Legal Aid NSW data (below at p.31) suggests that between **3% to 5%** of clients provided with in-house duty or grant services for summary knife offence matters **are homeless**.

Despite doubts expressed by some members of Parliament that vulnerable individuals would be prosecuted for possession of items like multitools and scissors,³³ it is our experience that this does occur. The case of *Police v O'Brien* [2012] NSWLC 7 was one such example.

³² Notably, in the case of children in care, the definition of 'parent' includes a guardian or person who has custody of the child, but it excludes the Minister or the Director-General of the Department of Community Services.

³³ Second Reading Debate, *Criminal Legislation Amendment (Knife Crimes) Bill 2023*, Legislative Council Hansard (29 June 2023), the Hon Tania Mihailuk.

While it is true that a range of ‘reasonable excuse’ defences are available, our experience shows that:

- police rarely accept excuses offered by our clients and exercise discretion not to charge. In the case of those who have a prior record for custody of a knife, they are not currently eligible for penalty notice diversion;
- a high proportion of disadvantaged people who are charged choose not to defend the matter, with reasons varying from lengthy court delays, onerous bail conditions, being on remand, or a belief their explanation will not be accepted. As noted below at p.22, approximately **41%** of all adult accused dealt with for custody of a knife matters **are convicted in their absence**.

Exemptions and homelessness

The Knife Crime Amendments³⁴ have replicated ambiguities that existed under s.11C of the *Summary Offences Act* about what amounts to a ‘knife.’³⁵ There remains little guidance as to what constitutes a knife, and no class of items prescribed as exempt under the regulations.

Legal Aid **supports exemption of items such as multi-purpose tools, scissors and bottle opener/waiter’s friend** which are common utility items and freely available for purchase by members of the public. Exemption would only exclude such items from Div. 2A *Crimes Act*, and would not impact on the ability to prosecute a person for *use* of such an item in a violent or threatening manner. Exemption could reduce the incidence of homeless people having their ‘camp’, car, or backpacks searched resulting in prosecution for custody of those types of items in a public place (despite it being, effectively, their home or only place they can store their belongings).

If such items were made exempt, this (accompanied by Community Legal Education) may also aid in encouraging the carrying of exempt items, rather than other larger knives.

We also **support homelessness being incorporated into the list of ‘reasonable excuses’** under s.92IB, with language such as “*because the person had custody of the knife for a purpose incidental to homelessness, including but not limited to preparing shelter, or for personal care or grooming.*” This recommendation is made in recognition of the circumstances of many of our long term homeless clients, and also the increasing rates of homelessness within the broader community, attributable to extreme housing stress, cost of living pressures, recent natural disasters, and the ongoing social and economic costs of the covid-19 pandemic.³⁶

³⁴ *Criminal Legislation (Knife Crimes) Amendment Bill 2023*

³⁵ See Legal Aid NSW Preliminary Submission, NSW Sentencing Council Review of Weapons offences (20 March 2023) (Reference PWE12), p.1.

³⁶ NSW Council of Social Services (10 October 2022) ‘New Research: NSW housing and homelessness crisis to cost NSW economy billions’. Available: [New Research: NSW housing and homelessness crisis to cost NSW economy billions - NCOSS - NSW Council of Social Service](#)

Although it has been noted that the list of reasonable excuses is not exhaustive, **express reference to this factor** may assist in encouraging police to consider the exercise of discretion not to charge.

Self defence and defence of another

Under the previous s.11C(3), self-defence was excluded as a reasonable excuse for custody of a knife only if it was the *sole* reason for possession. This left open the possibility of a mixed-purpose defence (e.g. a homeless woman with a history of domestic violence who carries a knife for self-protection as well as practical purposes like preparing food). New s.93IB(4) has removed the word 'solely'. This could be construed as intending to deprive that same accused of *any* defence because self-defence was raised as one of the purposes of possession.

Legal Aid **supports return of the word 'solely' to s.93IB(4)** to ensure that an accused who has a lawful excuse, but also truthfully acknowledges mixed purpose for custody which includes self-protection or protection of another, is not deprived of a defence.

Penalty notices (Q. 6.3 and 6.4)

We acknowledge that there is a body of evidence which highlights the disproportionate impact that fines can have on people experiencing socio-economic disadvantage.³⁷ We are also concerned that people experiencing visible homelessness are especially vulnerable to receiving on the spot fines. **Given the relationship between homelessness and poverty, fines can be especially punitive.**³⁸

However, in our view, Revenue NSW is better placed than the criminal justice system to assist vulnerable individuals and is specifically resourced to assist them to manage their way through fines. This includes safety nets for people experiencing hardship such as time to pay, write-offs and WDOs. WDOs have recently expanded to include mentoring and cultural activities, making it easier for people to participate. A penalty notice does not result in a criminal record, and allows individuals to court elect if they choose.

On balance, we support expansion of the use of penalty notices to second and subsequent custody of knife offences, and fine-only weapons offences **in conjunction** with the other exemption, defence and police discretion measures we have proposed.

Penalty notice offences can result in an official caution instead

Under s.19A of the *Fines Act 1996 (Fines Act)*, officers who issue penalty notices may use their discretion to give a caution instead. Guidelines are issued by the Attorney General under s.19A(3) of that Act to assist officers in exercising their discretion. Matters to be taken into

³⁷ See for example NSW Law Reform Commission, *Report 132: Penalty Notices*, (February 2012); Wei, Z, McDonald, HM and Coumarelos C, 2018, Fines: are disadvantaged people at a disadvantage?, Justice issues paper 27, Law and Justice Foundation of NSW, Sydney.

³⁸ McNamara L, Quilter J, Walsh T and Anthony T (2021) Homelessness and contact with the criminal justice system: Insights from specialist lawyers and allied professionals in Australia. *International Journal for Crime, Justice and Social Democracy* 10(1): 111-129, p.121.

account when deciding whether it is appropriate to give a person a caution instead of a penalty notice include a variety of factors, such as:

- the offending behaviour did not involve risks to the public, damage to property or financial loss;
- the person is homeless;
- the person has a mental illness or intellectual disability;
- the person is under 18 years old;
- the person is cooperative and/or complies with a request to stop the offending conduct.

However, these **guidelines do not apply to police officers**.³⁹

Statistics obtained from BOCSAR confirm that **Aboriginal adults and young people are disproportionately charged and sentenced for custody of a knife offences**. In 2022, First Nations adults totalled 313/965 or **32.4%** of all first offences dealt with through the Local Court, and 222/475 or **46.7%** of all second offences:

Custody of a knife, s.11C: Proven court appearances for adult defendants, January to December 2022

Aboriginality	Custody	Supervised Community Sentence	Unsupervised Community Sentence	Fine	Other*	Total
<i>First offence</i>						
Aboriginal	15	25	43	207	23	313
Non-Aboriginal	4	41	126	402	63	636
Unknown	0	0	10	2	4	16
Total	19	66	179	611	90	965
<i>Second / subsequent offence</i>						
Aboriginal	29	40	24	122	7	222
Non-Aboriginal	18	36	33	158	8	253
Total	47	76	57	280	15	475

Source: NSW Bureau of Crime Statistics and Research
 Reference: ab23-22643
 Table 7. Number of proven court appearances in the Local and Higher Criminal Courts for adult defendants where the principal offence related to knife and firearm offences under selected legislation

In the same year, First Nations children represented 20/48 or **41.6%** of first offences dealt with in the Children’s Court, and 10/17 or **58.8%** of all second offences.

Custody of a knife, s.11C: Proven court appearances for juvenile defendants, January to December 2022

Aboriginality	Custody	Supervised Community Sentence	Community Sentence	Fine	Other*	Total
<i>First offence</i>						
Aboriginal	0	5	3	0	12	20

³⁹ Fines Act 1996, s.19A(2).

Non-Aboriginal	0	1	4	0	23	28
Total	0	6	7	0	35	48
<i>Second / subsequent offence</i>						
Aboriginal	0	2	2	1	5	10
Non-Aboriginal	1	3	2	1	0	7
Total	1	5	4	2	5	17

Source: NSW Bureau of Crime Statistics and Research

Reference: ab23-22643

Table 14. Number of proven court appearances in the *Children's Court* where the principal offence related to knife and firearm offences under selected legislation

Overwhelmingly, first offences for adults were dealt with by way of a fine, which suggests the issue of a penalty notice may have been appropriate in the majority of those cases.

Legal Aid supports reforms to the *Fines Act* to expand application of the Attorney General's Caution Guidelines to police officers.

Rates of ex-parte conviction and fine in the Local Court

In our preliminary submission we observed that, anecdotally, defendants issued with a Court Attendance Notice for a custody of a knife offence often do not attend court and are dealt with in their absence under s.196 *Criminal Procedure Act* 1986. Data provided by BOCSAR appears to reflect this, with 41% of all s.11C offences dealt with in the Local Court in 2022 proven ex-parte:

% of s.11C Custody of a Knife appearances proven ex-parte in 2022

Court	Proceeded to defended hearing & proven	Proven - Proceeded to sentence only	Proven ex-parte	Total proven	% proven ex-parte
Local Court	148	708	587	1443	41%
Children's Court	10	52	10	72	14%

Source: NSW Bureau of Crime Statistics and Research

Reference: kf23-22932

^ This table shows all proven court appearances and is not a count of distinct people.

