School of Law and Justice
University of Newcastle
Level 5, NUSpace, 409 Hunter Street,
Newcastle NSW 2300
15 December 2023

The following submission has been compiled in response to a number of questions outlined by the NSW Sentencing Council in the October 2023 issues paper titled *Weapons-Related Offences: Sentencing Young Offenders*. Specifically, this submission is in relation to the following questions:

6.4 Could mandatory minimum sentences be introduced for young offenders in relation to weapons offences? Why or why not? If yes, what offences could be subject to mandatory minimum sentences?

6.6 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?

6.8 What changes, if any, should be made to encourage the use of targeted rehabilitation or diversion programs?

Mandatory Minimum Sentences for Young Offenders in relation to Weapons Offences

Minimum sentencing, as set out in the issues paper, generally requires a Court to impose a minimum length of custodial sentence for certain offences where a particular case meets the criteria for the imposition of a minimum sentence in relevant legislation. In most jurisdictions with such legislation, where the criteria for a minimum sentence offence is met, the Court cannot make a community-based order or a rehabilitation order.[1]

New South Wales should, under no circumstances, adopt a mandatory minimum sentencing scheme for young offenders committing weapons offence. To do so would be a direct contradiction of the fundamental principles of the juvenile justice system as recognised both domestically and internationally.

In considering the applicability and suitability of mandatory minimum sentencing of young offenders in relation to weapons offences, it is first necessary to consider the purpose of sentencing in both the adult and juvenile justice system and how minimum sentencing is, or is not, compatible with same.

Within the adult jurisdiction, the Court may have regard to a number of diverse purposes in determining and imposing an appropriate sentence on a convicted individual. In *Veen v The Queen (No 2)* (1988) 164 CLR 465 Mason CJ, Brennan, Dawson and Toohey JJ set out the purposes of sentencing at common law.

[1]New South Wales Sentencing Council, *Weapons-related offences: sentencing young offenders* (Issues Paper, October 2023) 66.

The purposes of sentencing as considered in *Veen v The Queen (No 2)*[2] are reinforced in section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). Section 3A set out seven purposes which a court may have regard to in imposing a sentence on an offender. These purposes are:

1. To ensure that the offender is adequately punished for the offence.
2. To prevent crime by deterring the offender and other persons from committing similar offences.
3. To protect the community from the offender.
4. To promote the rehabilitation of the offender.
5. To make the offender accountable for his or her actions.
6. To denounce the conduct of the offender.
7. To recognise the harm done to the victim of the crime and to the community.

In light of the varying purposes which may guide the Court in selecting an appropriate sentence depending on the individual facts of a particular case as well as the broader societal context of the offending, minimum sentencing has traditionally been utilised to promote sentencing consistency. Minimum sentencing in the adult criminal justice system can also serve to achieve sentencing purposes such as general deterrence, denouncing the conduct of the offender and recognising the harm done to victim and community by bringing sentences in line with public expectations, whilst also deterring potential offenders by raising awareness that particular offences will attract particular levels of sentencing.[3]

Whilst there are several diverse purposes for sentencing in the adult criminal justice system, conversely, the predominant purpose of sentencing in the juvenile criminal justice system is prevention, diversion and rehabilitation, with detention of a young offender a last resort.[4]

The principle that detention of a young offender should be a last resort is echoed across domestic and international law.[5] In New South Wales, section 7 of the *Young Offenders Act 1997* explicitly provides that the least restrictive form of sanction should be applied against a young offender who is alleged to have committed an offence. Internationally, article 37(b) of the United Nations Convention on the Rights of the Child provides that the *'arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort'*.[6]

Minimum sentencing largely removes the discretion of a Court to determine an appropriate sentence with regards to the circumstances of the individual, the offending and the broader social and cultural context. To impose a minimum sentence scheme for young offenders committing weapons offence would be directly in conflict with the purpose of the juvenile justice system, given that the Court would no longer have the discretion to determine whether a less restrictive form of sentencing would be appropriate for the circumstances of the case.

---

[2] (1988) 164 CLR 465.

[3] New South Wales Law Reform Commission, *Young Offenders* (Report No 104, December 2005) 198.

[4] Ibid, 33.