Overwhelmingly, those ex-parte matters resulted in the imposition of a fine, with an average amount of \$595, which is greater than the penalty notice amount of \$550.⁴⁰

Penalties imposed for matters proved ex-parte for s.11C Custody of a Knife in 2022

Penalty	Measure	Under 18	Adult	Missing / unknown	Total
Supervised Community Sentence	Count	0	2	0	2
Unsupervised Community Sentence	Count	1	4	0	5

⁴⁰ For offences under s.11C, the penalty notice amount was prescribed in cl 15 of the *Summary Offences Regulation 2015* (now repealed). For offences under s.931B, the amount remains \$550 and is prescribed in Schedule 4 of the *Criminal Procedure Regulation 2017*

Fine	Count	1	564	0	565
	Average Fine	\$500	\$595	na	\$595
Other penalties*	Count	6	18	1	25
Total	Count	8	588	1	597

Source: NSW Bureau of Crime Statistics and Research

Reference: kf23-22932

^ This table shows all proven court appearances for matters where the principal offence was s.11C *Summary Offences Act* and is not a count of distinct people

Legal Aid supports expansion of the use of penalty notices for custody of a knife offences given the above trends. However, to avoid detrimental consequences and disproportionate impact of infringement notices on vulnerable people, this **expansion should be considered in conjunction with:**

- **exemption** of certain knives as we have proposed to minimise the impact of prosecution and punishment of vulnerable people for possession of ‘everyday’ items;
- **expansion of the ‘reasonable excuse’ list** to specifically reference homelessness;
- strengthened obligations and guidance for police officers about when and how to exercise their **discretion** so that a reduction in court appearances.

While it may be outside the scope of this review, Legal Aid NSW has previously advocated for a **concession rate to penalty notices** issued to people on low incomes and suggested that “low income” could be defined as any person on income-tested Centrelink benefits.⁴¹

3.5 Alternative approaches to adult weapon offences – use of police powers (Q. 6.6)

Legal Aid considers that, given the suite of existing approaches, post sentence schemes and police powers noted in the Consultation Paper, any gap that exists to target low level offenders and the carrying of knives should be dealt with through broad community engagement and education.

Legal Aid supports educational and holistic responses to weapons related crime. We support evidence based, community developed and place-based initiatives which:

- recognise the unique needs of different communities;
- understand the complex social drivers of risk taking behaviour and crime, and need for program and support structures that are responsive to the specific needs of individuals and their community; and

⁴¹ See for example, Legal Aid NSW, Submission to the NSW Law Reform Commission Inquiry into Penalty Notices (2010).

- work to break the “criminal justice conveyor belt” cycle, which has been shown to compound existing disadvantage, create new disadvantage, and traps people, families and communities in that cycle.⁴²

Risks of increasing police powers – general observations

Legal Aid **opposes further expansion of police powers**. We also **urge caution** in the development of any scheme to target specific crime which relies on the exercise of police surveillance, search and arrest powers outside of the *Law Enforcement (Powers and Responsibilities) Act (LEPRA)*.

Rates of court appearance

A recent article in the Journal of Criminology by Don Weatherburn⁴³ looked at two key drivers of imprisonment rates in Australian states and territories – the rate at which people are arrested and brought before a court (the court appearance rate) and the fraction of those appearing who were sentenced to a full-time custodial penalty (the imprisonment rate). The author concluded that the primary driver was court appearance rates, which “*suggests that differences between the States and Territories in crime and policing policy are major contributors to the difference in their rates of imprisonment.*”⁴⁴

Of all jurisdictions, Victoria had the lowest court appearance rate. NSW was shown to have higher rates of court appearance in 12/16 offence categories, with rates more than twice those of Victoria in the categories of ‘acts intended to cause injury’, public order offences and illicit drug offences. The study concluded that if NSW adopted the Victorian court appearance rate (i.e. reduced the proportion of the population charged and put before a court) the prison sentence rate in NSW would fall by **23.7%**.

Measures which increase police powers will almost certainly lead to increased court appearance rates. This may lead to further police contact in already over-policed communities, and increased incarceration rates.

Impact of police powers based regimes

Historically in NSW, several schemes developed to target serious crime and specific groups of offenders have been **applied on a much broader scale than originally intended**, and in a manner which **disproportionately targets vulnerable people**, including First Nations people, those with cognitive impairment or intellectual disability, the mentally ill and children.

One example is the use of **Consorting laws**, which were introduced in 2012 as a suite of amendments to assist police to tackle organised crime and criminal gangs in response to

⁴² Centre for Policy Development (2020) ‘Report. Partners in crime: the relationship between disadvantage and Australia’s criminal justice systems.

⁴³ Weatherburn, D, (2022), ‘Interjurisdictional differences in Australian imprisonment rates: Sentencing or arrest rates?’ Journal of Criminology 55(4) p. 621-635 (‘Weatherburn’).

⁴⁴ Weatherburn, at p.623.

concern about drive by shootings. In a 2016 review of those laws, the NSW Ombudsman⁴⁵ found:

- evidence to indicate use by police officers in relation to a broad range of offending, including **minor and nuisance offending**.
- use of the consorting law in relation to **disadvantaged and vulnerable people**, including Aboriginal people, people experiencing homelessness, and children and young people.
- an **exceptionally high police error rate** when issuing consorting warnings in relation to children and young people.

The subsequent 2023 report by the Law Enforcement Conduct Commission (**LECC**) into operation of the Consorting laws found that, during the review period, **42%** of people who were the subject of consorting laws and **46%** of all warnings issued by General Duties police were to people who identified as Aboriginal.⁴⁶ LECC also found:⁴⁷

This review, and the Ombudsman's earlier review, have both shown that **police often use the laws to attempt to disrupt comparatively less serious potential criminal activity**, such as drug possession. The Commission has seen many examples where people searched by police on suspicion of drug possession are given an oral consorting warning and often a move on direction.

In a large number of cases ...there appears to be **no clear link between serious criminal activity and the warning issued**.

A separate report by LECC reviewing the NSW Police Strategic Direction 2018-2023 noted statistics for several types of policing interactions with Aboriginal adults and young people, such as STMP, strip searches, consorting warnings, bail refusals, bail compliance checks, and the issue of infringement notices for offensive language. The Commission reflected upon those statistics, finding that they highlight the way NSW Police force is policing Aboriginal communities may be undermining the aims of reducing Aboriginal overrepresentation in the criminal justice system, and improving the safety and wellbeing of Aboriginal young people. The Commission went on to observe:⁴⁸

Crucially, many of the types of policing interactions described above relate to pro-active policing. This means **officers have a substantial degree of discretion in how to choose to apply the law** when an offence is detected, and influence the way an interaction with the person of interest will proceed.... The statistics ... highlight that **currently, NSW police officers may be using their discretion in a way that causes more Aboriginal people to come into the criminal justice system**.

⁴⁵ NSW Ombudsman, The Consorting Law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900, April 2016, p.iii and Chapter 8.

⁴⁶ Law Enforcement Conduct Commission 'Review of the Operation of the amendments to the consorting law under Part 3A Division 7 of the Crimes Act 1900' (**LECC Review of Consorting**) p.39.

⁴⁷ LECC Review of Consorting, p.ii.

⁴⁸ Law Enforcement Conduct Commission, Aboriginal Strategic Direction 2018-2023 Monitoring Report p.36.

The use of powers under the Firearms Prohibition Order (**FPO**) scheme and recent LECC findings about the former Suspect Target Management Program (**STMP**) are also illustrative of the tendency of police powers-based schemes to produce adverse and discriminatory outcomes in vulnerable populations. We comment on each in further detail below at p.28 and 40.

Wandering powers

At this stage, Legal Aid **opposes expansion of police powers and broad use of ‘wandering’ without reasonable suspicion**. We observe that similar “targeted search” schemes have been implemented previously, with criticism about the manner in which they have been deployed and the low yield of relevant ‘finds’.

In NSW, the **drug detection dog scheme** was designed originally to target illegal drug supply⁴⁹ and has been the subject of criticism at various times since, including about its influence on drug use behaviour, invasions of privacy, harassment and illegal searches, and the undue targeting of the gay and lesbian community, users as opposed to dealers, and young people.⁵⁰ Recent figures obtained by the NSW Greens indicate that since 2012, police have conducted just under 95,000 searches following positive indication by a drug detection dog, with illicit drugs found in only **25%** of cases.⁵¹

We understand that the ‘wandering’ powers recently passed in the Northern Territory were not the subject of broad stakeholder consultation, and observe that the early review of the Queensland trial which the Sentencing Council has referred to⁵² found:

- **27.5%** of those ‘wanded’ were **under 18**
- no evidence of deterrent effect
- no quantitative data supporting changes in the type of weapon carried or severity of offences.

While we understand there may be some utility in use of metal detectors as an aid to an otherwise authorised and necessary person search, we are concerned that broad powers to search people without warrant or reasonable suspicion is likely to lead to discriminatory application. It may also inadvertently lead to escalation of interactions with police.

We suggest that before consideration of adoption of such measures, there is a **comprehensive review about the efficacy of ‘wandering’** in reducing knife crime and knife carrying, including examination of the associated costs, manner in which such power has been used by police, what those interactions yield, and the impact on individuals who are targeted and searched.

⁴⁹ Minister for Police, the Hon. Michael Costa, NSW Parliamentary Debates, Legislative Council, 6 December 2001, p.19745: ‘[t]he bill is drafted to recognise the need for police to use drug detection dogs to assist in identifying persons involved in the illicit drug trade and particularly those supplying prohibited drugs.’

⁵⁰ Lancaster, K, Hughes, C, Ritter, A (2016) ‘Drug dogs unleashed: An historical and political account of drug detection dogs for street-level-policing of illicit drugs in New South Wales, Australia, *Journal of Criminology* 50(3): [‘Drug dogs unleashed’: An historical and political account of drug detection dogs for street-level policing of illicit drugs in New South Wales, Australia - Kari Lancaster, Caitlin Hughes, Alison Ritter, 2017 \(sagepub.com\)](#)

⁵¹ [Latest sniffer dogs data more proof the program must be scrapped - Cate Faehrmann MLC](#)

⁵² Consultation Paper, p.102-103.

Post-Conviction schemes

Legal Aid **does not support** any further post-sentence regimes and **urges caution** about creation of such schemes which provide police with additional powers to stop, search and detain individuals. Consistent with our observations above, we are concerned that schemes designed for discrete purposes have a tendency to disproportionately impact on vulnerable people.

The ***Crimes (High Risk Offenders) Act 2006*** was initially intended to allow for the supervision of “a handful of high-risk, hard-core offenders who have not made any attempt to rehabilitate whilst in prison”.⁵³ Despite this, the regime has been consistently expanded with reduced safeguards and high rates of imprisonment for technical breaches of orders. Our analysis of available data⁵⁴ indicates that between July 2018 and July 2022, **99%** of persons the subject of an application had either a mental illness or cognitive impairment, with **31%** of all applications brought against a First Nations Person.

Specific concerns about Firearm and Weapon Prohibition Orders

Legal Aid is concerned about the operation of the Firearms and Weapons Prohibition Order schemes, because they can apply indefinitely, are largely non-reviewable, and have been found to be open to misuse by police.

We support prompt, comprehensive review of the FPO and WPO schemes by the LECC or the NSW Ombudsman.

While it may be outside the scope of this review, we consider criticism of the use made of such orders relevant to the Council’s consideration about the appropriateness of further police-based prevention and detection measures as a means of addressing weapons offending.

Findings of the NSW Ombudsman

In 2013, the *Firearms Act* was amended to provide police with the power to allow them to search for firearms, parts and ammunition without a warrant. Ostensibly, the aim of those powers was to assist police to ensure that individuals who had been issued with an FPO were complying with the terms of that order. The then Premier said “*Nothing in this legislation should concern innocent citizens of this state. This legislation will concern those who are involved in criminal activities involving guns.*”⁵⁵

In 2016, the NSW Ombudsman released a report about operation of the FPO scheme.⁵⁶ The report found that there were approximately 1,500 interactions where police used the powers to conduct searches. In those interactions police conducted over 2,500 separate searches.

⁵³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 March 2006, 21730, (Carl Scully, Minister for Police).

⁵⁴ Legal Aid NSW case work data and analysis of publicly available judgments.

⁵⁵ O’Farrell, B (17 September 2013) NSW Parliamentary Debates, Legislative Assembly, *Firearms and Criminal Groups Legislation Act 2013*,

⁵⁶ NSW Ombudsman, *Review of police use of the firearms prohibition order search powers: section 74A of the Firearms Act 1996* (August 2016) (**Ombudsman FPO Review**).

- More than half of the FPO searches were ‘person searches’. This is because police commonly searched a person at the same time as they searched a vehicle or premises that the person was occupying, or had under their control or management.
- Over a third of the searches were of vehicles and only 7% of searches were of premises.

A total of 634 people were subject to an FPO search during the 22-month review period. However, only 407 of those people were subject to an FPO; 227 were not. The Ombudsman found that Police conducted these searches on what appeared to have been an **erroneous application of the FPO search powers** and the searches **may have been unlawful**. The report found a **lack of clarity in police understanding** of the circumstances in which they are authorised to search an FPO subject:

The law permits an FPO search only when ‘reasonably required’ to determine if an FPO offence has been committed. **It is not a roving search power to be used randomly** on FPO subjects. In 14% of search events police may have proceeded on the basis that the FPO search powers authorised a search of a person solely because the person was an FPO subject.⁵⁷

During the 22 month review period, police found firearms, ammunition and firearm parts in only 29 search events, just **2% of the total interactions**, with **nothing was seized in 90% of search events** and the remaining 8% uncovered mostly small amounts of drugs and drug paraphernalia.⁵⁸

The Ombudsman considered it too early to tell if the FPO search powers were operating as an effective tool in policing firearms-related crime. In view of this, and the trend identified of increasing use of FPO search powers throughout the first two years of use, the Ombudsman recommended:

- changes to legislation to require **further independent and objective evaluation** of the effectiveness of the FPO search powers after they had been in operation for at least 5 years.⁵⁹ Noting the potential for the powers to be used arbitrarily remains, any future evaluation should include an **examination of whether the powers are being used appropriately and reasonably**.⁶⁰
- Development of internal procedures and practices that guide the way police use the FPO search powers to ensure that police use FPO search powers fairly and reasonably, including that FPOs should automatically **expire after five years**.⁶¹

To our knowledge, no further review has been conducted.

Continued misuse of FPO powers

⁵⁷ Ombudsman FPO Review p.iv, 8.

⁵⁸ Ombudsman FPO Review, p.10.

⁵⁹ Ombudsman FPO Review, Recommendation 15.

⁶⁰ Ombudsman FPO Review, p.10.

⁶¹ Ombudsman FPO Review, Recommendation 8.

LEPRA provides various statutory safeguards around the exercise of police powers, some of which do not apply to the conduct of an FPO search. Legal Aid has experience with several cases involving searches of FPO subjects and third parties where the concerns raised by the Ombudsman in 2016, including the use of orders to search third parties and failure to comply with Part 15 of LEPRA, continue to occur:

case – execution of FPO search

is an Aboriginal woman. In late 2022, brother was living with her, at her house. He was the subject of an FPO at the time. One afternoon, a large number of tactical police from Strike Force Raptor as well as local officers attended on 's residence for the purpose of executing their powers under the FPO.

answered the door, and police stated "Police FPO". As they entered 's premises, she asked them what they were doing, and asked to put her dog away so she would not be scared. She continued walking away from police. An officer told to "get against the wall", told her not to move, and to put her hands up against the wall. said "don't tell me to. What's this for?" Police continued to yell "Police FPO", and "FPO". Police forced against a wall, took her outside, and took her to the ground where they frisk searched her on the front lawn.

Following the exchange, was issued with a penalty notice for offensive behaviour. sought assistance from Legal Aid. She elected on the penalty notice, and was granted legal aid for a hearing.

Representations were made on 's behalf asserting that police had failed to comply with Part 15 of LEPRA, and that the frisk search of her was illegal because she was not the subject of the FPO, nor did police have reasonable suspicion about her. She was also not afforded privacy and dignity during the search contrary to s.32 of LEPRA.

The prosecution withdrew the charge against .

Indefinite nature of FPOs and manner in which powers are often exercised

In *R v Smith*, Conlon ADCJ noted concerns about the manner in which an FPO had been used. His Honour referred to the fact that the FPO had been executed by officers from Task Force Raptor at the offender's new home while his partner was 37 weeks pregnant, and that upon locating a camping knife he was "arrested and taken up the street in his pyjamas before being denied [police] bail." His Honour observed that the charge was ultimately withdrawn as the item was a camping knife "and not a prohibited weapon at all."

Of the offender's treatment, his Honour said "[i]n my time as a Judicial Officer I cannot recall an occasion when I have been more concerned to restore some justice to an offender rather than to further punish him."

His Honour acknowledged that FPOs are an important tool for law enforcement authorities, and that applications are generally made in respect of persons with significant criminal histories, those with links to organised crime, and those with involvement in firearm-related crime, but that "[t]his offender comes nowhere near such a category."

His Honour observed “[a]n FPO has no expiry date. One wonders if he and his family will continue to be subject to such intrusions.”

Immediate searches and overcharging

Despite usual practice⁶² being that police should provide a person opportunity to surrender any firearms or ammunition they possess following service of an FPO with amnesty from charges because of the short timeframe between service of the order and search, in our experience this does not always occur:

case – service away from home and immediate execution of FPO search

was at a medical practice with his child who was sick. Police attended the practice and served him with an FPO. By the time arrived home, the police were already searching his residence. They located a bullet in the garage, but no other items of interest.

was arrested, charged with acquiring/possessing ammunition while subject to a FPO s.74(1), an offence with a maximum penalty of 5 years’ imprisonment. He was refused police bail.

later pleaded guilty to possession of ammunition, a fine only offence.

Our concerns with FPOs specifically in relation to Young People are set out below at p.41.

In terms of WPOs, we are unaware of any review having been conducted of that separate but related regime. However, we hold similar concerns.

3.6 Characteristics of adult weapons offenders (Q. 6.7)

In our Preliminary submission, we observed that many weapons offences, and in particular low level knife or weapon possession offences, tend to disproportionately impact on vulnerable people from low-socioeconomic areas. We have conducted a review of available Legal Aid data and can provide the following additional demographic information.

We reviewed **in-house duty service data**⁶³ and **grants approved**⁶⁴ for summary knife and other weapons matters in the Local and Children’s Courts in 2022-2023. We also looked at the proportions over 2018-November 2023 to compare the most recent demographics data with longer term trends.

⁶² NSW Police response to the NSW Ombudsman Review of police use of the Firearms Prohibition Order search powers, Ombudsman FPO Review, p.55.

⁶³ Including only duty services provided by in-house Legal Aid where the primary matter type was summary knife or other weapons offences. It does not include duty services provided by private lawyers under the Duty Solicitor Scheme. Demographic data accuracy is limited by information available and identification by the client.

⁶⁴ Including matters where a grant of legal aid was approved for expenditure, including for appearance at summary defended hearing (over 50% of all grants).

Our data showed⁶⁵ that, on average, of the included duty and grant services for summary knife and weapon matters between 2018 to 2023:

- between **3-5%** of people identified as **homeless** at the time of service.
- between **18-27%** of all clients identified as **Indigenous**, with rates for 2022-23 notably higher than over the longer term, particularly for knife offences.
- between **35-42%** of all clients identified that they had a disability, with rates for 2022-23 notably higher than over the longer term.
- between **17-29%** identified as having a **mental health condition or mental illness**.
- between **8-13%** of all services were provided to a person **under 18**.

⁶⁵ Demographic data accuracy is limited by the information available at the time of service is provided.