[5] See eg Youth Justice Coalition (NSW), *Kids in Justice: A Blueprint for the 1990s* (Full Report of the Youth Justice Project, Law Foundation and Youth Justice Coalition, Sydney, 1990); *United Nations Convention on the Rights of the Child,* GA Res 44/25, Treaty Series, vol. 1577, p 3 (20 November 1989, adopted 2 September 1990) art 37; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules')*, GA Res 40/33 (20 November 1990, adopted 2 September 1990), r 13, 17, 19; *Young Offenders Act 1997* (NSW) s 7.

[6] *United Nations Convention on the Rights of the Child,* GA Res 44/25, Treaty Series, vol. 1577, p 3 (20 November 1989, adopted 2 September 1990) art 37.

In light of the principles echoed across domestic and international law which establishes that detention of a juvenile offender should be a last resort, New South Wales should under no circumstances adopt a minimum sentencing scheme for young offenders for weapons related offences. To do so would be to remove the discretion of the Court and undermine the fundamental principles of the juvenile justice system recognised both domestically and internationally.

Knife Crime Prevention Orders in the New South Wales Context

Although Knife Crime Prevention Orders ('KCPO') may be a well-intended preventive tool designed to assist in the diversion of young offenders considered to be at a higher risk of committing weapons offences, a careful consideration of the criticisms of KCPOs as implemented in the United Kingdom reveals that the scheme may not be appropriate for addressing and preventing weapons offences committed by young offenders in the New South Wales context, however, a modified scheme could be utilised to assist in the rehabilitation of young offenders following conviction.

The *Offensive Weapons Act 2019* (UK) included the introduction of KCPOs, a civil order imposed by a Court designed to provide the police with a tool to help divert young people away from routinely carrying knives in public and the commission of weapons offences.[7] The United Kingdom Home Office, in a guidance paper for KCPOs published in July 2021, asserted that the KCPOs were designed to be preventative rather than punitive, helping to prevent knife crime by utilising positive requirements to *'help steer the individual away from serious violence and to address factors in their lives that may increase the chances of offending'* whilst also prohibiting certain activities.[8]

A KCPO on conviction can be made by any Court dealing with a defendant where the Court is satisfied, on the balance of probabilities, that the defendant committed a relevant offence, that is, an offence involving violence or where a bladed article was used or carried by the defendant or any other person in the commission of the offence.[9]

The Court also has the power to make a KCPO in cases other than on conviction in respect of any person over the age of 12. In order to make a KCPO other than on conviction, an application to the relevant court must be made by the chief officer of police in the area in which the defendant lives or where, in the view of the applicant, the defendant is intending to be or to travel to. In granting an order other than on conviction, the Court must be satisfied on the balance of probabilities that the person has, on at least two occasions, had a bladed article with them in a public place, on school premises or on further education premises without good reason or lawful authority.[10]

Following the trial and implementation of KCPO's, the orders have been subject to substantial criticism, particularly in relation to their purported preventative purpose and the ability of the Court to impose KCPOs other than on conviction.

---

[7] Home Office, 'Knife Crime Prevention Orders: Guidance – issued under section 30 of the Offensive Weapons Act 2019' (July 2021), 4.
[8] Ibid.
[9] Ibid, 7.
[10] Ibid, 8.

Under the United Kingdom legislation, breaching a KCPO is a criminal offence which carries significant criminal penalty, including up to six months imprisonment following a summary conviction, or two years imprisonment following conviction on indictment.[11] Some critics of the scheme have suggested that in imposing a criminal offence for the breach of a civil order, a KCPO made other than on conviction may actually bring individuals as young as 12 years of age into the criminal justice system, in direct contradiction of the expressed purpose of prevention and diversion.[12]

Critics of the scheme are particularly concerned about the ability of KCPOs to bring young offenders into the criminal justice system by way of breach of an order in light of the relatively low standard of proof required for the making of a KCPO.[13] In order to grant a KCPO other than on conviction, the Court must only be satisfied that on the balance of probabilities (i.e the civil standard of proof) that the individual carried bladed articles with them on two occasions. As such, it is possible for individuals with no previous criminal convictions or cautions to be made the subject of KCPO's, a breach of which can then result in a serious criminal conviction.

Whilst critics recognise that the risk of those without a previous criminal conviction or caution being subject to significant criminal penalties for breach of a KCPO is mitigated by the discretion available to the Court in imposing penalties for breaches, the possibility that a KCPO may actually bring an individual into the criminal justice system, and noting that the available data suggests that KCPOs are disproportionally made against young offenders from disadvantaged backgrounds, there are substantial calls for the removal of the ability of a Court to grant a KCPO other than on conviction.[14]

In light of the above criticisms of KCPOs made other than on conviction in the United Kingdom, New South Wales should not adopt a similar scheme which would provide the Court with the power to make KCPOs other than on conviction, noting the possibility that individuals, including young offenders, could be brought into the criminal justice system for a breach of an order which was intended to prevent and divert the individual from that outcome.