4. Children and Young People

4.1 Diversion

Pre-court diversion options (Q. 2.1)

Legal Aid is **supportive of pre-court diversion** for Young People. Two issues we invite the Sentencing Council to consider are:

1. Police diversion, while discretionary, appears to be **inconsistently applied**. Whether a Young Person (**YP**) is diverted seemed to depend to a large degree on the attitude of local police, and in particular the Youth Liaison Officer (**YLO**).
2. In our experience, police are often **reluctant to refer a YP to a Youth Justice Conference (YJC)** where there is no ‘victim’ – this is common where the offence relates to mere possession of something, such as a knife. In our view, this is a lost opportunity for education and diversion.

Court diversion options (Q. 2.2)

In our experience, some Magistrates are **reluctant to refer a YP to a YJC where there is no ‘victim’**. While this is less common with Specialist Children’s Court Magistrates, our solicitors report it can be an issue with some regional Local Court Magistrates who will sit as a Children’s Court at times.

In our view, there are many benefits to a YJC, beyond restorative justice for a victim. It provides a YP with opportunities to participate in the development of a conference plan, with the benefit of input from Youth Justice and other support services. It provides important opportunities for learning, reflection and a measure of accountability given outcome plans are submitted to the Magistrate and there is follow up if that plan is not completed.

As we outline further below, **Legal Aid supports greater use of the existing YJC scheme** as a means of engaging and educating YP about the risks and consequences of knife and other weapon offences.

4.2 Maximum penalties for children

Children’s Court penalties (Q. 3.1)

Legal Aid supports the current range of penalties open to the Children’s Court to impose. The *Childrens (Criminal Proceedings) Act 1987 (CCPA)* provides a range of options, complemented by options under the *Young Offenders Act 1997 (YOA)*.

Youth Koori Court (Q. 3.2)

Legal Aid does not appear in the Youth Koori Court (**YKC**) sentences but provides supportive civil law services to young participants through our Children’s Civil Law Service (**CCLS**). CCLS provides a solicitor at each sitting of the YKC at Surry Hills and Parramatta Children’s Courts.

The solicitor conducts a Legal Health Check with the client (subject to consent) to identify any civil law needs. Where appropriate, and with client consent, the civil law issues may be included in the Action and Support Plan at the conference stage. The CCLS solicitor will advise and engage with the YP during the review period and report back to the court on their civil issues if they appear in the Action and Support Plan.

We note that many YP who end up in the criminal justice system will have developed significant trust issues with agencies including the Department of Communities and Justice (formerly known as FaCS), which can severely limit their capacity to engage with other services. Legal Aid **supports** the continuation of holistic, trauma informed, and culturally safe practices which support the unique needs of young Indigenous people entering the criminal justice system.

Sentencing principles (Q. 3.3, 3.4 and 3.5)

Legal Aid is of the view that the principles currently applied to sentencing young people for weapons offences are appropriate. We **oppose adoption of the UK approach, which prioritises deterrence and protection of the public following the principles in *R v Povey*.**

The “maturity gap” between cognitive and psychosocial development has now been widely described.⁶⁶ Whereas cognitive capacity reaches adult levels around age 16, psychosocial maturity reaches adult levels beyond (sometimes, to a striking degree) age 18, suggesting that adolescents and young adults are still developing in ways that should influence their culpability in criminal proceedings.⁶⁷

In *MS2 & Ors v Regina* [2005] NSWCCA 397; 158 A Crim R 93 Adams J identified two of the reasons that the youthfulness of an offender is considered to be a significant factor in sentencing. The first is the “substantial public interest in the rehabilitation of young offenders”. The second is “that immaturity is relevant to culpability or criminality” because “children do not have adult value judgments, adult experience, adult appreciation of consequences”.⁶⁸

In our view, the UK Sentencing Guidelines around *Povey* call for an approach which is inconsistent with well-established NSW sentencing principles for children, and cannot easily be reconciled with the requirement to find all other sentences ‘wholly inappropriate’ before sentencing to full time control. The adoption of offence-based guidelines which elevate principles of deterrence would also undermine the statutory principles of the *Childrens (Criminal Proceedings) Act* (‘the section 6 principles’), which echo the articles of the *UN Convention on the Rights of the Child* to which Australia is a signatory.

⁶⁶ Icenogle G, Steinberg L, Duell N, Chein J, Chang L, Chaudhary N, Di Giunta L, Dodge KA, Fanti KA, Lansford JE, Oburu P, Pastorelli C, Skinner AT, Sorbring E, Tapanya S, Uribe Tirado LM, Alampay LP, Al-Hassan SM, Takash HMS, Bacchini D. (2019). Adolescents' cognitive capacity reaches adult levels prior to their psychosocial maturity: Evidence for a "maturity gap" in a multinational, cross-sectional sample. *American Psychological Society: Law and Human Behaviour*. 43(1), p.69-85. Available at: <https://psycnet.apa.org/manuscript/2019-08477-003.pdf>

⁶⁷ Icenogle et al, above n 66, p.32.

⁶⁸ at [15]-[17].

We also note that the social and cultural context of knife and weapon crime in the UK is different to our own. There are vast distinctions in the nature and drivers of weapon offending amongst young people, even within our own country. The reasons for these differences do not yet appear to be well documented or understood.

In our view, there is an insufficient evidence base to conclude that harsher penalties or the approach adopted by the UK would result in any behaviour change or relevant reduction in crime in NSW.

We **support further research** into the drivers of knife and weapon crime among youth in NSW, and evaluation of alternative, place-based responses to more punitive and general sentencing measures.

4.3 Young offenders – prevalence and characteristics (Q. 4.1)

Prevalence of offending

Crime trends and context

The Issues paper makes the observation that, despite general downward trends in weapon offences among 10-17 year olds, community concern about the incidence of YP committing weapons offences persists.

We acknowledge that the public is entitled to feel safe and that there have been increases in some recent statistics, such as the number of YP dealt with by police for prohibited weapon and regulatory offences (Fig 4.3). Trends also indicate an acute rise in police proceeding against young people for certain types of crime, like break and enter, since 2020.⁶⁹

When reviewing statistics however, it is important to consider the potential impact of external factors such as increased policing of YP (for example, through increased use of FPOs and the Suspect Target Management Plan during those periods), and the impact that a rebound from covid-19 lockdowns and social restrictions may have had in terms of opportunity and likelihood of detection. Increases in rates may signal increased detection as opposed to prevalence.

Importance of community education

Community expectation and confidence in the justice system is important. We acknowledge the small number of very serious matters in recent years involving the death or serious injury caused by a young person (or persons) with a knife, and the impact that such tragic cases have on victims, families and the broader community.

We suggest though that **caution should be exercised before resorting to broad “law and order” responses** to a discrete number of high-profile incidents.

⁶⁹ BOCSAR – most common offences for young people proceeded against by police – 2018-2022 [Young people \(nsw.gov.au\)](https://www.nsw.gov.au)

There is now an abundance of research which suggests that a **significant proportion of the community is misinformed about crime and sentencing**.⁷⁰ Large-scale surveys of public opinion about crime and punishment in the United States, UK, Canada, Australia and New Zealand have led researchers to conclude that **the public has very little accurate knowledge about the criminal justice system, with extensive misperceptions about the nature and extent of crime**.⁷¹ A paper by the Victorian Sentencing Advisory Council in 2008 reported that consistent results from studies exploring public opinions about crime show that people tend to:⁷²

- perceive crime to be **constantly increasing**, particularly crimes of violence;
- **over-estimate** the proportion of recorded crime that involves violence;
- **over-estimate** the percentage of offenders who reoffend; and
- **under-estimate** the severity of sentencing practices such as the incarceration rate.

That study concluded that the lack of knowledge about crime and the criminal justice system is a significant factor perpetuating public misconception and misunderstanding, and that people tend to learn about crime and the system through mass media, responding to messages about crime and social order that are conveyed in tandem by politicians.⁷³

As former Chief Justice Bathurst AC notes:⁷⁴

*“..it is trite but true to point out that **it is only the unusual, controversial or macabre cases that the public hears about. There are hundreds, if not thousands, of other criminal cases dealt with each year before our courts that never receive publicity. This naturally skews perceptions. Further, media coverage of the cases that do garner public attention is often selective. The judicial reasons given, the submissions of the prosecution, and the many factors which a judge must have regard to in sentencing, are rarely mentioned.**”* (Emphasis added)

Studies have shown the people who think sentences are too lenient are more likely to be less knowledgeable about crime and imprisonment rates, and that when presented with accurate information and asked to deliberate on cases the majority select a sentence that is the same, or more lenient, than the sentencing judge.⁷⁵

Despite apparent punitiveness, research has also found that the **public believes that the most effective way to control crime is via programs such as education and parental support, rather than via criminal justice interventions**.⁷⁶

⁷⁰ See for example Roberts, J, Stalans, L, Indermaur, D and Hough, M, (2003) *Penal populism and public opinion: Lessons from five countries*. Oxford: Oxford University Press; Butler, A and McFarlane, K, *Public confidence in the NSW criminal justice system*, Monograph 2, NSW Sentencing Council, Sydney, May 2009, p 15; Jones, C, Weatherburn, D, and McFarlane, K “Public confidence in the New South Wales criminal justice system”, *Crime and Justice Bulletin*, No 118, NSW Bureau of Crime Statistics and Research (BOCSAR), August 2008, pp 5–6

⁷¹ Roberts et al, above n.70.

⁷² Gelb, K, (2008), ‘More Myths and Misconceptions’ *Victoria Sentencing Advisory Council*, p.4.

⁷³ Gelb, above n72, p.6.

⁷⁴ Bathurst, T F (2021) ‘Community Confidence in the justice system: the role of public opinion.’ *Handbook for Judicial Officers – Publicity and Social Criticism* (Updated 1 October 2021). Available: [Community confidence in the justice system: the role of public opinion \(nsw.gov.au\)](https://www.nsw.gov.au/community-confidence-in-the-justice-system-the-role-of-public-opinion)

⁷⁵ Roth, L (2014), ‘Public opinion on sentencing: recent research in Australia.’ *NSW Parliamentary Service e-Brief 08/2014*, p.10.

⁷⁶ Gelb, K, (2006) ‘Myths and Misconceptions: Public opinion versus Public Judgment about sentencing’ *Victoria Sentencing Advisory Council*

We respectfully adopt the observation of the former Chief Justice, that “[e]motional responses by the community based on misinformation are sincerely held and understandable, but they cannot shape the administration of criminal justice.”⁷⁷

Legal Aid **supports** development of well-informed social discourse about youth offending through:

- community education which focuses on the objective measures and known drivers of crime, and
- development of evidence-based responses that will produce longer term change for young people and their communities, as opposed to short term incapacitation.

Characteristics of offenders

We echo the observations in the Issues Paper⁷⁸ that, of the young people who in fact carry weapons on them, they often report doing so for reasons related to self-protection because they have been victimised themselves. case is illustrative:

case – carrying a taser after experiencing abuse

Legal Aid NSW represented a boy who was appearing before the Childrens Court on a charged of posses prohibited weapon (a taser).

The taser came to police attention after police stopped and searched . immediately told police that his mother had given him the taser for protection. He advised police that she had given him the taser after an incident where he had been sexually abused by a paedophile in a public toilet and had developed a fear for entering toilet blocks.

Police arrested and refused him bail. He remained in custody overnight and came before the court the next morning. ’s Legal Aid NSW lawyer was able to obtain evidence which supported his claim that he had previously been sexually abused in a public toilet.

A plea of guilty was entered on that day and the material supporting his claim was tendered in mitigation. The offence was dismissed with a caution on the condition that entered into a bond for a period of 9 months (pursuant to section 33(1)(A)(ii) of the CCPA).

4.4 Sentencing Outcomes (Q. 5.1)

We are of the view that the sentencing outcomes for the focus offences indicate the Courts are appropriately utilising the full range of sentencing options.

We observe that variations in the proportion of custodial penalties for more serious offences such as Robbery with an offensive weapon reflect the extremely wide range of circumstances in which an offence can be made out. For example, it may not be widely apparent within the

⁷⁷ Bathurst, above n 74.

⁷⁸ at p55-56.

community that such an offence may be made out by facts involving a 14 year old taking \$20 off another young person at a skatepark while holding a stick.

Legal Aid considers that **community education** about the nature of items that may constitute an “offensive weapon” and broad range of conduct that could amount to an offence **may assist in correcting misconceptions** about ‘lenient’ sentence outcomes.

4.5 Reform options

Increased penalties and mandatory sentences (Q. 6.3 and 6.4)

Legal Aid **opposes increased penalties and the introduction of mandatory and/or minimum sentences** for young people for the reasons set out above at p.11.

We note the Issues paper identifies that a review of the UK mandatory minimum laws found no clear evidence that it had any deterrent effect on the levels of knife crime carrying.⁷⁹

Sentencing options under the Children’s (Criminal Proceedings) Act (Q. 6.5)

Legal Aid **does not support the use of electronic monitoring (EM)** for children and young people. While in theory the use of EM may restrict the movement of young people into designated areas, we are unable to find evidence suggesting it reduces the incidence of weapon carrying. We have concerns that use of EM may produce harm which outweighs the intended benefits.

In November 2017 the Royal Commission into the Protection & Detention of Children in the Northern Territory recommended that electronic monitoring conditions should only be considered as a last resort, when there is no other alternative to remanding a young person in detention.⁸⁰ The Commission recognised that **EM carries complex social stigmas** that have the potential to undermine the rehabilitation of a young person by preventing them from engaging in pro-social activities.

Since the Royal Commission, it has been suggested that data from electronic monitoring of young people has increasingly used in investigations of potential further offending, cutting across the rehabilitative principles of youth justice.⁸¹ Additionally, the availability and practicality of electronic monitoring is not equal between urban and remote communities, creating disadvantages for many Aboriginal Territorians living remotely.

Despite growing interest in the use of EM programs particularly in domestic violence offending, there are very few broad, qualitative studies about the impact of EM on offenders. Themes identified in existing studies suggest impacts beyond the EM technology and the program itself,

⁷⁹ Issues Paper, p.67.

⁸⁰ *Royal Commission into the Protection and Detention of Children in the Northern Territory*, Recommendation 25.17.

⁸¹ Colliver, E. 2019. Digital shackles or rehabilitative technology? Electronic monitoring in the Northern Territory’s youth justice system. Presentation to Australian & New Zealand Society of Evidence Based Policing Conference (ANZSEBP), March 18. [Digital shackles or rehabilitative technology? Electronic monitoring in the Northern Territory’s youth justice system \(globalebpconference.com\)](https://www.globalebpconference.com/)

reaching into areas of daily living such as employment and relationships, as well as psychological impacts of stigma, and emotional distress.⁸²

Legal Aid is **supportive of programs designed to impact attitudes towards knife crime**, but notes that there are options to integrate such content into existing sentence options under the YOA and the CCPA, such as caution bonds with conditions to complete the program, and YJCs with the program nominated as part of the outcome plan.

Knife Crime Prevention Orders (Q. 6.6)

Legal Aid is **opposed to measures like the UK Knife Crime Prevention Order (KCPO)** scheme, insofar as it facilitates increased police power to conduct stops, searches and surveillance.

We note that the more ‘rehabilitative’ and ‘educative’ aspects of a KCPO, such as restorative justice activities, attendance at counselling, engagement with a youth mentor are **all available under existing sentences such as bonds and YJCs**. In addition, pursuant to cl.8(1) *Children (Criminal Proceedings) Regulation 2021*, a s.33(1) bond or probation order can include limits or prohibitions on the child from:

- associating from specified persons (f)
- frequenting specified premises (g); and
- conditions relating to other matters the court considers appropriate (i)

Additionally, s.33D CCPA provides for non-association and place restriction orders.

The Issues Paper identifies concerns and criticisms expressed by several UK organisations about the disproportionate impact of KCPOs on “black” children and that it falls short of a public-health based approach.⁸³ Despite being described during Parliamentary debates as “[giving] the police the power...to seek an order from the court, on a civil standard of proof, so the state can wrap its arms around children...if they are at risk of carrying knives frequently..” the Bill purported to achieve this by ‘placing negative and positive requirements on children who do not necessarily have a criminal conviction, to try to drag them away from the gangs...identifie[d] as being central to this criminality.’⁸⁴

There have been concerns raised by legal academics that KCPOs are likely to contribute further to the over-policing of Black, Asian and minority ethnic communities through measures like the use of alleged compliance-ensuring techniques such as surveillance and heightened stop and

⁸² Hwang, Y. I. J., Simpson, P. L., & Butler, T. G. (2021). Participant experiences of a post-release electronic monitoring program for domestic violence in New South Wales, Australia. *Journal of Criminology*, 54(4), 482-500.

⁸³ Issues Paper, p.69.

⁸⁴ UK Parliament, Hansard Vol 654 (4 February 2019) *Knife Crime Prevention Orders*. Available: [Knife Crime Prevention Orders - Hansard - UK Parliament](#)

search. They are concerned that such measures are also liable to result in more Black children subject to a KCPO being disproportionately found to be in breach.⁸⁵

We have particular concern that such orders, while made by a judicial officer, would **in practice result in similar over-policing of vulnerable young people to that observed with STMP, consorting, and FPOs.**

STMP and children

In 2018, LECC began investigating the use of the Suspect Target Management Plan (**STMP**) by police in response to concerns that it was being applied in a discriminatory manner and being used as an unlawful justification to stop and search young people.⁸⁶

In 2020, an Interim Report was published, which found that the STMP had been applied to 429 young people over a 2 year period, showed patterns of targeting that appeared to have led to unreasonable, unjust, and oppressive interactions for young STMP targets,⁸⁷ and had the insignia of being unreasonable, unjust, or oppressive.⁸⁸

The interim report made 15 recommendations to the NSW Police Force to improve how police used the STMP on children and young people. The NSW Police Force accepted all 15 recommendations and in November 2020, implemented an updated STMP policy, called STMP III.

In June 2021, LECC commenced further review to understand the changes introduced under the STMP III, and how police had applied the STMP III to a statewide cohort of 133 young people. In its Final Report, LECC observed:⁸⁹

Disappointingly, despite the policy changes the NSW Police Force implemented under STMP III, the second stage of our investigation found that **little had changed** in the way police used the STMP on young people.

We found considerable confusion about what powers police relied upon when undertaking STMP policing activities.

Police records lacked detail about the legal basis for some interactions, and we found some records that suggested interactions were, or **may have been unlawful**, because officers had **acted beyond their statutory powers** when interacting with young people on the STMP.

The Commission is **deeply concerned** that despite references in some sections of the STMP policy that say officers must act within legislative limits (such as powers to search set out in LEPR), **in practice, the way the STMP policy was applied to young people encouraged officers to act beyond their statutory powers.** (Emphasis added).

⁸⁵ Hendry, J (2022) 'The Usual Suspects': Knife Crime Prevention Orders and the 'Difficult' Regulatory Subject, *The British Journal of Criminology*, 62(2), p. 378–395. Available: [The Usual Suspects': Knife Crime Prevention Orders and the 'Difficult' Regulatory Subject | The British Journal of Criminology | Oxford Academic \(oup.com\)](https://doi.org/10.1093/bjc/azaa001)

⁸⁶ Law Enforcement Conduct Commission, *Operation Tepito Final Report: An investigation into the formulation and use of the NSW Police Force Suspect Target Management Plan on children and young people*, (October 2023) (**LECC Final STMP Report**), p.7.

⁸⁷ Law Enforcement Conduct Commission, *Operation Tepito Interim Report: An investigation into the formulation and use of the NSW Police Force Suspect Target Management Plan on children and young people* (January 2020) (**LECC Interim STMP Report**), p 11.