Whilst KCPOs as implemented in the United Kingdom should not be adopted in the New South Wales context, a modified scheme in which the Court has the power to impose a KCPO only after conviction of a relevant offence could provide a beneficial additional tool in promoting the rehabilitation of young offenders.

Under the United Kingdom legislation, the Court issuing a KCPO can determine any prohibition or requirement which it is satisfied is necessary for the purpose of protecting the public generally, or a particular person, from the risk of physical or psychological harm involving a bladed article.[15] It is also expected that the KCPO also include a positive requirement for the subject of the order to work towards addressing the offending behaviour

---

[11] Ibid, 20.

[12] Jennifer Hendry, 'The Usual Suspects: Knife Crime Prevention Orders and the Difficult Regulatory Subject' (2022) 62 *The British Journal of Criminology* 378, 381; Alexander Monghan, 'Knife Crime Prevention Orders: Blunt Tools against Knife Blades?', *Crucible* (Web Page, 6 September 2021) < https://crucible.law/insights/knife-crime-prevention-orders-blunt-tools-against-knife-blades >.

[13] See for example Georgia-Mae Chung, 'Knife Crime Prevention Orders: A Review of Associated Practical Issues' (March 2023), *Sentencing Academy* (Research Paper) 7 < https://www.sentencingacademy.org.uk/desistance-and-sentencing-a-review-of-research/ >.

[14] Ibid, 10.

[15] Home Office (n 7) 11.

and the relevant risk factors, this can include for example a requirement that the individual attend educational courses, life skills programmes, participate in community organisations, targeted intervention programmes, mentoring, or relationship counselling.[16]

The implementation of a modified KCPO scheme which grants the Court the discretion to issue KCPOs which include a positive requirement to work towards addressing the relevant offending and risk factors following a conviction would provide New South Wales Courts an additional tool to promote the rehabilitation of young offenders.

Whilst New South Wales should not adopt Knife Crime Prevention Orders as implemented in the United Kingdom, a modified scheme which grants New South Wales Courts the power to issue an order including a positive requirement to address relevant behaviour and risk factors for future re-offending following a conviction of a relevant offence would provide the Courts with an additional tool to assist in the rehabilitation of young offenders and prevent the future commission of weapons offences by those individuals.

Encouraging the Use of Targeted Rehabilitation and Diversion Programs

As outlined above in relation to minimum sentencing, the purpose of the juvenile justice system as recognised both domestically and internationally is prevention, diversion and rehabilitation. In order to achieve and promote this purpose, New South Wales should prioritise the engagement of young offenders in rehabilitation and diversion programs over other forms of sentencing where appropriate. However, in order to actively encourage the engagement of young offenders in these programs, New South Wales must address as a matter of practicality the limited availability of such programs.

Presently, diversion programs in New South Wales are generally limited to youth conferencing.[17] In addition to youth conferencing, there are some community based diversion and rehabilitation programs, but these are generally limited by the availability of resources to those organisations providing those programs as well as the geographical location of the program and the offender. Additionally, community based diversion and rehabilitation programs are generally targeted towards less serious offences and as such the likelihood of a young weapons-related offender being accepted into a community based program is limited.

In light of these issues, in order to encourage the participation of young offenders who have committedweapons offences into diversion and rehabilitation programs, New South Wales must make a sustained financial commitment to the development and provision of appropriate programs. To ensure efficiency of such programs, it is necessary to develop specific diversion and rehabilitation programs targeted at young offenders and weapons-related offences which consider and address factors influencing behaviours. After the development of such programs, New South Wales must commit to ensuring that these programs are practically available to young offenders across the State. There is an overarching need to make a sustained financial commitment to the development and delivery of diversion and rehabilitation programs.

Responses researched and written by final year LLB (Hons) student, Lauren Jessup - Little under the supervision of Professor John Anderson, School of Law & Justice.

[16] Ibid 12.

[17] Children Court of New South Wales, 'Youth justice conferencing and other diversionary option' (Web Page, 8 May 2023) < https://childrenscourt.nsw.gov.au/criminal/youth-justice-conferencing.html >.