⁸⁸ LECC Interim STMP Report, p.62.

⁸⁹ LECC Final STMP Report, p.9.

In finding that STMP was “*unreasonable, unjust, oppressive and may have been improperly discriminatory in its effect*” LECC observed that the way STMP was used:⁹⁰

- undermined the statutory and common law frameworks designed to minimise the entry of young people into the criminal justice system;
- that the STMP target selection process likely contributed to gross overrepresentation of young Aboriginal targets; and
- that there was “incontrovertible evidence”⁹¹ that some young people subjected to the STMP experienced patterns of policing interactions that **unduly monitored them**. The STMP policy was “*intrusive and disruptive to their day-to-day existence in a manner that was unreasonable.*”

LECC found that police:⁹²

- “**mostly ignored**” the complex needs of young STMP targets, and that strategies used by police demonstrated a “**continued inattention**”⁹³ to the specific characteristics of young people with complex needs, such as cognitive impairment or mental health related issues.
- most commonly dealt with young STMP targets using targeting strategies and interactions from toolkits that **encouraged police to be highly intrusive** in the life of the YP
- prioritised policing strategies that tended towards young people **experiencing increased interactions** with the criminal justice system **and increased the likelihood of incarceration**
- often **did not make accurate or complete records** of their interactions with young STMP targets. Police records showed that officers had a poor understanding of the basis for conducting STMP home visits, and yet police commonly used this action as a strategy to manage young STMP targets.

LECC also noted that the proportion of Aboriginal young people in the investigation cohorts over several years remained extremely high, and the NSW Police Force “*did not appear to have any practical strategies for addressing this*”.⁹⁴

FPOs and children

In addition to the concerns outlined above at p.28 about FPOs generally, we are concerned that FPOs appear to be increasingly used against children. Anecdotally, our lawyers report orders being made against children in circumstances where they have no history of firearms charges or convictions. Such an approach does not seem consistent with the original intent of the

⁹⁰ LECC Final STMP Report, p.9

⁹¹ LECC Final STMP Report, p.10.

⁹² LECC Final STMP Report, p.13-14.

⁹³ LECC Final STMP Report, p.10.

⁹⁴ LECC Final STMP Report, p.10.

legislation, to “*tackle criminals with guns...who are involved in criminal activities involving guns.*”⁹⁵

Some evidence exists that FPOs may have been **used as a strategic tool to proactively police young people**. The LECC Final report in Operation Tepito noted that the STMP policy encouraged police to engage in intensive proactive policing strategies, including “*using statutory powers to increase their interaction with the target – such as ... firearms prohibition order checks and issuing consorting warnings.*”⁹⁶

The searches which then flow from FPOs can be highly disruptive to young people and their families. For example, one young client in regional NSW was subjected to two separate searches of the family home within 2 hours of service of the order.

The impact of an FPO on a YP is exacerbated by the fact that, unlike most adults, they have no external review rights.⁹⁷ This is **at odds with principles of procedural fairness**, and our obligations under international law.⁹⁸

– on an FPO – search of home and resist charge

Our client is a [redacted] Aboriginal boy with an intellectual disability. He was sentenced for firearms charges involving a toy gun, which led to the Commissioner making a Firearms Prohibition Order against him.

Internal review of the order was sought unsuccessfully. An application was then made to NCAT where submissions were made that the legislation should be interpreted to allow for external review. That application was dismissed.

The day after the order was made, police chose to exercise powers of search by attending [redacted] home at 6:00am. The search of the home, which [redacted] shared with several family members, was undertaken by 10 police officers, and described by the [redacted] as like “a raid”. No firearms were found, but [redacted] and two of his family members were charged with Resisting police during the search.

case – FPO and WPO

[redacted] is a [redacted] Aboriginal young person who lives in rural NSW. He had been dealt with in the Children’s Court for firearms offences involving an air rifle. He had been filmed by another [redacted]

⁹⁵ O’Farrell, B (17 September 2013) NSW Parliamentary Debates, Legislative Assembly, *Firearms and Criminal Groups Legislation Act 2013*, 23564.

⁹⁶ LECC Final STMP Report, p.6.

⁹⁷ Under s.75 of the *Firearms Act*, a person may apply to NCAT for administrative review of an FPO. However, under s.75(1A) a person may not apply for review if they would not be entitled to issue of a licence as a disqualified person under s.11(5) of the Act – this includes a person who is under 18, who under s.11(5)(a) is not to be issued a firearms licence.

⁹⁸ E.g. International Convention on the Rights of the Child, Article 12.2: “...the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”; Article 16.1: “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.”

young person firing the air-rifle at his dad's house and towards another young person he knew who was riding a bike. The video was provided to police, which resulted in the charges being laid.

had no history of receiving control orders, and no other firearms offences.

was later served with both a FPO and a WPO. Immediately following this, his grandmother's home (where he resided) was searched. Nothing was found, and no person search was undertaken.

says he has "always been stopped and searched" by police, but since being served with the prohibition orders, this has been happening more often. says he has been stopped and searched by police about 5 times over the month following service of the order. Nothing has ever been found.

case – threat of a FPO despite no prior offences

has been on bail in the Children's Court for unrelated offences. He has no record of firearms offences. was arrested by police for breach of a bail condition. While in custody, spoke to a Legal Aid lawyer, and reported that police had searched his phone and found a photo of him holding a gel-blaster. was not charged with any offence related to the photo, but police told him they might put him on a FPO because of it.

A month later, was arrested for another breach of bail spoke to the same Legal Aid lawyer and reported he hadn't been put on an FPO since last time, but that police were still talking about it and told him it could still happen.

Legal Aid urges the Sentencing Council to consider recommending prompt and independent review of the FPO and WPO regimes by the NSW Ombudsman or Law Enforcement Conduct Commission.

Penalty notice offences for children (Q. 6.7)

In debates about the Knife Crimes Amendments, members of Parliament who supported the Bill indicated understanding that police would retain the discretion to issue penalty notices, and that children would not be impacted because they would still be eligible for diversion options under the YOA. However, as the Issues Paper notes, by moving the offences into the *Crimes Act*, the amendments have:

- removed the availability of penalty notices for young people, and
- removed police power to issue a caution under the *Young Offenders Act*

Legal Aid has previously opposed use of infringement notices for certain offences against children, particularly those under 14 years of age (who are presumed to be *doli incapax*) and where other diversionary options are available under the YOA.⁹⁹

⁹⁹ Legal Aid NSW Submission, 'Fraud and fraud related offences in NSW', Submission to the NSW Sentencing Council (November 2022).

However, for the reasons noted above at p.21, and given the previous availability to children for offences under s.11C and s.11E, we **support restoration of the penalty notice option to children** under the *Criminal Procedure Regulation*.

We also **support strengthening of the obligations of police to consider all available diversionary alternatives** for children before the issue of a penalty notice or decision to proceed to court.

We also **support** the recommendation of the NSW Law Reform Commission that penalty notices be set at **25% of the adult penalty**. Fines can a cumulative impact on children (especially as Revenue NSW will generally not take action until a child turns 18, before which, they are often unaware of mounting debt), and so reduction in penalty notice amounts would assist in reducing debt burden while providing other low level penalty and diversion.

Police powers to conduct random searches (Q. 6.10)

Legal Aid **does not support** increased police powers to conduct random searches of young people. We have noted above our concerns about wandering, generally.

We note a UK College of Policing report¹⁰⁰ looking at data from the London Metropolitan Police from 2004-2014 found only a weak relationship between stop and search and overall levels of the types of crimes the practice aimed to reduce. Increasing levels of weapon searches were found to sometimes lead to marginally lower-than expected rates of violent crime in the following week, but not beyond. The authors concluded that there was **limited evidence about the effectiveness of stop and search on crime rates**, and that **to have even a modest impact on crime rates would require massive expansion of stop and search** of a scale likely to be unacceptable to some communities.

The paper concluded that *"any benefits derived from such increases would also need to be offset against the associated costs (ie, financial, opportunity and to public trust) and weighed against their likely unequal impact on different communities."*¹⁰¹

Targeted rehabilitation, restorative justice and integrated approached (Q. 6.8, 6.9 and 6.11)

Efforts to intervene early, divert, rehabilitate, and reintegrate young people and adults involved in the criminal justice system are often impeded by various challenges associated with lack of coordination across siloed health, criminal justice, and welfare systems.¹⁰² Legal Aid acknowledges the range of expertise within the community, and **supports broader consultation about youth crime responses outside the narrow lens of sentencing**.

¹⁰⁰ Quinton, P, Tiratelli, M, and Bradford, B. (2017), *Does more stop and search mean less crime?*, London: College of Policing. Available [here](#).

¹⁰¹ Quinton et al, above n 100 p.4.

¹⁰² Dowse L., Cumming T. M., Strnadová I., Lee J.-S., Trofimovs J. (2014). Young people with complex needs in the criminal justice system. *Research and Practice in Intellectual and Developmental Disabilities*, 1(2), 174–185.

We strongly support the development of a **better understanding of the social drivers** that encourage children to engage in weapon possession and risky behaviour, and evidence-based holistic responses. We are of the view that such responses must acknowledge the special vulnerability of young people, the wider impact of social disadvantage, and the influence of intergenerational trauma.

Legal Aid **supports interventions which are developed with local community consultation, have an educative focus, and are accompanied by properly funded social supports.** We **endorse the observations of Youth Justice NSW** that increased access to supports such as housing, education, and employment are more effective than more punitive strategies in reducing rates of weapon carrying among young people.¹⁰³

While we have expressed several concerns about increased police powers as a response to weapons offences, we remain of the view that **police can play a positive and important role** in rebuilding trust within communities, and that positive interactions with police have the potential to influence generational change. We **support** the increased use of police diversion, and use of YJCs to facilitate participation in programs and educational outcomes.



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¹⁰³ Youth Justice NSW, *Preliminary Submission PWE07*, p.2.


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




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Gel Blaster NSW - FAQs

Can I order gel blasters if I live in NSW?

Unleash your tactical creativity and instincts with gel blasters! If you live in New South Wales, you can buy gel blasters and related supplies online.

Gel guns in New South Wales are regarded as a restricted device. This means you will need appropriate clearance to legally own and use gel ball blasters in Sydney. Gel Blasters are classified as an Air Rifle and therefore a Category A Firearm in New South Wales and require appropriate clearance. [For more information, click here.](#)

If you are located close to the border, than you are more than welcome - to come and purchase in Queensland, and store your purchase in QLD territory.

Browse and purchase all of your gel blasters and Gelsofts in NSW, as well as accessories and tactical equipment, at Tactical Edge Hobbies.

Where can I buy a gel blaster in NSW?

You only need to know one name for buying all of your gel blasters in Australia NSW, legally; Tactical Edge Hobbies. You can conveniently buy online, at any time. Simply browse our online shop and make your purchase.

How long will it take for my gel blaster to arrive?

Tactical Edge Hobbies will need 1-3 business days to handle and process your order. We may need some additional processing time during peak season, and we reserve the right to exceed these conditions under certain circumstances.

Standard shipping to New South Wales will take a further 4 business days. For express shipping, please use the shipping information on the Australia Post website for your exact location.

Where can I play gel blaster skirmish in NSW?

You can play gel blaster skirmish in NSW at specialised venues. Otherwise, you can visit interstate to Queensland -the closest Gelsoft venue to the NSW border is Gelsoft Australia.

But there are many more options than one - simply do an online search for gel blaster skirmishes in NSW near you, and you'll be inundated with results. Find the right spot to exercise your tactical tendencies in no time.

Are gel blasters legal in NSW?

Gel blasters are legal in NSW, as long as you have the correct license for them.

The gel blaster laws in NSW decree that gel blasters are a restricted device. This means it's an offence to possess or use an unlicensed gel blaster.

Can I get fined for using a gel blaster in NSW?

Gel blasters are classified as a restricted device. This means, if you use it incorrectly or own one without the proper license, you can and will get fined for your gel blaster in NSW.

If you are located close to the border, than you are more than welcome - to come and purchase in Queensland, and store your purchase in QLD territory.

DISCLAIMER: The contents above do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such.

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NSW Police Force

30 August 2022

Dear Parents,

Gel Blasters in New South Wales

New South Wales Police would like to highlight an emerging issue which many of you might not be aware of.

Gel Guns or Gel Blasters are lifelike 'toy' guns that closely resemble firearms. They fire gel balls and can be very difficult to differentiate from a real firearm. They are classified as air guns under NSW law and gel balls are classified as ammunition.

It is a crime to possess a Gel Gun in NSW unless you have a firearms licence, even if it was purchased online or legally in another State. It is also a crime to bring a Gel Gun to school. There is potential for injury if a person is struck by a gel pellet ammunition and understandably students and staff may become frightened and distressed if they believe a firearm has been brought into the school.

If a student is found to have a Gel Gun in a school, it will be confiscated, parents and the police will be called. The student may face disciplinary action through the school and could be arrested and charged with possession of a firearm. Parents may also be held liable as per Section 82 of the Firearms Act.

On 1 July 2021, New South Wales Police commenced an ongoing National Firearms Amnesty along with all other states and territories. This allows for any firearms or firearm related articles to be surrendered to a police station without fear of prosecution. If this issue relates to you please ensure you contact your local police station prior to attending and ensure the firearm is in a bag or wrapped in a blanket.

My sincere thanks for your attention to this important issue.

Sincerely,

Gavin Wood APM
Assistant Commissioner
Capability Performance and Youth Command

Legal Aid NSW – Table summary of responses to the Sentencing Council review of weapons offences – December 2023

Consultation Question – Adults paper	Legal Aid NSW comments / recommendations
Chapter 3: Maximum Penalties	
<p>Question 3.1: Maximum penalties for possession of prohibited weapon</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>Legal Aid NSW <u>supports</u>:</p> <ol style="list-style-type: none"> 1. reduction of the maximum penalty for an offence under s.7 <i>Weapons Act</i>. 2. comprehensive review of Schedule 1 of the Weapons Act to determine whether all items prescribed should remain illegal, and evidence-based differentiation of military and deadly weapons from less serious weapons. 3. creation of a separate offence, with a lower maximum penalty for less serious articles/weapons and suggest 2 years' imprisonment as a maximum penalty.
<p>Question 3.2: Possession contrary to a weapons prohibition order</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>Legal Aid <u>opposes</u> any increase to the maximum penalty for possession contrary to a WPO under s.34(1) <i>Weapons Act</i>.</p>
<p>Question 3.3: Maximum penalties for firearm possession</p> <p>(1) Are the maximum penalties for possessing a firearm, prohibited firearm or pistol adequate?</p> <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>Legal Aid <u>opposes</u>:</p> <ol style="list-style-type: none"> 1. any increase to the maximum penalty for firearm possession under s.7(1) and s.7A(1) <i>Firearms Act</i>. 2. introduction of a separate scheme and penalties for ‘prohibited persons’. 3. higher maximum penalties for subsequent firearm offences
<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>Legal Aid <u>opposes</u> the introduction of mandatory and/or minimum sentences for firearms offences, including subsequent offences.</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>(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>Legal Aid <u>supports</u>:</p> <ol style="list-style-type: none"> 1. gel blasters being exempted from the definition of ‘firearm’ by inclusion in cl 4 of the <i>Firearms Regulations 2017</i>. 2. a separate summary offence for possession of any imitation firearm (regardless of whether it substantially replicates the appearance of a firearm, pistol or prohibited firearm) with a maximum penalty of no more than 2 years and/or a fine; 3. an offence of possessing any imitation firearm in a public place, which could potentially be a Table 2 offence with a slightly higher maximum penalty (e.g. 3 years’ imprisonment and/or a fine) to reflect the higher degree of seriousness given public safety concerns 4. consideration be given to making s.51D(2) a Table 1 offence.
Chapter 4: SNPPs	
<p>Question 4.1: SNPP offences to consider</p> <p>(1) Are there any issues with the SNPPs of the eight offences that may involve weapons that would justify</p>	<p>Legal Aid NSW <u>opposes</u> expansion of the current list of SNPP offences.</p>

Legal Aid NSW – Table summary of responses to the Sentencing Council review of weapons offences – December 2023

Consultation Question – Adults paper	Legal Aid NSW comments / recommendations
<p>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>Question 4.2: Principles to be applied in determining SNPP offences</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>Legal Aid has previously advocated for SNPP to be reserved for the most serious offences, reflected by a maximum penalty of 20 years or more.</p>
<p>Question 4.3: Process for setting SNPPs</p> <p>(1) Is the process set out at [4.8] 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>(3) Is there any other process that would be appropriate for setting an SNPP for a weapons offence?</p>	<p>Legal Aid has previously advocated for SNPPs to be fixed at between 25 – 40% of the maximum penalty, and maintains that 40% is an appropriate upper limit for such offences.</p>
<p>Question 4.4: Application of the principles and process</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>No comment</p>
<p>Question 4.5: Similar firearms offences not all having an SNPP</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>Legal Aid NSW does <u>not</u> support a SNPP being applied to s.36(1), s.74(1) for pistol and prohibited firearms, and s.62(1).</p>
<p>Question 4.6: Inconsistent proportions of SNPPs to maximum penalties</p>	<p>No comment</p>

Legal Aid NSW – Table summary of responses to the Sentencing Council review of weapons offences – December 2023

Consultation Question – Adults paper	Legal Aid NSW comments / recommendations
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>Question 4.7: Difference in SNPP of similar offences</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>	Legal Aid NSW <u>supports</u> abolition of the SNPP for s.7(1) Weapons Act offences.
Chapter 5: Sentencing principles	
<p>Question 5.1: Purposes of sentencing</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>	No comment
<p>Question 5.2: Objective seriousness and knife offences</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>	No comment
<p>Question 5.3: Objective seriousness and firearms offences</p> <p>Are there any other cases or issues that should be considered in relation to assessing the objective seriousness of firearms offences?</p>	Degree of serviceability, and the offender’s belief in its capability, are two factors that are important to take into account on sentence.
<p>Question 5.4: Objective seriousness and gel blasters</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>	The actual dangerousness posed by such gun-like objects to others is objectively lower and should be reflected in sentencing.
<p>Question 5.5: Objective seriousness and firearms offences</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>	No comment
<p>Question 5.6: Aggravating factors and weapons offences</p> <p>Are there any other cases or issues that should be considered in relation to aggravating factors and weapons offences?</p>	No comment
<p>Question 5.7: Mitigating factors and weapons offences</p> <p>Are there any other cases or issues that should be considered in relation to mitigating factors and weapons offences?</p>	No comment
<p>Questions 5.8: Guideline judgments</p>	No comment

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Consultation Question – Adults paper	Legal Aid NSW comments / recommendations
<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>Questions 5.9: Sentencing principles and factors generally</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>	No comment
Chapter 6: Other issues	
Whether any summary offence should be made indictable	
<p>Question 6.1: Summary offences considered by the review</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>	Legal Aid <u>opposes</u> any current summary offences being made indictable.
<p>Question 6.2: Summary offences relating to knives</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>Legal Aid <u>opposes</u> s.11D and s.11F <i>Summary Offences Act</i> being made indictable.</p> <p>Legal Aid <u>supports</u>:</p> <ol style="list-style-type: none"> 1. exemption of items such as multi-purpose tools, scissors and bottle opener/waiter's friend 2. homelessness being incorporated into the list of 'reasonable excuses' under s.92IB 3. return of the word 'solely' to s.93IB(4) to ensure that an accused who has a lawful excuse, but also truthfully acknowledges mixed purpose for custody which includes self-protection or protection of another, is not deprived of a defence.
Penalty Notices	
<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>(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>Legal Aid <u>supports</u>:</p> <ol style="list-style-type: none"> 1. expansion of the use of penalty notices to second and subsequent custody of knife offences, and fine-only weapons offences in conjunction with the other exemption, defence and police discretion measures we have proposed. 2. reforms to the <i>Fines Act</i> to expand application of the Attorney General's Caution Guidelines to police officers 3. a concession rate to penalty notices issued to people on low incomes, including any person on income-tested Centrelink benefits

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Consultation Question – Adults paper	Legal Aid NSW comments / recommendations
<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>Legal Aid <u>supports</u> fine only weapons offences being prescribed as penalty notice offences.</p>
Alternative approaches to weapons crime	
<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 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 considered when dealing with adults who have been convicted of weapon related offences?</p>	<p>Legal Aid <u>supports</u>:</p> <ol style="list-style-type: none"> 1. educational and holistic responses to weapons related crime. We support evidence based, community developed and place-based initiatives. 2. review of the FPO and WPO schemes by the LECC or the NSW Ombudsman. <p>Legal Aid <u>opposes</u> further expansion of police powers, including 'wanding', as a means of addressing weapon related offending, and does not support further post-sentence scheme development.</p>
Characteristics of offenders	
<p>Question 6.7: Characteristics of weapons offenders</p> <p>Is there anything we should specifically consider when it comes to characteristics of weapons offenders?</p>	<p>Legal Aid has provided in-house service data for summary knife and other weapon duty and grant matters.</p>
<p>Question 6.8: Experiences of victims of weapon-related crime</p> <p>(1) Are there any other issues we should consider relating to victims' experiences of crime involving a weapon?</p> <p>(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?</p>	<p>No comment</p>

Consultation Question – Children's Paper	Legal Aid NSW comments / recommendations
Chapter 2: Diversion	
<p>Question 2.1 Pre-court diversion under the Young Offenders Act 1997 (NSW)</p> <p>Are there any issues related to pre-court warnings, cautions, and youth justice conferences under the <i>Young Offenders Act 1997</i> (NSW), and their application to weapons-related crime, that should be considered?</p>	<p>Legal Aid <u>supports</u> pre-court diversion for Young People. Two issues we invite the Sentencing Council to consider are:</p> <ol style="list-style-type: none"> 1. Inconsistent application of police discretion 2. Reluctance of police to use YJC where there is no 'victim'
<p>Question 2.2: Court diversion under the Young Offenders Act 1997 (NSW)</p> <p>Are there any issues related to court diversions under the <i>Young Offenders Act 1997</i> (NSW) and their application to weapons-related crime, that should be considered?</p>	<p>Legal Aid <u>supports</u> court diversion for Young People, and greater use of YJC scheme including where there is no 'victim'</p>

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Consultation Question – Children’s Paper	Legal Aid NSW comments / recommendations
<p>Question 2.3: Mental health diversions Are there any issues related to mental health diversions and their application to weapons-related offences committed by young offenders, that should be considered?</p>	No comment
Chapter 3: Maximum Penalties	
<p>Question 3.1: Available penalties under the Children (Criminal Proceedings) Act 1987 (NSW) What issues, if any, should be considered about available penalties when sentencing young offenders for weapons-related offences?</p>	Legal Aid <u>supports</u> the current range of penalties open to the Children’s Court to impose
<p>Question 3.2 Youth Koori Court What issues, if any, should be considered about the Youth Koori Court in relation to weapon-related offences?</p>	Legal Aid <u>supports</u> the continuation of holistic, trauma informed, and culturally safe practices which support the unique needs of young Indigenous people entering the criminal justice system.
<p>Question 3.3: Sentencing principles (1) Are the principles that currently apply to sentencing young people for weapons-related offences, appropriate? Why or why not? (2) Are there any principles relevant to sentencing young people for weapons related offences that should be considered for introduction in NSW?</p>	Legal Aid is of the view that the principles currently applied to sentencing young people for weapons offences are appropriate. Legal Aid <u>opposes</u> adoption of the UK approach, which prioritises deterrence and protection of the public following the principles in <i>R v Povey</i> .
<p>Question 3.4: Indictable offences What issues, if any, should be considered about the sentencing of young offenders for indictable weapons-related offences?</p>	No comment
<p>Question 3.5: Serious children’s indictable offences What issues, if any, should be considered about the sentencing of young people for weapons-related serious children’s indictable offences?</p>	No comment
Chapter 4: Young Offenders and Weapons	
<p>Question 4.1: Prevalence What other issues are there around prevalence of weapons offences by children and young people?</p>	Legal Aid <u>notes</u> the general downward trend in weapon offending rates for 10-17 year olds, and raises concern about broad “law and order” responses to discrete high profile cases. We also note for the Sentencing Council’s consideration research about community misperceptions, and the potential benefits of community education.
Chapter 5: Sentencing Outcomes	
<p>Question 5.1: Sentencing patterns for focus offences Are the sentencing patterns for the three focus offences appropriate? Why or why not?</p>	Legal Aid considers that: <ol style="list-style-type: none"> 1. sentencing outcomes for the focus offences indicate the Courts are appropriately utilising the full range of sentencing options. 2. community education about the nature of items that may constitute an “offensive weapon” and broad range of conduct that could amount to an offence may assist in correcting misconceptions about ‘lenient’ sentence outcomes.
Chapter 6: Reform Options	
<p>Question 6.1: Sentencing reforms generally What reforms, other than those outlined below, could be made to help deal with young offenders in relation to weapons?</p>	No comment
<p>Question 6.2: Improving outcomes for young people</p>	We <u>support</u> further research into the drivers of knife and weapon crime among youth in NSW, and evaluation of alternative, place-based responses to more punitive and general sentencing

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Consultation Question – Children’s Paper	Legal Aid NSW comments / recommendations
What responses could best help improve community safety, rehabilitation and other outcomes for young people?	measures.
<p>Question 6.3: Increased penalties</p> <p>(1) What changes, if any, should be made to the maximum penalties for weapons offences committed by young offenders? Why?</p> <p>(2) What changes, if any, should be made to the indictable or summary status of weapons offences committed by young offenders? Why?</p>	Legal Aid <u>opposes</u> increased penalties for young people
<p>Question 6.4: Mandatory minimum sentences</p> <p>(1) Could mandatory minimum sentences be introduced for young offenders in relation to weapons offences? Why or why not?</p> <p>(2) If yes, what offences could be subject to mandatory minimum sentences?</p>	Legal Aid <u>opposes</u> the introduction of mandatory and/or minimum sentences for young people
<p>Question 6.5: Sentencing options under the Children (Criminal Proceedings) Act 1987 (NSW)</p> <p>What changes, if any, could be made to the sentencing options available under the <i>Children (Criminal Proceedings) Act 1987</i> (NSW) to assist in dealing with weapons-related offending by young offenders?</p>	<p>Legal Aid does <u>not</u> support the use of electronic monitoring (EM) for children and young people.</p> <p>Legal Aid <u>supports</u> programs designed to impact attitudes towards knife crime, but notes that there are options to integrate such content into existing sentence options under the YOA and the CCPA, such as caution bonds with conditions to complete the program, and YJCs with the program nominated as part of the outcome plan.</p>
<p>Question 6.6: Knife crime prevention orders</p> <p>Could knife crime prevention orders, or a version of them, be introduced to help deal with young offenders in relation to weapons? Why or why not?</p>	<p>Legal Aid <u>opposes</u> measures like the UK Knife Crime Prevention Order (KCPO) scheme, insofar as it facilitates increased police power to conduct stops, searches and surveillance.</p> <p>In considering the appropriateness of police-based regimes as a response to knife crime, Legal Aid <u>refers</u> the Sentencing Council to recent reports from the Law Enforcement Conduct Commission about the use by police of Consorting laws, STMP and its review of the Aboriginal Strategic Direction 2018-2023, as well as the use of FPOs and the findings of the NSW Ombudsman in 2016.</p>
<p>Question 6.7: Penalty notice offences</p> <p>(1) What weapons offences, if any, should be subject to penalty notices for young offenders? Why?</p> <p>(2) If penalty notices were to be set for any weapons offences for young offenders, what adjustments should be made, including to the penalty notice amount?</p>	<p>Legal Aid <u>supports</u>:</p> <ol style="list-style-type: none"> 1. restoration of the penalty notice option to children for knife possession offences under Part 3 Div 2A <i>Crimes Act</i> 2. that penalty notices be set at 25% of the adult penalty
<p>Questions 6.8: Targeted rehabilitation and diversion programs</p> <p>What changes, if any, should be made to encourage the use of targeted rehabilitation or diversion programs?</p>	<p>Legal Aid <u>supports</u> broader consultation about youth crime responses outside the narrow lens of sentencing, including:</p> <ol style="list-style-type: none"> 1. better understanding of the social drivers that encourage children to engage in weapon possession and risky behaviour 2. evidence-based holistic responses that are developed with local community consultation, have an educative focus, and are accompanied by properly funded social supports. 3. increased use of police diversion, and use of YJCs to facilitate participation in programs and educational outcomes.

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Consultation Question – Children’s Paper	Legal Aid NSW comments / recommendations
Question 6.9: Restorative justice programs What changes, if any, should be made to the availability, scope and content of restorative justice programs for young offenders who commit weapons offences?	See 6.8
Question 6.10: Police powers to conduct random searches Would random scanning be effective in reducing weapons-related offending by young people offenders in NSW? Why or why not?	Legal Aid does <u>not</u> support increased police powers to conduct random searches of young people.
Question 6.11: An integrated approach (1) How could an integrated approach to young offenders who commit weapons-related offences be developed in NSW? (2) What elements could be included in any such integrated approach?	See 6.8